REVIEW OF SPCB SUPPORTED BODIES COMMITTEE

Tuesday 3 February 2009

Session 3

£5.00

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

CONTENTS

Tuesday 3 February 2009

REVIEW OF SPCB SUPPORTED BODIES COMMITTEE
2nd Meeting 2009, Session 3

CONVENER

*Trish Godman (West Renfrewshire) (Lab)

DEPUTY CONVENER

*Jamie Hepburn (Central Scotland) (SNP)

COMMITTEE MEMBERS

*Jackson Carlaw (West of Scotland) (Con)
*Ross Finnie (West of Scotland) (LD)
*Joe FitzPatrick (Dundee West) (SNP)
*Johann Lamont (Glasgow Pollok) (Lab)

THE FOLLOWING GAVE EVIDENCE:

Jim Black (Waterwatch Scotland)
Kevin Dunion (Scottish Information Commissioner)
Kathleen Marshall (Scotland's Commissioner for Children and Young People)
Christine O'Neill (Brodies LLP)
Richard Smith (Interim Scottish Prisons Complaints Commissioner)
Gary Womersley (Waterwatch Scotland)

CLERKS TO THE COMMITTEE

David Cullum
Claire Menzies Smith

LOCATION

Committee Room 4

Scottish Parliament

Review of SPCB Supported Bodies Committee

Tuesday 3 February 2009

[THE CONVENER *opened the meeting at 10:02*]

Review of SPCB-supported Bodies

The Convener (Trish Godman): Good morning and welcome again to the Review of SPCB Supported Bodies Committee. First on this morning's agenda is evidence from Kevin Dunion, the Scottish Information Commissioner. Mr Dunion will speak for a few minutes; I will then invite questions from the committee.

Kevin Dunion (Scottish Information Commissioner): I will be brief. The committee has received my written submission, in which I set out my view that the freedom of information laws have been successfully introduced in Scotland and that, in my view, they reflect well on the care that Parliament took in shaping the legislation.

The level of public knowledge of the right to information is high, and public authorities are aware of their responsibilities, with the result that more information than ever before is being published or disclosed. As the first Scottish Information Commissioner, I have sought to provide the assurance that rights will be upheld and, where necessary, enforced. When dealing with appeals, I aim to come to decisions that command respect from public authorities as well as the public, whatever the outcome. In so doing, I aim to provide clarity in interpreting the new law. I have now issued more than 700 such decisions.

One intention of the Freedom of Information (Scotland) Act 2002 was to improve the transparency and accountability of Scottish public authorities. The Scottish Information Commissioner is a public authority, and I welcome scrutiny of how I go about my functions, as well as any subsequent proposals for improvement. As I said in my submission, any changes to what I think is generally regarded as a well-functioning operation should be specific and evidence based, and should give rise to public benefit.

I have followed and contributed to the Audit Scotland review, the Finance Committee review, the Crerar review and the Sinclair action group report. I have also considered the evidence that has been given to the committee by the Scottish Parliamentary Corporate Body and various office-holders. I observe that, so far, the proposals would leave my role relatively unchanged, which of course I welcome. However, on generic issues such as strategic planning, the legal status of the postholders, budget approval and shared services, there is a need and an opportunity to resolve matters in a way that is clear, proportionate and balanced. I am happy to assist the committee in coming to a view as to what needs to be done.

The Convener: Your written evidence states that you agree with the SPCB that your office should be a stand-alone one and that another approach would compromise your role. What advantage is there for the public in retaining the existing structure and not moving your role in with other structures?

Kevin Dunion: The advantage to the public is that they have a high awareness of the Freedom of Information (Scotland) Act 2002 and of their rights and the way in which they can access those rights. I would be concerned if that was diminished in any way. The commissioner is, and was meant to be, at the heart of enforcing people's rights. As I said in my written submission, one concern relates to the fact that I receive appeals concerning other postholders. The public might find it difficult to accept the independence of the commissioner and could question his willingness to use his enforcement powers against people with whom he literally sat round the table.

There is no evidence of inefficiency in the way in which I carry out my function. I cannot see a public benefit simply from physically relocating me to conduct my function in another location. As I explained in my written evidence, I cannot see how, in law, other commissioners or postholders could be allowed to observe the cases that I receive, access the systems in which information is held or provide the assurance of security that is required—particularly by the surveillance and police authorities, which to a large extent have entrusted me with information on the basis of an assurance that nobody else can possibly see it.

The Convener: You suggest that a commission with a chair would "increase costs" and

"could … decrease efficiency in coming to case decisions."

Why?

Kevin Dunion: I am not yet entirely clear about the SPCB proposals regarding, for example, the proposed complaints body. The only comparisons that I can make are with bodies elsewhere in the world. Some countries have an information commission, rather than a commissioner, which involves several commissioners with either a senior commissioner or a primus inter pares. Those commissioners have to reach decisions collectively. I have observed that that occasions great delay—because the commissioners can disagree on outcomes—and that decisions that

are taken on a majority basis do not engender public confidence.

In Scotland, I am not clear about how the Information Commissioner would be part of the proposed complaints body. Would the commissioner basically get on with their work and access the shared services of a shared facility, or would there be somebody who would set the common standard that was to be applied in enforcement? For example, if I thought that the 2002 act should be applied robustly and a senior commissioner or chairman took the view that it should be applied less robustly, how would that be resolved? Who would have the authority? I still seek clarity about what would be the model for that.

Jamie Hepburn (Central Scotland) (SNP): Your written evidence suggests that having a single office-holder

"provides clarity and consistency as to decisions".

However, you also suggest the establishment of a management group. Do you envisage such a group being limited to an advisory role? What would be the group's functions and purpose?

Kevin Dunion: The suggestion is a response to the notion that office-holders should carry out some kind of stakeholder engagement. My counterpart down south has a similar group.

The function of the group would be more to help shape strategic planning than to deal with individual cases or operational matters, and it would meet three or four times a year. My counterpart's group involves external people with considerable awareness of public service who contribute to shaping the running of his organisation. I would be perfectly content to go down that route.

Another proposal is for the SPCB to have a direct role in strategic planning. I am happy to engage with the notion of presenting a strategic plan and showing that it has been developed in conjunction with stakeholders' views.

I have already created what I call a reference group, which involves a much larger number of people but which meets me less frequently to consider issues such as my approach to designating new public bodies, or to improving the practice of public authorities across Scotland. I have found that group extremely helpful. It is made up of six or seven people who come from a range of organisations—from the Campaign for Freedom of Information through to the Convention of Scottish Local Authorities. I am keen to develop such stakeholder engagement, and I am fairly relaxed about its exact form. It certainly would not take away my authority or my direct management of the organisation.

Jamie Hepburn: So you are talking about stakeholders just offering advice.

Kevin Dunion: Yes.

Jamie Hepburn: Various suggestions have been made about the re-appointment processes for the various bodies for which the SPCB has responsibility. Your submission suggests that you are quite relaxed about the subject, but that you favour a single term of seven to eight years. Why do you favour that approach?

Kevin Dunion: I do not have strong views on the matter. I went through a re-appointment process that I thought was handled pretty well by the SPCB, and if that process was to continue, I would be happy. However, inevitably, office-holders are aware that they have to leave after five years or seek re-appointment. A single term of seven to eight years would give an office-holder independence and a sufficient period of time to deliver the goods without their having to look over their shoulder and worry about either the impression that they might be giving coming up to their re-appointment or overstaying their welcome. In places such as Canada, appointments are made for periods of seven to eight years.

However, as I say, I have no strong views on the matter. If a single term is considered, it should be of the order of seven to eight years. Some people suggest a shorter term, but I think that people would not find it attractive to up sticks for a fixed term of five years, and 10 years is too long.

Jackson Carlaw (West of Scotland) (Con): A number of witnesses have said something similar. I want to probe your answer a bit further. Is your opinion informed by experience? Did you feel that you were looking over your shoulder, or is your suggestion just a commonsense approach?

Kevin Dunion: I did not particularly feel that I was looking over my shoulder. In this job, you have to be prepared to accept that you might have to go if someone does not think that you are doing a good job, even if you think that you are. You have to stick to your guns. My role is particularly adversarial at times, not least in my contacts with the SPCB, of course, and MSPs over MSP expenses. I simply have to get on and do the job—all the office-holders recognise that.

For the purposes of planning and getting on with the work, and setting out, say, two strategic plan periods of three years, we need seven or eight years. My post involved a setting-up period, but there is also the handover period. The office-holder has to wind down at some point if they think that they are going at the end of five years. I did not take it for granted that I would be re-appointed, so as part of our risk management in the final year, we thought about what would happen if I

went. That was an unnecessary investment of energy.

If an office-holder knows that they will stay in post for a period of seven or eight years, they can plan for that from the outset.

Jackson Carlaw: It might be less about feeling that you have to look over your shoulder and more about the office being in limbo because it has to accommodate planning discussions that it would not otherwise have to have.

Kevin Dunion: That is true. In particular, if the office-holder plans to stay on but does not, the office might not be geared up to their moving. The post would not have been advertised, and there could be a period of limbo. If the office-holder knows that they will definitely go at the end of seven or eight years, the office can plan accordingly.

The Convener: My question follows on from that. The future employment of some office-holders can be restricted. What is an appropriate period for such restrictions to apply, given that the existing provisions are designed to avoid conflicts of interest or allegations of corruption once an office-holder leaves their post?

Kevin Dunion: Fortunately from my point of view, such restrictions do not apply to my post. Those conflicts of interest can be overstated, although I could understand why restrictions could apply to an ombudsman who works solely with complaints about the insurance industry or legal services.

Where we have an ombudsman whose post covers a vast swathe of public life in Scotland, those conflicts of interest need to be accommodated by the way in which the office-holder carries out their work. It should not be assumed that office-holders take decisions in their second year in post to set themselves up with a job four years down the line. We need to be more realistic about the people who occupy such posts and not assume that the public will think ill of postholders if they subsequently go back to work in academia or legal services.

I agree with Alice Brown, who is very experienced and knows ombudsmen around the world. I will not gainsay her sensible proposals, on which she gave evidence to the committee.

10:15

The Convener: The act that establishes your office provides for removal from office. Should the grounds for removal be set out in legislation?

Kevin Dunion: Jim Dyer makes useful points in setting out how the removal process could be triggered. I understand why Parliament does not want to give away its capacity to remove a postholder who is clearly failing in their role or who goes well beyond what Parliament expects of them, but ground rules for removal need to be set out. That could be done fairly generally in legislation by leaving that to the discretion of a parliamentary committee.

At present, any MSP who takes umbrage against a commissioner can simply lodge a motion to remove them—there is no mediation process or warning. From an employment point of view, that is unhelpful. Even if such a motion did not succeed, it would sour relationships.

Joe FitzPatrick (Dundee West) (SNP): You suggest that such a motion should require support from two thirds of all MSPs—rather than two thirds of MSPs voting—which could make removal from office difficult, particularly if there was a concern related to a political party, which felt obliged to abstain. Do you see that conflict and accept that, in general, two thirds of MSPs voting, rather than two thirds of all MSPs, is the democratic and correct requirement?

Kevin Dunion: Scotland has statutes that provide for the alternative positions. It is up to the committee to decide which it favours. That the Information Commissioner can be removed only with the support of two thirds of all MSPs, and not just those voting, is not what I favour as a hypothetical; it is enshrined in the act that established my post. Parliament set that hurdle high for two reasons. In their evidence on the bill to create my post, ministers made great play of the role of an independent commissioner who determines what is in the public interest. At times, the commissioner's view might be different from that of some MSPs. It was recognised that the commissioner should be given that function and should be protected in undertaking the sometimes unpalatable role of determining between rival authorities or rival political parties what is in the public interest.

Removing a commissioner would be a serious matter. Down south, even failing to reappoint a commissioner has been seen as a political step. The seriousness of removing a commissioner mid-term should be recognised in law. The safeguard of ensuring that all MSPs contribute is important.

Jamie Hepburn: I was slightly surprised that you said that you did not have a view on the voting threshold, because your written evidence says:

"I do not see the merit of altering the provision".

However, you have perhaps clarified the point.

Kevin Dunion: I was not saying that I have no view; my view is that the act to create my post is well framed—I followed it as it went through Parliament. However, I am not positing a

hypothetical. The reality is that the act that established my post says that two thirds of all MSPs must vote for a motion to remove the postholder from office. I favour that position over that in the legislation for Scotland's Commissioner for Children and Young People and the Scottish Commission for Human Rights.

Ross Finnie (West of Scotland) (LD): The legislation that established your position gives you a certain legal status. Will you comment on how you view it in light of your experience in the post? Are there difficulties in the way in which it was framed? The opportunity might exist to amend the legislation. What approach would you favour if you believe that some form of alternative status would be more appropriate?

Kevin Dunion: There are two issues, one of which my legislation touches on and one of which it does not.

I think that the committee will address the issue of the legal personality of not only the Scottish Information Commissioner but the other bodies. I do not know whether this was appreciated at the time, but we now have significant problems as a result of appointing the commissioner—as well as the other postholders—as a person in their own right, with no other legal personality for the post. I said in my submission that that issue has to be resolved quickly, because there are practical consequences of our not doing so.

I propose that the primary legislation be changed to create a body corporate—a bit like the corporate body of the Scottish Parliament—which would be the Scottish Information Commissioner body corporate. Appointees would fill the role and move out of it, but the body corporate would continue. The body corporate would hold the lease, it would have any liabilities and it would be the employer of staff. Currently, I am the employer of staff and I sign the lease—technically, the building is leased to me. The legal advice that I have been given is that there could be significant problems if we do not resolve that issue.

You asked about the legislation, which I think has been reasonably well framed. One of the technical issues that I have—I will not take up the committee's time unduly—is that if we are going to look at the primary legislation, we should certainly resolve the difficulties that we have with the interface between the Freedom of Information (Scotland) Act 2002 and the Environmental Information (Scotland) Regulations 2004, which does not work well at present. The expectation was that we would deal with environmental information requests under the regulations, but, given how the act is framed, we have to deal with those requests under both pieces of legislation. That is really cumbersome for me and my staff. Decisions are delayed because we have to look at the information requests under both pieces of legislation. That process could be tidied up; I am happy to give the committee a proposal for that in writing.

Ross Finnie: That would be helpful. We will perhaps have to park that issue to one side. It would be nice if you could get all that into one sentence, but I am not sure that resolving the difficulties with the two pieces of legislation, with which I am familiar, is quite as simple as that.

I turn to the issue of the legal, corporate status. It is clear that you hold similar views to other office-holders on liabilities that might become personal or contractual obligations. What about the individual performance of the office-holder himself or herself? Are you seeking protection in that regard?

Kevin Dunion: One of the difficulties is that we are office-holders, but we are appointed on an extremely sparse contractual basis. In other words, the terms of our employment, if you like, are effectively on two sides of A4. You should compare that with the contract that we give to our staff and the handbook that goes with that contract. We have none of that—we have no proper terms and conditions, and there is no clarity about how terms and conditions can be discussed or debated.

Audit Scotland's recommendation is that a remuneration committee, dealing with not just remuneration but terms and conditions, be established. That is the locus in which we could begin to discuss the performance of the commissioners, whether an appraisal process would be appropriate and what should be done with an appraisal. At the moment, that is done in an incredibly ad hoc way, which does not lead to any great satisfaction among the postholders, who enter into their posts in a great spirit of willingness.

There is a frustration that such things are not being thought out at the outset, nor are they being remedied as we go along through, for example, Audit Scotland's recommendation that a committee be established so that all postholders can feed in their experience, concerns and proposals for change in a negotiated fashion—as an employee of any of the organisations would do.

Ross Finnie: In your written evidence, you say that you support the Audit Scotland recommendation that a separate committee be established to deal with office-holders' terms and conditions. If such a committee were established, would you see it fulfilling the roles that the SPCB currently undertakes?

Kevin Dunion: Yes, in part. At the moment, the SPCB has too many things on its shoulders that it was not set up to do. It recruits, or helps to recruit, a commissioner; sets out their terms and

conditions; pays them; and scrutinises their budget, or even tells them what should be in their budget. In some instances, it can direct them as to where they should set up their office. I do not think that the SPCB was set up to do that.

It is not even clear what we mean when we talk about the SPCB. Are we talking about officials, or are we talking about parliamentarians with the Presiding Officer in the chair? If the SPCB is going to have a function, we have to be clear what that function should be. The office-holders, who are accountable officers and independent senior postholders in their own right, should have the capacity to engage in dialogue and discussion about that in a formalised fashion, rather than in an ad hoc fashion in respect of certain outcomes. We lack any proper structure for such engagement.

Some of the scrutiny of budgets, strategic planning or terms and conditions could be done by a separate committee. I certainly do not think that it should all be on the shoulders of the SPCB. If there is a disagreement between the SPCB and the postholders, where do we take it? I do not think that the Parliament would ever expect me to make a special report to Parliament, which I have the power to do, on a matter of detail; I assume that it would expect a special report to be on a matter of substance.

Ross Finnie: The issue was raised not just by you but by others who have given evidence to us. You will understand that, given that we have been charged with looking at streamlining processes, the notion of creating another committee does not come naturally to us. There is a contention that, as currently constituted, the SPCB is not an appropriate body for sponsoring these offices, which I think is what you are saying. You are leaning towards the creation of a different structure, with a committee and lines of responsibility. Have you given any thought to whether there might be changes to the current constitution of the corporate body to accommodate the criticisms or suggestions that you and other office-holders have put to us? That is not quite within the remit of this committee, but it is a consideration nevertheless.

Kevin Dunion: Whatever the outcome of these discussions, change will not come at no cost and with no change at the other end. I have been here from the outset and, in my view, we are the foster-children of the SPCB—and not even particularly wanted foster-children. I think that we have been forced on the SPCB, or billeted with it perhaps. The chief executive has taken on the task pragmatically, saying, "Nobody has thought this through. We'll get on and do it." He did not have a staff member who was dedicated to, or recruited for, the purpose. If the SPCB is to take on a more formal, engaged role, that has a resource implication. Who will carry out that function? What is their job description? Will there be a dedicated member of staff? What would happen if there was a dispute between the postholders and that member of staff? Will a member of the corporate body be given special responsibility to engage with the postholders and with that process?

10:30

I will set out my preference. There are a number of things that I must do in relation to the Parliament—I think that that applies to all the postholders. We have to lay our accounts and annual reports before the Parliament, and it has been suggested that we lay strategic plans for the forthcoming three or four years. I would be happy to lay such a plan before the Parliament. We should also set out our indicative funding for the three or four-year period, so that there are no surprises when we lay annual budgets before the SPCB and the Finance Committee.

We are talking about a substantial amount of work, whether there are three or seven commissioner and ombudsmen bodies, and I do not think that the SPCB is set up to fulfil such a function of engagement and oversight. The oversight role must be separated from the operational engagement role. Currently, the SPCB is heavily involved in discussing the specifics of our operations and budgeting and in approving the budget—and the SPCB would approve strategic plans. Even though I am an accountable officer and I report to the Parliament, it is not clear what would happen if I was in dispute with the SPCB about the necessary resourcing of my office to meet my statutory responsibilities.

Johann Lamont (Glasgow Pollok) (Lab): Is it your view that the SPCB is not the appropriate body or that it is not effective in doing what it is supposed to do?

Kevin Dunion: It is not clear to me that the SPCB was the appropriate body from the outset. The SPCB was tasked with getting commissioners. In my files I have correspondence with Scottish Executive civil servants that dates back to the discussions about how postholders' budgets should be approved. It was thought—given that the budgets would be relatively small—that it would be unnecessary to require the Finance Committee to consider them one by one, so it was suggested that we simply tack them on to the back of the SPCB's overall submission, so that is what was done initially.

The Finance Committee then said to the SPCB, "We want you to begin to scrutinise the budgets. We do not want to pick them up and to consider the differences between them in detail; we expect

you to do that." The SPCB's role has evolved, from scrutiny to approval, and there has even been a proposal on budget setting. There has been incremental creep in the SPCB's role, which has not happened in a strategic fashion. There has been a focus on one area—financial scrutiny—but no provision has been made in other areas that we identified as having weaknesses, such as terms and conditions or the need for a strategic plan that attracts an expectation of funding. The committee needs to consider whether the SPCB is willing or able to carry out those functions.

Johann Lamont: I will be frank. There seems to be a tension between the independence of your role—I do not think that there are any circumstances in which Parliament could direct you—and your suggestion that a parliamentary committee should somehow normalise your job. We have to wrestle with that tension. Given that you have a unique job and enjoy unique privileges, it might not be reasonable to expect a committee to deal with the terms and conditions of your post. There are few posts in relation to which a two-thirds majority in Parliament is needed to get rid of the postholder. You are in a unique position. Forgive me if you answered this question in your submission; I do not remember whether you did so. Who would you envisage being on the suggested committee? Whatever the SPCB's corporate functions, it is a political body that includes MSPs. Would the membership of the committee include MSPs?

Kevin Dunion: Yes. I envisage a parliamentary committee that would scrutinise our functions, as happens with the Auditor General for Scotland. The difference between a parliamentary committee and the SPCB is that by statute I have authority over the SPCB, in that I can and do adjudicate in disputes about release of information—I have ordered the SPCB to order the release of information. If the SPCB were to say to me, "You should take a lighter touch. We will not give you resources for enforcement", it would not be unnatural for people to think that there was a potential conflict of interest.

I must say at the outset that I do not think that there has been a conflict of interest. The SPCB has acted extremely well and I have experienced no interference with my role as a commissioner.

However, if it is assumed, for example, that my role is to take decisions on appeal and that I should be funded to do so, but I view my role as also being to improve the practice of public authorities as set out in legislation, that role needs to be resourced as much as the hard investigative role. That has a budgetary implication. If times are tight, I could make my case to the SPCB, but it might say that it takes a different view of my role as commissioner. I want that to be an explicit engagement rather than something that is done in a way that is not transparent. It could be done by, for example, presenting a strategic plan, having that plan accepted and accepting that the work flows from that.

Johann Lamont: We have heard from the postholders who have given evidence so far that independence is important and that very challenging responsibilities go with it in respect of employment of staff and so on. Is that a case for having a commission, rather than commissioners? That would remove the isolation of one individual's having authority in that area—a situation in which we are at the mercy of the quality of the individual commissioner.

The consequences of that situation have to be dealt with in terms of protecting the commissioner, but it would also need to be possible to remove a commissioner who was not functioning effectively. Could that be addressed by a commission, in which responsibility is shared by a body, and in which individuals within the commission had responsibility for discrete areas of work?

Kevin Dunion: That model is not included in either option that has been presented to us. For a single postholder such as me, it would be cumbersome and unnecessary to create a Scottish information commission. We would, I presume, have to create a quango-type board that would need a chairperson. The commissioner would be more like a chief executive, or would chair the board, but decisions would be taken collectively. I am not clear what the role of a commission would be in relation to the current set-up in which there is a single postholder with a fairly small staff.

I am not clear how such a commission would work as a complaints-handling body, and I have not yet seen any detail to suggest that that will happen. It seems that all the individuals would retain their responsibilities and would not share the decision making—they could not, because of the degree of specialism. It is not clear how commission members would get around data protection responsibilities if they were single stakeholders—for example, certain information would be held by one postholder in their capacity as public appointments commissioner, or by another as parliamentary standards commissioner. I am not sure how such information could be shared among postholders. I am still awaiting a degree of clarity on what is being proposed with regard to whether it will bring about synergies and efficiencies.

Johann Lamont: The committee's role is to examine the options that have been presented to it, and to consider other options in terms of effectiveness, I presume. For the sake of asking

the question as devil's advocate, and given that vulnerability is a key issue, is the role of individual postholder inappropriate for the task because it makes you vulnerable in the way that you have described? Are the vulnerabilities that you have identified worth it, because you are able to maintain your independence and focus?

Kevin Dunion: I think your second point is correct. The common standard around the world is to have a single independent postholder as information commissioner. Some countries, such as New Zealand, still have ombudsmen, and a few countries have a commission in which decisions are taken by majority vote or cases are parcelled out among commission members, on which they reach a collective view. That is not particularly efficient, and it is not necessary for Scotland.

I do not feel particularly vulnerable. I have been allowed to get on with my job, I am able to take tough decisions and I am adequately resourced, so I do not come here with any complaints. Some improvements could, however, be made to the individual postholder's role that would benefit the public and the operational management. Those improvements could include clarity about whether the appointment is for seven or eight years; the presentation of a strategic plan in some form to Parliament, so that everybody knows what we are working towards; sorting out of terms and conditions; and securing the budget for the post in a way that does not compromise the operational independence of the commissioner or involve micromanagement by the SPCB. I am suggesting improvements to the current system rather than a complete overhaul of it.

Joe FitzPatrick: You argued that the SPCB is not the appropriate body directly to approve and scrutinise your budget. Clearly, however, your budget needs to be scrutinised by someone because it is public money. You suggested that the scrutiny is being done by the SPCB so that the Finance Committee did not have to do it. Would the Finance Committee be a more appropriate body to do the scrutiny?

Kevin Dunion: The current approach does not work. In reality, postholders are given an indication that, if they submit a budget that is equal to the previous year's budget plus an indicative figure of 2 per cent or 3 per cent, it is likely that it will be approved by the SPCB as being a sum that could be presented to the Finance Committee.

My difficulty with that approach is that it does not acknowledge that expenditure does not flow in that fashion. For example, if I needed to overhaul my information technology systems at once—which might be necessary, given that everything was bought at once when we were setting up the office—that would create a need for a capital element that would be greater than the 3 per cent increase that I would expect to get on an annualised basis. However, there is no adequate way of entering into dialogue with the parliamentarians on the SPCB or the Finance Committee about why that capital expenditure should be necessary. It would be good if we could forward plan that process by using indicative budgets for which we could get support.

Joe FitzPatrick: Would an eight-year term help, in that it would enable you to manage such capital elements over a longer period?

Kevin Dunion: Yes, that would help because we would be able to set out, say, two strategic plan periods within those eight years, which would mean that the replacement of certain items from time to time over a long period would not come as a surprise to parliamentarians, who would otherwise say, "I'm sorry, but to make this happen you have to reduce costs elsewhere."

Another point to remember is that staffing costs form more than 80 per cent of my budget, which means that if real-time costs are to be met, savings have to be made from staff costs. We have to discuss with the SPCB the consequences of that in terms of losing posts or, if necessary, of making staff redundant, but there is no way of having a formal discussion about that early enough in the process.

Joe FitzPatrick: Are you concerned more with getting a process in place than you are with which body is responsible for the scrutiny?

Kevin Dunion: Yes. The SPCB could still have the scrutiny role, but that role must be much more formalised and explicit; it must be properly resourced and the appropriate systems need to be put in place to allow it to operate correctly.

Jamie Hepburn: You seem to support the SPCB's suggestion that you should produce a strategic plan that would be laid before the SPCB and Parliament, but with the caveat that that process should not give the impression of direction or control. Could you expand on that and say what exactly you mean? Also, how could direction be avoided?

Kevin Dunion: Like any manager in public service, if I am to manage the organisation well, I have to have a strategic plan to satisfy Audit Scotland and my audit advisory board, so it is something that we would have in any case. The advantage of the strategic plan is that it sets out not only the headline tasks that people think of, but all of the other responsibilities, such as the risk management programme and the operational plan. I think that as much of that as possible should be in the public domain. It is important that that sort of ambition and direction of travel are taken into consideration.

However, what if the SPCB or a parliamentary committee were to take an entirely different view to the commissioner's? That is an interesting question. If the commissioner were overambitious or underambitious in their views, he or she should be questioned and challenged on that. The expectation would not be that the SPCB or the committee would rewrite the commissioner's plan but that the commissioner would reflect on the views of the SPCB or the committee. Clearly, if there were a gulf between the commissioner's view and the view of the SPCB or the committee, that would need to be addressed.

Jamie Hepburn: Should that parliamentary committee, as you have suggested with regard to stakeholder engagement, have an essentially advisory role?

10:45

Kevin Dunion: It should, in large part. Nevertheless, if I came up with a plan that required my staff complement to be doubled, it would not be unreasonable for a committee to say to me pragmatically that although that complement might be necessary to deliver on my plan, it is simply not going to happen. Of course, I would not expect that committee then to take the matter out of my hands and write its own plan that included a smaller staff complement. The responsibility must always lie with the postholder who, one would hope, would have taken soundings before reaching that point. It would be sensible for any system that is put in place to include provision for the reference group and for stakeholder engagement to ensure that a draft plan is issued for the views of officials and that we go into the final decision-making process with a well worked-up and discussed plan.

The Convener: As members have no more questions, I thank you very much for your helpful evidence. It would also be helpful if you could submit in writing your proposals on legal status. If, once we have read the *Official Report*, we find that we need clarification on any other issues, we will write to you.

I now welcome to the meeting Kathleen Marshall, Scotland's Commissioner for Children and Young People. I invite you to make a few introductory comments, after which I will invite questions.

Kathleen Marshall (Scotland's Commissioner for Children and Young People): I very much welcome this opportunity to engage with the committee on its review of SPCB-supported bodies. In my written evidence, I reflect on the justification for establishing a commissioner for children and young people—the fruit of a 10-year-long campaign by children's organisations and an extensive inquiry by a parliamentary committee—and I argue that the reasons for setting it up still exist and that reorganisation at this stage would be disruptive.

The SPCB suggests that a merger is appropriate because SSCYP, which is what we call ourselves for public purposes, and the Scottish Human Rights Commission have similar rights and responsibilities and that the change of structure could be effected without loss of function. I disagree.

An architectural principle is that form follows function. Many of the activities that are carried out by the two bodies might be couched in similar terms, but I argue that the fundamental differences in, and tensions between, the constituencies to which they are addressed render those functions quite different, necessitating different forms and structures.

As outreach and advocacy services for children and young people are quite different from those for the adult population, one cannot assume that the same staff would be capable of undertaking both roles effectively or that a single access point that was designed for adults would be accessible by children and young people. Relationships are important to children and they are more likely to respond to an identifiable individual than to a committee or commission.

The SPCB suggests that the rights body could be established as a commission representing different interests, including the rights of older people, and has noted that some people want an older people's commissioner to be established. I am also aware of the suggestion that a victims commissioner be appointed. The difference between those interests and the situation of children is that adults have an interest in the rights of older people, as they are likely to become older people themselves, and of victims, as they might well become victims at some point. However, they will never be children again. I do not suggest that adults have no sympathy for children and young people, but I believe that there is a distinct danger that children's voices will be drowned out in the clamour of adults' concerns for their own futures. That is especially significant given that children and young people have no vote, possess no political power and are a shrinking proportion of an ageing population.

We look to the next generation to support us and look after us in our old age, so it is in all our interests to give children and young people a special place in our rights-respecting systems. They need a place that counters our natural tendency to selfish short-termism and which protects children both for their sakes and, in the long term, for ours.

If we are to safeguard children and young people's rights and create a peaceful society that includes and respects children and young people, we need to ensure that we listen to them. As adults, we cannot rely on our memories of childhood and youth to shape our law, policy and practice. Childhood and youth have changed in character, so we need to listen to children and young people and to learn from them. That does not mean just inviting a token young person on to a committee or setting up an occasional focus group.

We need to develop effective methods of engaging with children and young people, which must be a central function of a rights body for children. My office has begun work on different methods of engagement, but that is only the beginning. We need to be able to reflect on our work, to build on our learning and to disseminate our achievements as a contribution to the emerging field of active child citizenship.

Having looked at the structure of rights bodies for children in other countries, I know that the single commissioner or ombudsman is by far the most common model. I know of two countries—Greece and Catalonia—that locate the children's ombudsman as a depute within a more general body. I have had quite a lot of contact with both those office-holders but, as the name implies, they are ombudsman posts, which focus largely on dealing with complaints. That kind of arrangement is perhaps more understandable for an ombudsman post, which is largely reactive, than for a commissioner-type post that allows the postholder more choice about which issues to address and how to address them. The lack of an ability to make such choices is where children and young people are likely to lose out if they do not have a protected institution.

The written submissions from children's organisations evidence their belief that an independent office of Scotland's Commissioner for Children and Young People adds value to their work in a way that a broader-based office might not.

Of course I am happy to engage in discussions about any arrangements that might avoid duplication of costs, although it will be essential to be sure that real duplication exists. We must not make assumptions based on superficial resemblances. Otherwise, the functions will be adversely affected, which I think all parties to the debate wish to avoid.

The Convener: Are there overlaps between your remit and that of the Scottish Commission for Human Rights?

Kathleen Marshall: There are obviously areas of common interest. The legislation for my post states that the commissioner's remit is

"to promote and safeguard the rights of children and young people",

with a specific focus on the United Nations Convention on the Rights of the Child. The remit of the Scottish Commission for Human Rights is to promote human rights—strangely enough, the legislation does not say "to safeguard"—with a specific focus on the European convention on human rights. An unspoken link between both organisations is perhaps that, whereas I deal with general rights with a specific focus on the UN convention but sometimes need to reflect on the ECHR, the Scottish Commission for Human Rights focuses mainly on the ECHR but can also refer to other international instruments. However, we deal with different voices in the democratic process. The fact that there is a common interest in some areas does not mean that the interest is so similar that it could be made into one function that one structure could serve.

The Convener: Can you give me an example of an outcome that you hope to achieve that could not be achieved by a merged body?

Kathleen Marshall: All our work on involving children and young people—our taking on board of their voices—shapes everything we do in the office and is the core of what we do, so we put a lot of resources into it. One of the differences between my role and the complaints bodies' roles, for example, is that they react to complaints, whereas my role is much more proactive; it is about getting children and young people's issues on the agenda and ensuring that decision makers take them seriously. It would be difficult to maintain that focus, take it forward and give it all the resources that it wants when there are resource pressures everywhere.

With all the worthy issues about older people—dementia, the growing ageing population who will make more demands, and all the other human rights issues that will be significant—there will be an inevitable pressure that will draw funds away from work with children and young people, which is too easy to trivialise when viewed from the outside.

If we want to engage children and young people properly we have to make it fun. People sometimes find it difficult to take on board that some of the things that we do and produce, and some of the ways in which we engage children and young people are effective because they are fun. A lot of that could be lost in a broader organisation.

Jamie Hepburn: What added value does your post give to children and young people in

Scotland? You say in paragraph 4.3 of your written evidence:

"Children's rights are not well enough known or understood"

in Scotland. How have you addressed that?

Kathleen Marshall: I have addressed it in a number of different ways. For example, our responses to consultations are always couched in terms of the rights of children. All our responses have a preamble that explains the context of children's rights, what they mean and why they should be taken seriously, and they analyse matters in terms of children's rights. We produced the children's rights impact assessment tool—the CRIA—which the Scottish Government has used to analyse some of its proposals. We use it routinely to identify positives and negatives in proposals. It has also been taken on board by other children's commissioners' offices internationally. For example, I have spoken about it in Strasbourg, I will speak about it in Austria in the next couple of weeks and it is to be translated into German.

We have produced valuable tools that try to get people to ask questions and take children's rights seriously. We have also produced a number of documents for children and have collaborated with the Scottish Government on publications that have been widely disseminated in schools. For example, we have produced cartoon illustrations for all the Convention on the Rights of the Child articles. Children and young people helped us decide what articles meant and how we could portray that in a way that made sense to both younger and older children. We have had 40 international inquiries about using those illustrations because people recognise their value.

However, we are at the beginning of such work and are still learning and reflecting. We have also produced a detective kit for children and young people that helps them look at things to do in their area and emphasises their right to play, which has been a huge success and is appreciated by schools. We are evaluating it just now.

We work in many ways and at different levels to help law and policy makers understand children's rights and to make them an intrinsic part of their development of law and policy, and to get the rights through to children and young people themselves. We do a wide range of things to raise the profile of children's rights in Scotland.

Jamie Hepburn: I have seen much of your work and it is very good—the cartoons that illustrate the convention's articles are particularly good. However, why would not a merged rights body be able to do exactly the same work?

Kathleen Marshall: We must have a body that focuses on children and young people as a priority and which can spend resources on developing and doing the fun things that I described. If a rights body were to replicate everything that we do, keep all the staff and do all the awareness-raising outreach work, it would not save any money. The same functions could be performed with the same effort under another banner, but it would not save any money. Furthermore, such a body would have to ensure that it took on the issue of the identifiable individual and the relationship.

11:00

We could use education as an analogy. Why do we have nursery schools and teachers, primary schools and teachers, secondary and further and higher education? Why not just have one big body in a school, given that its role is teaching? One building could be used as a teaching resource in which one group of people would teach everyone. In other aspects of education and communication with children, we recognise instinctively that we need to take different approaches, and that different people have different remits. We have to make sure that that is safeguarded in whatever we do for children and young people.

Jamie Hepburn: But if there were a specific commissioner for children and young people within that body, would that not still work?

Kathleen Marshall: All sorts of configurations are possible. As Kevin Dunion said, the point is that there is no clarity about what is being proposed.

I am absolutely clear that, if there were such a commission-type body, it should not be possible for the person who represented children to be shouted down by other voices. The children's representative would have to have a statutory role with the ability to determine their priorities and a safeguarded budget to ensure that money did not drift towards more powerful interests that had a vote in the system, were listened to and were not demonised by the media. If such a body came about, you would have to ask whether it would save money or it was being set up just for the sake of it, and whether it could be established in a way that ensured that children's voices were not shouted down and children's resources did not seep into other areas.

Johann Lamont: I feel that you have overstated the commissioner's role in order to make your case, and I am not sure that that is particularly helpful. No matter how effective they are, it is simply not possible for a commissioner to engage with all young people.

I acknowledge the fact that many children's organisations have been very exercised about the

proposals because they see a key role for the commissioner, but that is not the same thing as the commission having to do the job. Indeed, judging by your description of the issues that you have dealt with, the commissioner clearly has a broader role. It cannot be just about direct engagement; it is perhaps about good practice.

Saying that we should stick everyone in one big building and teach them all together might also make the argument that a children's commissioner does not recognise the diversity of need among children and young people or the conflict of the rights of young people at different ages and stages. We can protect the notion of the rights of children and young people, which the Parliament clearly indicated it wanted to do when it set up the commission, but a broader body might recognise that there are different ages and stages, that children and young people are not all one group, that they are not necessarily all accessible in the same way, and that some of their rights might conflict with each other.

Kathleen Marshall: I am sorry that you feel that, in my enthusiasm, I have overstated my role. Obviously we cannot engage in an individual relationship with every child, but we can create a situation in which they recognise that someone is speaking up for them. They respond to that—and I have seen that response when, for example, I have engaged with groups of asylum-seeking children, children with disabilities and those in other situations. They like the fact that an identifiable person is speaking for them.

The commissioner's work could be more widely disseminated but, because I am demitting office, I have put some plans on hold. We have all sorts of ideas based on things such as the success of the detective kit for children in schools. Some of those who have used the kit are talking about Kathleen as an individual they know, and that helps them to understand. I have held fire because I do not want to hold a big publicity event now if somebody new is going to come to the role. There are more possibilities for having an identifiable individual with whom a broad range of children can identify, and I hope that that is achievable.

There are particular issues of diversity among children and young people, bearing in mind all the activities that are relevant to them. I do not think that the diversity agenda for children will be advanced by incorporating their interests in a wider group. There are issues of relationships and communication, too, and my office has put a lot of effort into working with the more marginalised groups of children, including the children of prisoners, disabled children, those who visit secure units and asylum-seeking children. We have put their issues on to the agenda.

On the question of overstating things, I would put the question round the other way: why change it? What advantage will there be to children and young people if they are embraced by a bigger group? It is not clear to me that there would be advantages, and I can see some disadvantages. We are such a new organisation, and there has been so much investment in setting it up and in our gaining experience and developing a profile. Are any possible advantages of moving into a bigger group worth the disadvantages? That is the question.

Johann Lamont: I recognise your enthusiasm, which I share. It is not unique to those who are committed to the current structure, with young people and children being given a voice through the commissioner post, and all bodies that work with young people recognise the power of proper engagement, as opposed to tokenism. That is true across the equalities field.

On the question of the job being about engagement, that self-evidently cannot happen—it is just not possible. What is unique to the job that allows such engagement in other organisations? What is it about the current commissioner structure that has made children's charities so enthusiastic about it? That is the question that we are wrestling with. In my view, it cannot be because individual members of staff can reach out to individual groups of youngsters—that is not possible.

The real issues are the impact on the way in which young people experience public services and so on, and their being given a voice. What challenge is presented to other organisations? If we cannot identify the unique and significant features of the current arrangements, then, by your own logic—which is that we cannot have a generalised body—the role would be quite safe with the protections that would be available inside a more general human rights body.

Kathleen Marshall: The function is recognised internationally, and by far the greater number of organisations have an identifiable or separate institution for children. The current set-up makes it possible to tackle the difficult things from a child's point of view. Our role is not just to get the things that children want on to the agenda—that is important in itself, and we have been doing that—but to tackle the difficult aspects.

For example, I have been advancing the case for anonymity before conviction for people who have been accused of committing offences. That idea has come from the children's point of view, and it does not just focus on people who are accused of committing offences against children or another particular group. I have been saying that, from the children's point of view, the fact that adults feel that they are not treated fairly if an

allegation is made rebounds on children and seriously affects their quality of life. If that argument had come from a more general organisation, it would be vulnerable to the accusation that its voice was being used to put adults' rights before children's rights. I am working from the point of view of children's rights and the quality of children's lives.

The same goes for risk aversion. Following my consultation, one of my priorities has been proportionate protection, which is about trying to get a better balance between protection and fun, development and healthy relationships. The aim is to avoid the measures that are sometimes presented as child protection but are really about protecting adults from criticism if things go wrong.

When I first raised that issue with children's agencies, it was relatively new to them but, once they thought about it, they were keen for me to work on it. Under the proposed system, it would have been more difficult for them to do that, because the issue is difficult and they would have had to think about their funders—if it was alleged that those agencies were taking forward an adult agenda, their funding would be vulnerable. They therefore encouraged me to do what I wanted to do, which was to raise the proportionate protection agenda from the point of view of the impact on children. Part of my added value is that I have not held back from addressing the difficult issues, even those that sometimes seem counterintuitive. That is a significant point—the fact that such ideas come from the children's voice is important.

Johann Lamont: They do not necessarily come from all children's voices. That is the challenge of the post, as I said when I talked about your overstating the role. I do not want to get into an argument about anonymity, but sometimes not having anonymity allows other victims to come forward.

The issues that you raise are interesting, but I am not convinced that those functions are distinct and unique to the current organisation and post. The committee is wrestling with the issue of how to ensure that children and young people have a voice and their experience is understood by those who deliver services. We need to consider which features of the structure are required and which are not, and we are not clear on that yet.

Kathleen Marshall: The case has yet to be made as to how changing the present system will benefit children and save money. We are a very new organisation that links well with international children's commissioners and the other children's commissioners in the United Kingdom, all of whom have separate offices. Scotland has just been commended by the United Nations for setting up the office, so it would be strange to change it unless there was very good reason for doing so—and the case has yet to be made as to why we should change it. The organisation is new, so can we not carry on and establish ourselves, rather than have another reorganisation that will distract from the significant issues that must be dealt with?

Ross Finnie: I hear what you say about the relative newness of the position and your desire for more time, but we are faced with the slightly difficult situation that, for a variety of reasons that do not necessarily emanate from your office, the Parliament has requested us to examine all the SPCB-supported bodies.

I am interested in the evidence from elsewhere. You are clear in your mind on the issue, which we welcome. Some witnesses have put the question back to us and said that they will go along with whatever we want to do. That does not help us a great deal, so it is good to have a firm opinion. You are clear that young people would have difficulty identifying with a body that somehow had a muddied front-office look about it, and you are assertive on the need for a separate and dedicated organisation to promote and protect the rights of the child. Can you direct us, perhaps in writing, to evidence from elsewhere that supports that? Obviously, your experience is extraordinarily valuable, but is there any other evidence? I am asking not simply for evidence that other countries have such a system but whether you can direct us to evidence that supports the proposition that you have clearly articulated.

11:15

Kathleen Marshall: I have examined international models and analysed them as far as possible from the information that is available in English on various websites and from my personal knowledge. I am not aware of anywhere that has a proactive commissioner role set within a wider body. As I said, there are two examples of an ombuds role that is set within a wider body, but that is a bit different.

In a commissioner role such as mine, getting the message across is in some ways more challenging than it is for an ombudsman who handles individual complaints. Someone who deals with complaints can say to children, "Bring us your problems and we'll try to solve them," whereas our office operates at a more strategic level. Having said that, my legacy paper for the next commissioner will suggest that we could develop a group complaints system to help groups of children and young people in particular areas to take issues forward.

If you are looking for evidence to compare the two options, I am not aware of an arrangement such as what is proposed that could provide comparative evidence. The evidence would have

to allow comparison of a separate commissioner with a wider body that had a commissioner part—I know many commissioners, most of whom are separate bodies, but I am not aware of a pure commissioner role that is part of a wider body.

Some of the other children's commissioners in the UK have a mixed function. Like us, the commissioner in England does not deal with complaints, while the commissioners in Wales and Northern Ireland have a mixed function of the commissioner role and the ombuds role of dealing with complaints. I am not sure whether I could find the comparator that you are asking for. I think that the proposal goes into unknown territory.

Jamie Hepburn: You raise the issue of children's rights as opposed to adults' rights. That reflects your submission, which talks about tensions between those rights. In the overall human rights landscape, tensions will always exist between various groups—whether they are adults and children, the young and the old, employers and employees or asylum seekers and those who have been on our shores for longer. We accept that, but the concept of human rights is still indivisible, so when you refer to "an adult-centred body"—I presume that you mean the Scottish Commission for Human Rights—is that slightly bogus?

Kathleen Marshall: There are of course tensions and different voices. The difference is that children are vulnerable, have developmental needs, lack political power and do not have a vote. Their voices are the most likely to be set aside as being immature and not fully formed. Even if children are listened to, their views might not be given appropriate weight. Children are different from the rest of the population, who have rights that involve tensions.

We must have a clear and effective focus on listening to and communicating with children. The right of someone to have their views listened to and taken account of does not stand alone; its purpose is to achieve better decisions. I said that we cannot rely on memories of our own childhood. Life can be very different for children and young people today. If we want to make correct decisions that respect their rights and will create more peaceful communities, we must hear their perspective, so we must communicate effectively with them. I acknowledge what you say, but children have a particular need.

Jamie Hepburn: I do not necessarily disagree with that, but where does the idea come from that the Scottish Commission for Human Rights is an adult-centred body? What is the evidence for that? If that is the perception, perhaps that is because your office provides a specific commissioner for children and younger people. If your office did not exist, perhaps the idea that the Commission for Human Rights is an adult-centred body would not be held.

Kathleen Marshall: I do not want what I said to be taken as a criticism in any way of the commission. I know its personnel and I worked with some of them for years. Can we take that for granted?

Jamie Hepburn: We take that as read.

Kathleen Marshall: The body is very new and is establishing its profile. The comment is more about the conceptual basis. There is a lot of work to be done on human rights and, given the calls from the different constituencies, the demands on the Scottish Human Rights Commission will be absolutely huge. The fear is that, as a result, the children's angle will be squeezed out by louder voices.

However, as I said, my criticism relates to the conceptual basis of all this; I make no criticism whatever of the Scottish Human Rights Commission. Even before the legislation that established the commission was passed—indeed, from the very beginning of my appointment—I said that I would regard the commission as one of the partner organisations and that our relationship would be very fruitful. Moreover, in various interviews and in articles that I wrote before the commission was established, I envisaged that, given the amount of work that has to be done, we would discuss areas of common interest and decide, for example, that the commission might take the lead on certain issues and that my office would take on and push young people's priorities.

I simply do not see any added value in merging the two bodies. In fact, I fear that we will lose something valuable into which we have put a lot of investment and which is only now beginning to take off. If that happened, it would be very sad.

Jamie Hepburn: I hear what you are saying. One of your concerns is that young people and children will not be able to engage with this adult-centred body, but could not a merged rights commission engage with children quite easily? I accept your earlier point that none of us can become children again and that we cannot rely on our memories of childhood. However, with all due respect, I point out that you, too, are not going to become a child again and that you, too, cannot rely on those memories. Short of appointing a child as commissioner for children and young people—I presume that that is not what you are suggesting—we will always have to rely on adults to fill the role. Why could a merged body not do so?

Kathleen Marshall: Since the beginning, I have made it clear that I am not cool and that I am not trying to be cool. I know very well that I need to listen to children and young people from different

constituencies. However, something that we have learned is the effort that has to be put into doing that properly. For example, we have done national consultations with and have involved young people in different projects, and our three standing groups—a reference group, a young persons health advisory group and a care action group—have taught us a huge amount about engagement. As a result, we have changed our models—

Jamie Hepburn: But why could the same not be achieved by a merged body?

Kathleen Marshall: Reflecting on what we have done, we have realised more than ever the resources that are needed and the focus that is required to do that work properly and effectively. We have followed that learning curve. There will always be a temptation to eat into resources for children to satisfy adult needs, and that is what I am afraid will happen in this case.

Children—and the resources allocated to them—are vulnerable, and it would be too easy to downplay what is needed to do the job effectively. Given all the investment that we have put in, public money would be better and more effectively used by continuing along this road and working in partnership with the Scottish Human Rights Commission than by merging the bodies. The case for a merger has still to be made, because none of the figures or other evidence that has been put before me has indicated any added value in such a move. On the other hand, there is value in having an independent body. I suggest to the committee—which will, after all, make the decision—that the adverse implications of a merger at this early stage outweigh any of its hypothetical or theoretical advantages.

Jackson Carlaw: I am afraid that I am going to worry the same ball of wool, but I will try to ask another question, too. I speak with the natural authority of a father of two teenage sons who do not identify with anything that he says. However, their experience of dealing with adult bodies has varied, depending on the way in which those adult bodies have responded.

I have listened to you carefully. You make two powerful arguments—one for the best practice of your office, and the other for the existence of your office. I am not sure that I could differentiate between the two; they seemed to be the same argument.

You have identified resource issues, but if there were separate offices, your points would apply in the same way. It is perfectly possible that one office might be better funded than the other, which might therefore feel that it was not resourced sufficiently to fulfil its function.

Ross Finnie asked about your evidence, but I wanted to ask a different question. Has any qualitative research been done to show that young people find it difficult to relate to adult bodies? Or is the perception anecdotal, perhaps informed by the experience of certain young people dealing with certain adult bodies?

If the best practice of your office, and the valuable work that it has done, were encapsulated and protected in a wider rights body, it would not follow that your office's priorities would be squeezed, would it? In a wider body, could benefits not accrue for children, young people, communities, stakeholders and your staff?

Kathleen Marshall: You asked about the evidence base for our views on the ways in which children identify with adult bodies. On the one hand, complaints bodies—ombudsbodies, for example—tend to be approached not by children, but by adults on behalf of children. It has often been said that the European Court of Human Rights—which is regarded as an adult body—is not approached by children.

On the other hand, children know that ChildLine was set up specifically for them. Children know that the organisation respects their need for confidentiality, and they respond to that. They somehow know that ChildLine is for them. I would like our organisation to have the same kind of profile, so that children know that it is for them and know what they can expect of us. There is evidence that children respond to that.

You asked about our best practice being encapsulated in another body. That could happen; I am not saying that such ideas are impossible. However, a couple of issues arise: one is a resource issue, relating to the resources that are required to involve young people appropriately; the other is a voice issue, relating to how young people can have a say in the formulation of law and policy. Young people's priorities have to be put on the agenda as serious issues.

If there were to be any kind of merged body, it would be essential—if we were to safeguard the rights of children and young people—that a children's commissioner had an independent voice; was able to speak out without being voted down by other members of a commission; was able to identify priorities; and had a safeguarded budget. If we want all those things, what would be the added value of saying that this commissioner—who has a separate independent voice, a separate budget, and so on—should be part of a wider commission?

You asked about the possible advantages of having a merged body. In my written submission to the committee, I say that there could be an advantage in sharing services, for example. We are small public authorities, and the same high standards are expected of us as are expected of

other public authorities. We could benefit from sharing expert personnel in subjects such as human resources, information technology, procurement and all the background services. That could be done in a number of ways—one of which might be pretty close to what is being suggested, with some sort of central body providing services to various commissioners. The question is, what is the difference between having a central services body and having a commission that is an administrative body, the members of which have separate, independent statutory voices?

11:30

There is a spectrum of possibilities. My concern is to ensure that the children's voice is kept statutorily independent, that other people are not able to vote down the children's priorities and that there is a budget for all the things that we must do for children. Those are the powers that must be safeguarded, regardless of whether we have a commissioner, a commission or a central services body. We must have an independent voice for children, protection of children's priorities and the resources that are needed to do the job. Does that mean having a commission made up of several members or having a number of commissioners, with some shared services? It is difficult for me to quantify the benefits that are to be had from shared services without discussing the matter with other offices, because I can speak only from my experience—I cannot speak for them.

The Convener: I move on to the questions about governance and terms and conditions that we put to Mr Dunion. It is suggested that the independence of office-holders can be undermined by their having to apply for reappointment. In your submission, you agree that one term of seven years—the same as in Wales—is appropriate. Why have you taken that position?

Kathleen Marshall: There is a fairly unanimous view on the issue. An office-holder should have a term that is long enough to enable them to get through their initial learning curve and to do things, but someone who is in a relatively powerful position should not hang on too long and become tired on the job. A term of seven years gives people one year to get their feet under the table and time for two three-year plans. As Kevin Dunion said, it allows them to carry out succession planning in a constructive way, without question marks around whether there will be a second term.

The Convener: A number of office-holders are subject to restrictions on their future employment; I know that you do not wish to be reappointed. What do you consider to be an appropriate period for such restrictions, given that the provisions were designed to avoid conflicts of interest? I do not know whether you have another job.

Kathleen Marshall: That is an interesting issue, because there are no restrictions in the legislation to which I am subject. I have told staff and other stakeholders that I will keep a low profile for six months after I have left the job, because I feel the need to let my successor establish themselves. I have a background in both the academic sector and the voluntary sector, but it would be a bit strange for me to go job hunting in organisations over which I have jurisdiction; I could investigate any service provider for children. For that reason, I have decided not to seek a job at the moment.

Although my office is not subject to restrictions, there is a genuine issue. I make my comments without self-interest, as the provisions do not affect me. In some other countries, people who are subject to a long term of exclusion from the kind of employment for which they would be appropriate are compensated for that; MSPs also have a six-month buffer after they leave their posts. If we do not offer compensation, we exclude people who cannot make their own arrangements. If someone has several children at university, they cannot allow themselves the luxury of six months unpaid. Such issues do not apply to me but must be taken into account. There is a genuine issue about striking a balance between ensuring that people do not feather their nests before they leave office and allowing them the opportunity to earn a living.

The Convener: The Commissioner for Children and Young People (Scotland) Act 2003 provides for removal from office, includes grounds for removal and sets the voting threshold at

"not less than two thirds of those voting."

Is that appropriate, or should the threshold be two thirds of all MSPs?

Kathleen Marshall: That is an interesting issue. I do not know whether there is a quorum for the Parliament—I assume that there must be, but perhaps there is not. I can envisage a scenario in which, if people wanted to abdicate responsibility for a difficult issue, the two thirds of members who voted would not amount to many people. Further thought needs to be given to that issue. I tend to agree with Kevin Dunion that it would be better if the threshold were two thirds of the whole Parliament, but I acknowledge that issues have been raised in that regard. If there is no quorum and the threshold were two thirds of the members who voted, there could be difficulties in some circumstances.

The Convener: There are quorums in committees.

You suggested that if there were moves to remove a person from office, the office-holder

should have the opportunity to defend themselves. How would that work?

Kathleen Marshall: In the act that established my post, the grounds for removal are that the office-holder is not carrying out their functions or the Parliament has lost confidence in the person. For the sake of natural justice, there should be a forum in which such propositions can be put to the office-holder and they have an opportunity to respond and defend themselves. I suppose that, strictly speaking, if the Parliament makes the decision, the office-holder should be able to address the Parliament. I do not know whether that is possible; I have not thought the matter through and I have not studied the standing orders of the Parliament.

As a matter of principle and for the sake of transparency and the independence of the office, consideration must be given to how the office-holder can contribute to the process, challenge assertions and defend themselves, so that a more informed decision can be made. A member who is to vote on such a significant matter should at least be able to hear both sides of the argument. That is the principle, but I do not claim to have thought through the procedure. I have not studied all the vagaries of parliamentary procedure.

Jamie Hepburn: Office-holders have told us about difficulties with their legal status. Will you describe practical difficulties that arise as a result of the legal status of your appointment? Do you favour an alternative approach?

Kathleen Marshall: I have been raising the issue since before I started the job, because as a lawyer who is not a corporate lawyer I know what questions to ask but do not know all the answers. When I compared the Commissioner for Children and Young People (Scotland) Bill with the Children's Commissioner for Wales Act 2001 and the Commissioner for Children and Young People (Northern Ireland) Order 2003, which preceded the Scottish legislation, I noted that the approach in Wales and Northern Ireland was to make the commissioner a "corporation sole", which means that the office has corporate status but only one person is a member of the corporation. That means that when the person who entered into a contract leaves, the contract continues with the next commissioner.

I read up on the matter and asked about it. Apparently, corporation sole status does not exist in Scottish law. Although the act that established my post says that the commissioner may "enter into contracts" and "appoint staff", those are isolated issues and are not set in a broader philosophy. When I read the bill, the question that arose in my mind was, "What kind of creature is this?"

The Commissioner for Children and Young People has legal authority to do certain things. For example, if on leaving here I was accidentally killed by one of the buses that go up and down the street, no person would be the leaseholder or employer of staff. Although the Commissioner for Children and Young People (Scotland) Act 2003 states that the SPCB can appoint an acting commissioner, there would still be a hole. For example, I can delegate to staff, but any delegation falls if I die, so there would be no delegation, no employer and no leaseholder if I died while in office. We all took legal advice on such matters. There are issues about transmitting delegations when an office-holder leaves.

Some very practical issues of personal liability and indemnity also need to be addressed. I have had informal discussions with various legal parties on whether it would make sense to introduce the concept of corporation sole into Scots law. Given that the Scottish Law Commission has produced a discussion paper on unincorporated associations, this seems like a good opportunity to include that issue in the debate.

Some of the practical issues can be addressed—we have discussed this with the SPCB—through contracts. As part of the terms and conditions of employment, the new commissioner will take over the staff and take over the lease, which will be assigned to the new commissioner. However, that is not a wholly satisfactory solution, as it does not address what happens if the commissioner dies. Some of the legal advice that we acquired suggested that the lease would go to the person's personal representatives.

Jamie Hepburn: Some discussion on that work has obviously been undertaken. The situation sounds similar to that of members of the Scottish Parliament, although there are obviously provisions for dealing with our staffing arrangements in the unfortunate event of our untimely demise. Is there nothing like that for commissioners?

Kathleen Marshall: No. We have had discussions and correspondence with the SPCB on the issue. I think that the SPCB is talking about dealing with the matter contractually and by assigning leases and contracts. However, that will not address all the issues. When we started up and tried to set up bank accounts, a few of us had to try to explain what our legal status was and what that meant for holding a bank account. It is not clear to people what our legal status is. Although some issues could be addressed on a contractual basis, that would not deal with what happens in the event of the sudden departure of the commissioner—that is very high on the risk register for our office—or the issues about the

office-holder's liability and indemnity. We need a comprehensive response rather than a piecemeal approach. At the moment, there is no supporting philosophy for the office that allows people to go back to first principles in dealing with all the various eventualities that arise that—as tends to happen with human life—were never thought of previously.

Ross Finnie: I will move on to another question. The corporate body considers that the provisions in the Scottish Commission for Human Rights Act 2006 meet the necessary accountability provisions without interfering in the functions test. Do you agree with that? Do you consider that any further protections are necessary?

Kathleen Marshall: I have no problem at all with a transparent and robust process for scrutinising and approving budgets. I have never had a problem with that. Although questions initially were raised because my legislation requires the SPCB to pay all expenses that are properly incurred by me—obviously, that raises the blank cheque scenario—I have never asked for a blank cheque and I have never exploited that provision. I would be very happy with a process of proper and robust budgetary approval.

In terms of the Paris principles that have often been mentioned in previous consultations, there is an issue about ensuring that commissioners, ombudsman offices and human rights bodies have adequate resources to carry out their functions. That is, I suppose, the real question. However, as long as things are transparent and can be challenged, I have no problem at all with a budgetary approval process. That is how we have worked so far.

Ross Finnie: Are you content for that process to be conducted through the SPCB?

11:45

Kathleen Marshall: I do not have the tensions with the SPCB that some office-holders have. Because the SPCB is not regarded as a service provider to children, it is not a body for which I have an investigative function. If anything, the children's commissioner has interests in common with elected members. As I explained in my evidence to the Finance Committee's inquiry, there is a sense in which I am expected to be the Parliament's eyes and ears and to bring issues for the Parliament to decide on. I do not have the jurisdiction that the Parliamentary Standards Commissioner, the Scottish Public Services Ombudsman or the Information Commissioner have, so the SPCB's remit would not be a problem for me. The question would be about having consistency across the commissioners' offices.

Ross Finnie: Despite that, you refer later in your written evidence to a potential tension. You are not against being required to lay strategic plans before the SPCB, but you appear to be concerned about having to accept the SPCB's comments on the plans.

Kathleen Marshall: It is not so much accepting comments as having to act on them. The Scottish Commission for Human Rights Act 2006 is fine in that respect, because it refers to inviting comments but does not say that a plan must be changed because of them. If a strategic plan was subject to political control, that would certainly raise questions about the independence of the office concerned. In fact, one of the reasons why the Children's Commissioner for England does not meet the standards for membership of the European network of ombudspersons for children is because of the commissioner's lack of independence, since ministers can direct the commissioner to do certain things.

The question is whether we want our bodies to have the status of being the kind of independent institutions that the United Nations recently applauded or whether we want to water down the bodies' independence. If a body was subject to the kind of political direction that I described, that would put it in a different category. However, inviting comments and working in partnership aids transparency and could create a fruitful dialogue.

It would be a positive move if we had a more robust reporting mechanism. For example, my annual report is laid before Parliament, but it is just mentioned in the *Business Bulletin*. On taking office, I negotiated a protocol with the previous Education Committee so that it would consider the annual report. However, it would be good if we were clearer about what happened to the annual report and had an annual debate in Parliament on the state of children in Scotland. Strengthening links like that would be valuable, but it must be done in a way that maintains the independence of the institution.

Ross Finnie: The extension of that is that you have reservations and concerns about a comment process on strategic plans that results in a direction. Nevertheless, the issue of finding the resources to meet the plans remains, so there is a second interface. Even if we accept the proposition that there are difficulties and tensions in creating the possibility of a direction in relation to strategic plans, there is nevertheless an implication that, if Parliament did not have the power to direct, you might—I put this more as a question than a statement—argue that the SPCB should not necessarily have powers to set budget limits, or you might resist that.

Kathleen Marshall: I reiterate that I do not think that anyone should have a blank cheque for public

funds. This point is also relevant to the issue of children's vulnerability, but complaints bodies such as the SPSO and the Information Commissioner, as Kevin Dunion explained, respond to what is happening out there, so there is a quantitative issue that they do not control.

With bodies such as mine, which are more proactive, you have choices about the scale of the organisation and what can be done proactively. When I set up the office, I tried to ensure that I established it in accordance with the scale that was anticipated by Parliament. I am not complaining about this, but my office is half the size of the other UK offices. In the inquiry that established my post, it was suggested at one point that the budget and staffing levels of the Welsh commissioner's office should be scaled up to determine what the Scottish commissioner's budget and staffing levels should be. However, they were actually scaled down—Wales has two thirds the number of children that Scotland has and twice the staff. However, as I said, I am not complaining about that; I am saying that, having taken on board everything that I have mentioned, I have tried to keep the office within the scale that Parliament envisaged.

In my evidence to the Finance Committee, I suggested that, given that we are already audited and have to lay accounts before Parliament, it would protect independence and accountability if the scale of our budget were maintained. I suggested that, for example, there could be an expectation that we would receive the same scale of budget each year—adjusted for inflation—and we would decide how to spend it, within the terms of our statutory remit and subject to audit, but we would have to argue for a change in the scale of budget if we wanted to expand the organisation. I thought that that sort of process would be a reasonable compromise.

I have no problem at all with budget setting; I can see that it is essential.

The Convener: As we have no more questions, I thank you for your time this morning. If, once we read the *Official Report*, we decide that we need further clarification of certain issues, we will write to you.

11:52

Meeting suspended.

11:58

On resuming—

The Convener: I welcome Gary Womersley, who is the chief officer of Waterwatch Scotland and Jim Black, who is its head of customer support. Thank you for your submission. I invite you to make an opening statement, after which we will move to questions from the committee.

Gary Womersley (Waterwatch Scotland): Thank you, convener, for inviting Waterwatch Scotland to give evidence. Waterwatch Scotland is a national complaints-handling authority for all domestic and non-domestic water customers and the consumer representative body for the water industry in Scotland.

Waterwatch Scotland went live with its statutory role as of 1 April 2006. From that time, along with other industry stakeholders, Waterwatch Scotland has played a significant role in improving customer service, systems, processes and service-provider performance in the water industry in Scotland. As an example, I cite the 65 per cent reduction in second-tier complaints against Scottish Water over that time.

Waterwatch Scotland is unique. Post the introduction of competition to the water and sewerage services sector in Scotland it is a statutory second-tier complaints-handling body, often referred to as an ombudsman, for a Scotland-wide industry that spans both a publicly owned corporation—in other words, Scottish Water—and private-sector entrants such as Business Stream and SATEC Ltd and other new entrants to the market.

Waterwatch Scotland is not publicly funded, either through general taxation or otherwise, but via a levy on the industry. As such, we can be cited as an example of incentive-based complaints handling or regulation.

12:00

Waterwatch Scotland engages with water and sewerage service providers not only to improve complaints-handling processes in the industry but to prevent and mitigate the causes of complaints. Unlike many other ombudsmen, Waterwatch Scotland is not limited to dealing with individual complaints or to overseeing specific kinds of complaint, such as maladministration. That allows us to deal with complaints and customer contacts on not only an individual basis, but systemically. Many of our successes to date are the result of that ability to raise and pursue systemic issues to the benefit of customers and the industry as a whole. That approach also allows Waterwatch Scotland to identify issues that are bubbling under the surface and to remedy them within a relatively short timescale. Although we do not act as the design authority for the organisations that we monitor, we audit and performance-monitor them in that regard—organisations are scored on how they organise their complaints handling.

Waterwatch Scotland is empowered to make statutory recommendations to a wide range of

water industry stakeholders including ministers, the Government, the Scottish Environment Protection Agency, the drinking water quality regulator and the Water Industry Commission for Scotland.

As a result of the Scottish Government's small business unit relocation policy, Waterwatch Scotland's corporate office is in Alloa. A small, professional staff supports the organisational role.

Ministers have decided that Waterwatch Scotland could possibly be merged with the SPSO and we will engage appropriately in that process. However, as a customer representative body, noblesse oblige requires us to argue that our current powers should not be diminished in any way, shape or form. Accordingly, we welcome the invitation to give evidence to the committee today.

The Convener: Thank you for that statement. The committee wishes to be absolutely clear about the Government's proposal. I understand that only Waterwatch Scotland's complaints-handling function would go to the ombudsman and that Consumer Focus Scotland will take over the role of representing water customers. Will you expand on that and set out the issues that may arise for the consumer if your existing functions were to be split?

Gary Womersley: We gave many examples of that in our submission. I will refer briefly to some of them. A large part of the added value that we bring as a complaints-handling or ombudsman organisation is our holistic approach. We are not concerned only with processes, systems and so forth, so we can concentrate on the substantive issues. Instead of looking at the merit of a complaint on an individual basis, we use our complaints-handling data as a robust and credible evidence base to feed information on the complaint into the processes in which we participate. We can feed that information to ministers, other stakeholders and so on. For example, following our investigations, what appears on the face of it to be a complaint about Scottish Water—or another of the organisations that we police—often turns out to be a complaint not about the organisation per se but about Government policy or the practices of other stakeholders.

In a normal complaints-handling model, we would probably find that there was no complaint to uphold in the majority of cases. Although we still do that, we can also tell the complainant that, by feeding the data into the relevant processes we can mitigate the problem on a proactive basis. That is an example of how we work holistically to join the loop between complaints handling and customer representation. The two are not mutually exclusive; both derive added value from the fact that they sit under the same umbrella.

The Convener: What discussions have you had with the Government about its proposal?

Gary Womersley: We welcome coming to committee today. It is the first time that we have been asked to give oral evidence on the matter. Previously, we made written submissions to the Crerar review and the Sinclair fit-for-purpose complaints system action group.

The Convener: Much as we would like to be the Government, we are not it. What discussions have you had with the Government on the proposal, including with officials?

Gary Womersley: The only communication that we have had has been with our sponsoring division at Victoria Quay. We also made a submission to ministers that was no different from the one that we made to the Crerar review.

The Convener: In your written evidence, you refer to the "significant role" that Waterwatch Scotland plays in improving customer service and state that second-tier complaints have reduced by 65 per cent. What have you done to achieve that reduction and how would the proposed transfer affect that work?

Gary Womersley: For the sake of objectivity, I feel obliged to say that a transfer might not, in itself, have any impact on that figure provided that appropriate systems, balances, checks and safeguards were in place to ensure that that was the case. Thinking aloud, I suppose that many of those could be somewhat cumbersome. The advantage that we have at the moment is the synergy that is derived from complaints handling and consumer representation being under the umbrella of the same organisation. There has been discussion about providing a modicum of safeguards through memoranda of understanding and ensuring that any new legislation is drafted accordingly, but those mechanisms would be put in place to endeavour to maintain the synergy that currently exists within one body.

Jamie Hepburn: I have a question on the funding issue that you raised. You said that Waterwatch Scotland is not a taxpayer-funded body but is funded by a levy on industry. Can I take it that you mean that you are funded by Scottish Water?

Gary Womersley: Ultimately, we are funded by customers. At present, most people are customers of Scottish Water.

Jamie Hepburn: So you are funded by water rates. Is that correct?

Gary Womersley: Yes. Ultimately, we are funded via water charges.

Jamie Hepburn: In that case, would it be fair to comment that it is slightly semantic to say that you are not funded by the taxpayer?

Gary Womersley: It would be and it would not be. There is a difference; it may be subtle, but it is nonetheless worthy of being flagged up. Ultimately, we are paid for by the organisations that we police. For example, if we requested more resources because of the number of complaints or issues that were being generated in the industry, the bodies that gave rise to those issues would be the ones required to give us the additional funding.

Jamie Hepburn: So is there a degree of leeway within your funding?

Gary Womersley: There is a linkage, yes.

Jamie Hepburn: I said leeway, not linkage. Do you not have a set budget from year to year? How does it work?

Gary Womersley: Unfortunately, we cannot require the various organisations, but there are systems: balances and checks. Any budget that we propose must be approved by ministers, but it is paid for by the water industry.

Ross Finnie: I will press you on the questions that the convener and deputy convener asked. We have the Government's views and those of the Sinclair review but, from your evidence, I am not clear what benefit would arise to the consumer from splitting your functions. Will you expand on that? Do you share or have reservations about the view that a benefit would arise?

Gary Womersley: Currently, there are synergies—I would also say efficiencies, but there are certainly synergies—with the complaints-handling and customer-representation roles being in one organisation. I must respect the fact that, if those roles were split between various organisations, mechanisms could be put in place to maintain those synergies, although I dare say that we would need to watch that those mechanisms did not become overly artificial or cumbersome. Therefore, for the sake of objectivity, I feel bound to say that the same means could be achieved on paper. I would prefer others to comment on whether that would be as efficient or provide the synergies that we currently enjoy, but it might be somewhat hard to achieve the same level of efficiency.

Ross Finnie: It is not the function of this committee, but I am trying to get both sides of the argument in my head. I apologise for this, convener. Obviously, we have nothing to do with Consumer Focus Scotland, but it might be important for committee members to get your view of the other side of the coin. You appear to have some reservations about the split. Let us be blunt. Are you concerned about the other part of your function going to Consumer Focus Scotland? Is it the case that getting rid of your organisation will not necessarily benefit the consumer? What is your view about Waterwatch Scotland being merged with Consumer Focus Scotland?

Gary Womersley: Whether it is Consumer Focus Scotland or any other body, the general argument is that I remain to be satisfied that any mechanisms that are being proffered would maintain the current synergies. I accept that there are mechanisms that can be put in place, but an element of that synergy would be lost at the day-to-day level, which is where the bulk of the advantages of our being under the same umbrella are enjoyed.

For example, a separate body would deal with individual complaints and there would then need to be systems, processes and communication on a fairly regular basis to share the benefits of the evidence base that was gained via the complaints. The same would apply for any body to which the customer representative function was passed. We currently also sit on various industry groups such as the Scottish Government's outputs monitoring group. I imagine that that would need to be attended both by the complaints-handling body—the owner of the evidence base—and by the customer representative body. So two bodies might be required to attend where one attends at present.

Ross Finnie: I have a final question on that. If the complaints side comes within the SPSO, that will have to be funded out of the Parliament's budget. At present, you are funded by a consumer levy. Will it be tenable or practicable to continue the consumer levy if your functions are merged into an all-consumer body?

Gary Womersley: With respect, the question whether that will be tenable or acceptable is for others to decide.

It is important that the incentive-based element to which I referred is maintained. As far as I am aware, most of the bodies that might be subject to the mergers that the committee is looking into are funded by the public purse. However, I can envisage scenarios in which the Scottish Water element of complaints—not the private sector element of complaints—could feasibly continue to be funded as it is at the moment. That might sit somewhat incongruously with the funding arrangements for the other bodies but, ultimately, that is for others than Waterwatch Scotland to decide.

Jamie Hepburn: I am second-guessing you, but I pick up the feeling that your concern about separating the specific complaints-investigating role from the systemic investigating role arises from the fact that that would mean that you could

not share the evidence that had been gathered from the specific complaints. Perhaps Mr Black, as the head of customer support, might be better placed to answer this question. Can you think of any example of a systemic investigation that you have undertaken as a result of individual complaints?

12:15

Jim Black (Waterwatch Scotland): Yes. We have published five or six "in the public interest" reports, as we call them, on issues such as those at Peterhead or Kingseat in Fife. Specific complaints had been made that raised large and generic issues. We subsequently made recommendations that were accepted in full by Scottish Water or, in one of the other cases, by Business Stream.

We also have to consider the practicalities. There is benefit in having the complaints system and the customer representation system under one roof, because I can attend to individual and systemic complaints, and I can attend meetings of the groups that Gary Womersley referred to earlier. I am not sure how that would work if the functions were split.

In developing a model, we considered how private companies dealt with complaints. Most good private companies do not regard complaints as necessarily a bad thing; the companies invest in their complaints systems and use information from complaints to improve their businesses. That is the model that we now use in our industry.

Jamie Hepburn: You suggest that you do not see how information could be shared if functions—specific individual complaints, systemic complaints and customer representation, as you call it—were separated. Would it be impossible? Or would it simply require someone—this committee, I imagine—to ensure that specific procedures were in place so that information could be shared?

Jim Black: We asked the SPSO and Consumer Focus Scotland how they operate, but it was unclear what information went from the SPSO to assist Consumer Focus Scotland in its operations. I am still unclear about how such things will pan out and I agree that they may be a matter for the committee.

Gary Womersley: As I said earlier, I do not think that what you suggest would be impossible. I do not want it thought that I have gone on record as saying that it would be. It would be possible, and it would certainly be practicable to put various mechanisms in place, but those mechanisms would be put in place to try to maintain the synergies that we already enjoy.

It will ultimately be for others to decide whether the two hats that we currently wear are split up, but we have expressed another concern. At present, our powers in the handling of complaints are unique. They are wide and allow us to make statutory recommendations, and we have said in evidence that the powers should not be diluted in any way by merging us with other bodies that also handle complaints. Such a dilution would not be in the interests of customers. I welcome the evidence from the SPSO and others that the powers, framework and modus operandi enjoyed by Waterwatch Scotland could, in time, become the benchmark for the powers and responsibilities of other bodies that handle complaints—subject to the results of potential merger talks.

I accept that mechanisms could be put in place to deal with a split, but I would not be happy about any move that diluted our powers to handle complaints. It would not be in the interests of customers.

Jamie Hepburn: What happens when you decide to undertake a systemic investigation as a result of individual complaints? Does a pattern emerge from a number of cases? Do case workers flag that up? If so, I presume that that is one mechanism by which two separate organisations could still undertake the work.

Gary Womersley: Various things can happen, and the example that you give is a common one.

I do not want to be too specific in my examples, but we are a fairly small office and we can pick up trends and patterns fairly quickly. We identified meter-reading issues in the north-east of Scotland that were quite marked, and we were able to deal with and resolve those with Scottish Water and Business Stream in what was a relatively short time, given the scale of the issue.

Similarly, the systemic issues that we are talking about are not necessarily to do with Scottish Water. We found, for example, from the amount of contact that we received that the trend in external sewer flooding throughout Scotland was significantly increasing. Scottish Water is not currently funded to deal with external sewer flooding, so if complaints are articulated against it, we can identify that and feed the data into ministerial policy. It can work from the micro to the macro level, and anywhere in between.

Jamie Hepburn: I have two final questions. You mentioned your power to make statutory recommendations. As far as you are aware, how does that power differ in its practical effects from the existing powers of—for example—the SPSO?

Gary Womersley: Some of the powers that the SPSO currently enjoys are probably not much different from ours at a practical level. However, the power to make a statutory recommendation

does not involve simply that power itself, but the statutory procedure that is in place when we make such a recommendation. That relates to what ministers and various other stakeholders are required to do, and, although they could ultimately agree to disagree with a statutory recommendation, it is—dare I say it—a fairly weighty and onerous mechanism, and I suspect that many organisations that are subject to it would not take it lightly.

Jamie Hepburn: And the SPSO, as far as you are aware, does not have such a process?

Gary Womersley: To go back to the start of my response, I imagine that the mechanism of being able to bring individual reports before Parliament has that name and shame factor—if I dare to call it that—that I imagine many public sector organisations would be keen to avoid, so, on a practical level, it is not dissimilar.

Jamie Hepburn: You mentioned that you try to solve things quickly when they are brought to your attention. I see that your target for second-tier complaints is completion within 35 days. How would that target be affected by a merger with any other body—for example, with the SPSO?

Gary Womersley: Any change might not in itself encroach on that target, but that is subject to various management and micromanagement decisions. It would be remiss of me to speculate too much in that regard but, provided that our current complaints-handling role was not diluted in any way, any transfer of those to any other body would not necessarily in itself lead to a more advantageous or disadvantageous position—subject, however, to the managerial processes and systems put in place. We could be set up within any new body as a water industry division, for example, and we would still derive many of the benefits of being a fairly small, fast body, but there could be myriad other ways to operate the organisation. It is not really for me to comment on that.

Joe FitzPatrick: The two models that the Scottish Parliamentary Corporate Body and the Scottish Government have put forward are designed to meet the Sinclair report's proposals to simplify public service complaints handling, and to make it more responsive and consumer centred and less bureaucratic. Will it benefit the consumer to have a single body for complaints?

Gary Womersley: I accept that there are possible advantages to such an approach. However, in the context of the complaints-handling landscape that was described in the Crerar review, I would have thought that making a complaint about the water industry is one of the simplest processes. We were set up to go live from 2006 as a one-stop shop for complaints handling and customer representation in the water industry in Scotland. It is for other people to determine whether there would be advantages in the proposed approach.

Joe FitzPatrick: I think that most politicians who have been in local government have encountered constituents who went to the wrong complaints body, for whatever reason, and were told that they should have gone to the council or wherever. How often do members of the public complain to the wrong body? Can you understand how frustrating that is for people?

Gary Womersley: You asked whether there could be advantages in having a one-stop shop. Yes, there could be advantages. However, since we were set up I think that we have received two referrals from the SPSO of people who went in error to another organisation instead of to us. We are fairly well signposted. Signposting for the target audience—if I dare call it that—can create many of the advantages that could be gained from having a one-stop shop.

Although the system might be simplified if all complaints about the public sector, including Scottish Water, went to a new body, we must consider whether the approach might create more confusion in relation to complaints about the private sector. People might ask, "Is this a complaint about Scottish Water, which must go to the new body, or is it a complaint about my private retail services provider?" There is potential for things to fall down the gap. We have tried responsibly to flag up concerns in that regard over the piece.

Joe FitzPatrick: As you know, there are proposals to streamline the process. The SPCB has proposed the establishment of a complaints and standards body and the Government has proposed an expanded role for the Scottish Public Services Ombudsman, to include complaints about Scottish Water and complaints that currently go to the Scottish prisons complaints commission. What are your views on the two proposals?

Gary Womersley: I do not want you to think that I am making only negative comments; there could be many inherent advantages in having a single body—I would not kid anyone that it was otherwise—particularly in respect of complaints handling. The kudos or gravitas that a complaints-handling organisation is perceived to have contributes greatly to its success, so setting up a single, inherently significant body would facilitate the complaints-handling process. The body would have greater influence and clout—certainly at a political level. However, such advantages should not be secured at a cost of eroding benefits that are currently enjoyed. That is ultimately what we are flagging up. Advantages should not be

secured to the detriment of other aspects, which might be lost in the transfer.

The Convener: The Government has proposed that Consumer Focus Scotland take over the role of representing water consumers. In your submission, and in your answers to members' questions, you have drawn our attention to the need to retain a robust customer representative role. How would the proposed split impact on Waterwatch's complaints-handling functions and capability? You have answered the question to some extent, but will you expand on what you said? We need to be clear about how your functions would be split and about the difference that splitting your functions between Consumer Focus and the ombudsman would make.

12:30

Gary Womersley: Splitting our functions would make a difference because currently the two elements are part of one organisation and are linked by internal systems and mechanisms—they are in physical proximity to each other, if nothing else. There are potential disadvantages that would have to be considered and, hopefully, accommodated. Safeguards would have to be put in place to ensure that the synergies that are currently enjoyed were not diminished. A memorandum of understanding could require the two bodies to act in a certain way or to attend the various groups and policy forums that Waterwatch Scotland currently attends. The ultimate concern is that nothing should be lost in the transfer.

The Convener: What proportion of your budget goes to the complaints side? If you cannot tell us now, can you supply us with that information in writing?

Gary Womersley: I would prefer to make a written submission on the issue. Earlier, I referred to the two parts of the organisation, which gave the impression of an artificial split that does not exist in reality—to a great extent, they have a common footprint. The bulk of our budget relates to the complaints-handling function. At this stage, it is hard for me to identify the element that goes to customer representation.

The Convener: Are some of your staff responsible specifically for handling complaints, or is there more of a mix?

Gary Womersley: We have a customer support section, which deals with individual complaints on a day-to-day basis. The section and other staff who wear a customer representative hat also seek, through engagement with stakeholders, to identify and ameliorate issues and to prevent them from recurring. The boundary between the proactive aspect of complaints handling and customer representation is quite fuzzy. It is hard to put them into discrete packages or to say where one finishes and the other starts.

The Convener: Can you suggest legislative changes that would improve the operation of the complaints-handling function of Waterwatch Scotland and the service that it provides to complainers?

Gary Womersley: Not necessarily, but I have been given no indication of what would happen to the post-competition private sector element of water complaints if the public sector element went to a new body. That is one lacuna of which I am aware. I hope that over time my concern about that will be assuaged.

The Convener: Waterwatch Scotland consists of a convener and five regional panels; the convener is responsible for dealing with complaints. What are the benefits of that governance set-up?

Gary Womersley: We have a fairly hybridised governance structure. We work as a corporate body. Complaints are handled in the name of the convener, who has an input, in much the same way as public sector complaints are handled in the name of the Scottish Public Services Ombudsman. However, it must be recognised that the corporate entity deals with the bulk of complaints. An advantage of the set-up is that one person is accountable for the complaints-handling role. A further advantage is that the convener can draw on the advice and concerns of members. Usually, the convener will take on board the bulk of those comments but, ultimately, accountability lies with the convener. That makes it easy for politicians and others to hold the organisation to account.

The Convener: Thank you for coming to the meeting and answering our questions. Once we have read the *Official Report* of the meeting, we will write to you if there is anything that we need more clarification on.

I welcome Richard Smith, who is the interim Scottish prisons complaints commissioner, and Christine O'Neill, who is a partner in Brodies LLP. I invite the witnesses to make a short statement and then we will ask questions.

Richard Smith (Interim Scottish Prisons Complaints Commissioner): Thank you for inviting us to the committee. I have nothing further to add to my written submission, but I am happy to take any questions.

The Convener: I will start with general questions. In the conclusion to your submission you say:

"the Committee can be confident that the SPSO could effectively absorb complaints from prisoners against the SPS relating to maladministration and service failure."

How did you reach the conclusion that it would be appropriate for the ombudsman to absorb such complaints?

Richard Smith: The methodology that we use at the moment is the SPSO methodology, which I believe is having a positive effect for prisoners and the Scottish Prison Service. There would therefore be a direct transfer of methodology for the investigation of complaints. The issue becomes one of capability and capacity. The SPSO has infinitely greater resources than the Scottish prisons complaints commission—it has 20 to 25 very skilled investigators. Given the commonality of process, the SPSO's additional capability and capacity justify the transfer.

The Convener: On the implementation of the prison complaints function, the committee noted from your written evidence that you have accepted 111 complaints for investigation and that you have published 14 reports. How many complaints are currently being investigated? What proportion of the investigations result in a report being published?

Richard Smith: We have 163 on-going cases, of which 40 to 50 are currently under investigation. I think that around 25 cases have now been reported and a number are at draft. We are working through them as quickly as we can. The numbers are going up; they have gone up significantly since we submitted our written evidence.

The issue is that it is very difficult to tell how long a complaint will take when we start the process. Some of the more complex cases start with a very simple question, such as, "Why am I being moved from prison X to prison Y?"

The other issue is that the SPS has a limited capacity to process our information and evidence requests quickly. There is a learning curve for the SPS, as it has to get used to our methodology, too. I think that we are on top of the workload. We tackle our cases in chronological order, so we do not have too many going back into the middle part of last year. However, volumes are going up and, as I said in my written evidence, these cases are relatively complex to investigate, so they are taking a little longer than we expected them to.

The Convener: What process do complaints handlers follow in arriving at a decision whether a complaint is vexatious, trivial or without clear value? What is the process for that? I am thinking of your moving into the ombudsman's office and what process is followed there.

Richard Smith: In simple terms, we follow the SPSO's guidance on complaints that are trivial, vexatious or without value. It comes down to the motivation of the complainer in raising the complaint. For example, I decided that I was not going to investigate a complaint about cold sweetcorn at Dumfries. A more serious issue is where, for example, a prisoner has a gripe against a particular officer and the complaint is used as a vehicle against that officer. That is where we get firm and say, "No. I own the complaint and I will decide what matters are for investigation." The commission is neutral. If we take a complaint on, it becomes our complaint and the prisoner cannot drive it; neither can the SPS take issue with the prisoner. The complaint is an inquisitorial process—it is my complaint—and, in determining what complaints are trivial, vexatious or without value, we follow the guidance that Professor Brown has issued.

The Convener: The committee understands from your written submission that complaints from vulnerable prisoners are fast-tracked. Why is that necessary, given that those complaints relate to downgrades or relocation? I think that I know the answer, but I would like to hear it from you.

Richard Smith: Obviously, because of privilege, I do not want to talk specifically about the two prisoners whose complaints we have fast-tracked. Such prisoners are accepted by the SPS as being vulnerable. They have personal issues, which are often psychological, so it is in their interest and the interest of the SPS that matters are brought to a conclusion as quickly as possible. The SPS is incredibly supportive in that process. It knows the prisoners and their issues very well, and it works with us to get a solution as fast as we can.

The Convener: I suppose that, if the prisoners are moved or put into a different category, they can be worked with and supported in a different way.

Richard Smith: Yes. My predecessors gave evidence about the importance of speed. However, most of the actions in question take place over a very short timeframe. For example, disciplinary awards usually take between three and 14 days and usually involve a loss of privileges. Prisoners are moved continually and prisoners' status is changed. What we investigate is usually the consequences of those decisions. The decision is taken and then, after the event, we review the processes and procedures that were followed to determine whether there was maladministration or service failure.

Jamie Hepburn: Good afternoon, Mr Smith. Could you comment on the recommendation from the fit-for-purpose complaints system action group that the prison complaints function should be transferred to the SPSO in order to improve responsiveness and consumer experience? Although, in your written submission, you state your confidence in the ability of the SPSO to absorb the function, you seem to disagree with that reasoning. Why do you disagree?

Richard Smith: Yes. I do not recognise the picture of prison complaints that was provided to Crerar and Sinclair. It may well be to do with the fact that the inquisitorial methodology that we follow shines a different light on prison complaints. In my experience, prison complaints are quite complex issues involving some quite complex individuals. The SPS is a unique organisation and the background to these complaints is a very undeveloped legal framework.

I also do not recognise the argument relating to speed. That does not seem to be the main concern of prisoners. As I have said, the actions in question are usually taken at short notice and there is little that any agency can do within the timeframe. Prisoners are more concerned about the implications. For example, they may lose seven days' access to a television, but it is the implications for their status and location that concern them more. Speed is not the primary driver. I am not sure about consumer experience in relation to prisoners. I have a captive audience, really.

Jamie Hepburn: Literally.

12:45

Richard Smith: I was interested in the previous debate on what is and is not systemic. From my experience, properly conducted inquisitorial investigation gets to the root cause, which is, by implication, systemic. The SPS has accepted recommendations that we have made on strip searching and disciplinary practices, which have been introduced as changes to its practices and procedures. I do not wish to decry the Sinclair group's recommendations. Indeed, I think that its recommendation on the transfer of the prisons complaints function is right, but its rationale is different from ours. The SPSO is the most capable agency in Scotland for dealing with such a level of complexity, which is why I think—

Jamie Hepburn: In a nutshell, you do not disagree with the group's recommendation, but you disagree with its rationale.

Richard Smith: Yes. Our rationale is different.

Jamie Hepburn: You have spoken a little about why it is not important that some prisoners' complaints are dealt with as rapidly as has been recommended. Do you operate to a timescale for resolving complaints? I see that you are indicating that you do not. Is doing so simply not possible?

Richard Smith: From an assurance perspective, we should be able to track the average time that is taken to resolve complaints as a guide for those who provide resources to the SPSO, but we simply cannot operate to a timescale on a case-by-case basis. We do not have any idea how long it will take to resolve a complaint when we start to deal with it. At this stage, we are finding that a fair number of legal issues need to be resolved, as the area of law in question is very undeveloped. Complaints may be taking longer to resolve now than they will in the future when we become more knowledgeable about how the law works.

Jamie Hepburn: So you do not operate to a set timescale. Are you concerned that merging your functions with those of the SPSO would cause further delays in dealing with complaints?

Richard Smith: No, I do not have concerns about that. However, as the SPSO is a parliamentary agency for which the Parliament provides funding, I caution the committee that the SPSO would be taking on a difficult task. It would need adequate resources, including access to top-quality legal advice. The message to Parliament is that we are not talking about easy complaints, but I have no doubt that the SPSO is able to deal with such complaints well.

Jamie Hepburn: I presume that you are suggesting that it is a matter of training and upskilling, to use a word that I hate.

Richard Smith: The SPSO uses the basic technique of investigation that we use anyway. The methodology that we follow is the same that is followed to deal with medical complaints, planning complaints and complaints against the Government generally. However, familiarisation training would be required. We have to investigate difficult and often quite unpleasant subjects—relating to the sex offenders treatment programme, for example—but SPSO staff are used to dealing with difficult medical cases. There could be a phased handover of work during which some of my existing team could support the SPSO for a short period. However, the biggest additional expenditure may be on legal advice because of the nature of the law as it relates to prisoners.

Jamie Hepburn: That leads me nicely on to my next question. You said clearly that, essentially, you investigate complaints to the same standard as and using the same methodology as the SPSO. In that case, if it was proposed to merge your office's functions with those of the SPSO, would the ombudsman's operational practices require to change?

Richard Smith: I have a small technical concern about the ombudsman's ability to deal with disciplinaries, which is raised in our written submission. I may be being overcautious, but the legislation that set up the SPSO prevents it from looking at disciplinaries. It really depends on how disciplinaries are defined.

Jamie Hepburn: I presume that that would be a legislative matter.

Richard Smith: It is a matter on which to check legal opinion. In relation to disciplinary hearings, I can offer an opinion regarding verdict and sentence, but the SPSO cannot. It is in no way an appellate body, and I do not think that it should be. Another way would need to be found of providing that function.

I caution the committee on a further point. The law in relation to prisons is changing and evolving, and the prison rules are being redrafted, which is appropriate, because a significant redraft is required. However, the changes will alter the landscape. We have highlighted some areas of potential risk involving things such as human rights and how they apply, because those areas are unknown and uncertain. From the Parliament's point of view as sponsor of the SPSO, there are difficulties and potential risks. That does not undermine the basic logic of the proposals, but the matter is perhaps not as easy for the Parliament as Sinclair made it out to be.

Jackson Carlaw: You advised the committee that the Scottish Prison Service is updating the prisons and young offenders rules for Scotland, and I think you said that it would be advantageous if consideration of the disciplinary process was concluded before any transfer. Is that for the obvious reason that it would be convenient, or would a particular disadvantage arise if that did not happen? Also, is there a timescale for the work?

Richard Smith: The rewrite is under way, and I think that the rules will be ready at the end of 2009 or the beginning of 2010. That is the interim timetable for bringing forward the secondary legislation.

There is an issue about the appellate nature of my role, on which Christine O'Neill might want to comment. I have an appellate role, but the SPSO does not, so there would be an issue if there was a transfer before the rules were rewritten.

Christine O'Neill (Brodies LLP): I will explain how the prison rules operate, albeit at a fairly high level. As you would expect, the prison rules govern the relationship between the prison and the prisoner, but they also specify a role for the Scottish ministers in relation to disciplinary decisions.

When a governor or another prison official makes a decision in a disciplinary context, a route is open to the Scottish ministers to overturn any verdict of guilt and to interfere with any sanction that is imposed. Things operate at present more as a matter of practice than a matter of legal certainty, because the rules are not clear. That is one of the difficulties that the commissioner and the commission face. As a matter of practice, the Scottish ministers invite the complaints commissioner to make a recommendation or offer a view on how they should deal with their power in relation to overturning verdicts or sentences. That is not something that the SPSO can deal with.

Jackson Carlaw: We note that, at present, the complainant and the Scottish Prison Service can lodge an appeal against a decision with the ombudsman. What would replace that? Also, how many appeals have there been?

Richard Smith: We have a fair number of complaints. At present, we are directly running 25 to 30 complaints in relation to disciplinary hearings.

The consequence of disciplinary hearings is another matter altogether. In some ways, prisoners are not necessarily concerned about losing their privileges for a short period: it is the consequences that cause concern. At present, I can offer a view—after the sentence has been carried out, in almost all cases—on whether the sanction was reasonable or excessive. The SPSO simply cannot do that, so the appellate role would need to be held elsewhere. That raises complicated questions about which body should be the appellate body in relation to the SPS if it is not the commission.

Jackson Carlaw: Do you have a view on that? What do you suggest?

Richard Smith: I am not suggesting anything. All that I am doing is flagging up the matter to the committee. The SPS is not unaware of the issue, but I have not yet had sight of its proposals. The area of appeals in relation to prison disciplinary hearings is legally complex.

Christine O'Neill: In response to Jackson Carlaw's earlier question, the SPSO does not look at or oversee the prisons complaints commissioner's recommendations with regard to guilty verdicts, sentences, disciplinary issues or sanctions—that role is solely for the Scottish ministers. However, the Scottish ministers are not really an appeal body, because prisoners have no right of appeal. Instead, prisoners have almost to ask the indulgence of ministers to overturn a verdict of guilt or to quash sanctions. As I say, the prisons complaints commissioner's views and recommendations on such matters cannot be considered by the SPSO.

Ross Finnie: I want to pursue the proposition of transferring the prisons complaints commissioner's functions to the SPSO. Does the issue about rights of appeal in a disciplinary process impinge on interpretations of the European convention on human rights and the requirement in certain circumstances for the ability to appeal? I do not want to go too far down that line—I suspect that we would be here all day if we did so—but it is important for the committee to understand the

context in which the current body operates and to be clear about the context in which any future arrangement might have to sit. I am not a lawyer, but I am vaguely aware that, even if no complaint had been made for 20 years, strict interpretation of the ECHR would still require any framework to include the ability for an appellant to appeal a decision.

Christine O'Neill: I will try to respond briefly to that question.

There are a couple of ECHR issues to take into account, the first of which is the extent to which someone who is involved in a prison disciplinary hearing has human rights. As the commissioner's written evidence makes clear, there is no particular authority in Scotland on whether specific guarantees must be in place to make a hearing convention-compliant. In a case from 2001, which has not been reported in the usual law reports but is available from the Scottish Court Service, Lord Reed's decision was that the disciplinary hearing in question did not have to comply with the ECHR. However, he went on to say that, in certain circumstances, such hearings have to be compliant. Further work might need to be done in that area.

With regard to appeals, if a prisoner who is dissatisfied with a guilty verdict or sanction is unable to get the Scottish ministers to overturn the decision, one legal remedy might be judicial review. It surprises me that, although the Scottish ministers have the power to look at verdicts or sanctions, prisoners have no right of appeal within the rules to ask for that. That seems odd.

Ross Finnie: I am curious as to why existing Scottish law—never mind European law—contains a right to seek judicial review but there is no link to ECHR provisions to provide an absolute right of appeal without the need to invoke judicial review.

Christine O'Neill: Moreover, judicial review is often a remedy of last resort and is used only when no other remedy is available. It might be argued that it would be more appropriate to have a more traditional route of appeal than to rely on judicial review.

13:00

Ross Finnie: To cut to the chase, let us get back to the context in which the functions would be transferred to the SPSO, and proceed on the hypothesis that the committee was minded to transfer them. What would we have to bear in mind about how an appeals mechanism would fit into the SPSO? You may wish to write to us on that, given that time is moving on. I direct your attention to the evidence from the current ombudsman, who was anxious to clarify the general point that an ombudsman is an arbiter and not a court of appeal. There is a conflict between that evidence and the proposition that emerges from your evidence.

Christine O'Neill: We would be happy to write to the committee to explain that further. Perhaps the tension arises because of the dual function—being part of an appellate process and a complaints handler—that the current complaints commissioner is expected to fulfil.

Richard Smith: One of the biggest surprises for me is how little case law and judicial guidance exists on prisons. They are an undeveloped part of the Scottish legislative landscape, which presents risks and opportunities. The next revision of the prison rules will be an important document. It needs proper and thorough consideration and will impact on how the SPSO conducts its role if it takes over responsibility for complaints.

Ross Finnie: It is not really relevant whether Scots law advances on case law. That might be a separate issue.

Joe FitzPatrick: The Scottish prisons complaints commission is not established by statute. What are the main elements that should be prescribed in legislation if the commission is integrated into the SPSO?

Richard Smith: I refer the technical matters to Christine O'Neill. A statutory basis would have no operational effect on my staff and prisoners, but we are talking about matters that relate to the commission as an institution.

Christine O'Neill: There are two different issues. The first is the commission's remit. At present, it is not set out in any legislation. There are, however, advantages in defining within legislation the powers and obligations of an authority such as the commission. Therefore, any amendments to the Scottish Public Services Ombudsman Act 2002 would need to address the commission's remit and cover questions such as whether it should consider disciplinary issues.

The other question is the legal status of the body. That brings us back to evidence that the committee has already heard on legal personality and whether the commission is a statutory corporation. That is a wider question, to which the committee will no doubt have regard in its overall consideration of the ombudsman's role.

Joe FitzPatrick: Your written evidence expressed some concerns about your inability to require that evidence from intelligence be given to you. Will you outline that concern?

Richard Smith: The acquisition and management of intelligence is a necessary part of day-to-day operational life and is an essential part of what the SPS has to do to manage risks and threats within and without the prisons.

Responsibility for scrutinising the acquisition, management, storage and exchange of intelligence rests with the surveillance commissioners. The rules on what they can and cannot release, and how they can exchange intelligence with or advise other agencies, are restrictive. For example, they are not covered by freedom of information legislation.

If I am investigating a complaint that has intelligence-related aspects, I can pick up the complaint only from the point at which the intelligence is used to make a decision—when the SPS moves or downgrades a prisoner or restricts a visit. I can deal only with the output of the process, which means that I cannot necessarily investigate the root cause. That does not negate the output of an investigation, but it means that I cannot check on systemic matters that relate to the whole process.

That separation of jurisdiction would continue under the SPSO, because the surveillance commissioners are not under the SPSO's jurisdiction. The same restrictions on my dealing with the surveillance commissioners would also apply to the SPSO. That is just a peculiarity of how the jurisdiction is divided. However, that means that regulation of and assurance about issues are difficult when complaints have a root in acquired and managed intelligence.

Joe FitzPatrick: Is there any way to resolve those issues, or do we just have to live with them?

Richard Smith: Parliament might be able to address the situation because it has authority over the surveillance commissioners. RIP(S)—the Regulation of Investigatory Powers (Scotland) Act 2000—is Scottish legislation, so Parliament has some influence over the surveillance commissioners through exploring issues in annual reports and so on. The commission and the SPSO just have to deal with the landscape.

I have a protocol with the SPS under which it self-certifies its conformance with its own guidance. That arrangement is not ideal and has limitations, but it is the best I can do. That protocol would not transfer to the SPSO and I cannot speak for the ombudsman, who would need to choose whether to renegotiate the protocol or to create another. Until matters change, the division will exist.

Intelligence is a frequent component of complaints; it is not rare. On day-to-day issues, use and management of intelligence are factors in prisoners' lives and in the work of prison officers.

The Convener: Given that the Scottish Prison Service is the focus of complaints, have its views on the transfer of functions been sought? Have you discussed that with the Government?

Richard Smith: The Government has been supportive. It asked me to introduce the SPSO-style methodology in the commission, in anticipation of the Crerar review and some of the proposals that are before Parliament.

Mike Ewart and his team at the Scottish Prison Service have been supportive and co-operative. I did not receive many Christmas cards from them, but I hope that they are getting value from the process. We are influencing some of the SPS's processes and procedures. I have not directly asked the SPS whether it thinks the proposals are a good idea; I think that it is quite happy to leave that to the committee's advisement.

The Convener: The committee has no more questions, so I thank both witnesses for coming along. After we have read the *Official Report*, we will write to you if we need further clarification.

I ask those who should not be in the room for our private session to leave, please.

13:08

Meeting continued in private until 13:41.

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:

Tuesday 10 February 2009

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 RR Donnelley 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

Scottish Parliament

RNID Typetalk calls welcome on
18001 0131 348 5000
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 RR Donnelley