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Pàrlamaid na h-Alba

Official Report

FINANCE COMMITTEE

Wednesday 12 September 2012

Session 4

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FINANCE COMMITTEE
22nd Meeting 2012, Session 4

CONVENER

*Kenneth Gibson (Cunninghame North) (SNP)

DEPUTY CONVENER

*John Mason (Glasgow Shettleston) (SNP)

COMMITTEE MEMBERS

*Gavin Brown (Lothian) (Con)
*Mark McDonald (North East Scotland) (SNP)
*Michael McMahon (Uddingston and Bellshill) (Lab)
*Elaine Murray (Dumfriesshire) (Lab)
Paul Wheelhouse (South Scotland) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Rosemary Agnew (Scottish Information Commissioner)
Carole Ewart (Campaign for Freedom of Information)
Euan McCulloch (Scottish Information Commissioner)
David Sillars (Commission for Ethical Standards in Public Life in Scotland)
Nicola Sturgeon (Deputy First Minister and Cabinet Secretary for Infrastructure, Investment and Cities)
Dave Thompson (Skye, Lochaber and Badenoch) (SNP) (Committee Substitute)

CLERK TO THE COMMITTEE

James Johnston

LOCATION

Committee Room 5

Scottish Parliament

Finance Committee

Wednesday 12 September 2012

[The Convener *opened the meeting at 09:30*]

Decision on Taking Business in Private

The Convener (Kenneth Gibson): Good morning and welcome to the 22nd meeting in 2012 of the Finance Committee. I remind all those who are present please to turn off any mobile phones, pagers and BlackBerrys. We have received apologies from Gavin Brown.

I welcome Dave Thompson, who is substituting for Paul Wheelhouse today. I invite him to declare any interests that are relevant to the remit of the committee.

Dave Thompson (Skye, Lochaber and Badenoch) (SNP): I have nothing to declare, convener, other than what is already on the parliamentary system.

The Convener: Agenda item 1 is a decision on whether to take item 4 in private. Do members agree to do so?

Members *indicated agreement.*

Freedom of Information (Amendment) (Scotland) Bill: Stage 1

09:31

The Convener: Item 2 is stage 1 scrutiny of the Freedom of Information (Amendment) (Scotland) Bill. We will take evidence first from Carole Ewart, from the Campaign for Freedom of Information Scotland, and David Sillars, from the Commission for Ethical Standards in Public Life. This will be the first of three evidence sessions on the bill this morning. I understand that there are no opening statements, so we will go directly to questions.

I will ask each witness a question and will then open the discussion to the rest of the committee. My first question is for Ms Ewart. In your written submission, which is one of the most detailed written submissions that we have received, you express concerns about the bill. I have some concerns about your written submission, as it talks about what should be in the bill rather than what is in the bill and we are here to take evidence on the bill. In particular, you have concerns about the extension of freedom of information to cover other areas.

The bill's stated purpose is

"to amend provisions of the Freedom of Information (Scotland) Act 2002 relating to the effect of various exemptions and the time limit for certain proceedings."

We have received a letter from Brian Adam, which states that

"the Freedom of Information (Scotland) Act 2002 already contains order-making powers to extend coverage to bodies who appear to the Scottish Ministers to exercise functions of a public nature or are providing under a contract made with a Scottish public authority any service whose provision is a function of that authority."

We will put questions on that point to the cabinet secretary. I understand that the Scottish ministers intend to extend coverage once the problems with the 2002 act are ironed out. What is your view on the specifics of the bill? The Scottish Government has said that it

"will adjust the regime where it is necessary and sensible to do so."

As I said, we will ask questions about that. What do you feel about the royal exemption? That issue has been raised by a number of people. What is your organisation's view on that?

Carole Ewart (Campaign for Freedom of Information): We are quite underwhelmed by the bill. We have chosen to focus our submission on what should have been in the bill, and it was reasonable to expect that there would be a broader view of reform of freedom of information in

Scotland. It is now 10 years since the legislation was passed and there have been numerous consultations. It is interesting to note what has not been consulted on but is in the bill, such as the exemption for royal correspondence. We are also conscious that the public support reform of the freedom of information legislation. The Scottish Government's six principles also back up the environment and the framework in which that more detailed reform should take place.

I will emphasise the history of the consultation, which has also been part of the stage 1 process, as it is important to revisit that. At the stage 3 debate on the Freedom of Information (Scotland) Bill in April 2002, the then Minister for Justice, Jim Wallace, promised consultation. He said that the consultation would begin very quickly after the bill had been passed and did not need to await the appointment of the first Scottish Information Commissioner.

In 2006, we had a Scottish Executive consultation, but the Executive declined to introduce reform in 2007. A discussion paper was issued in November 2008 and a consultation was run in 2010.

At each step of that process, there was broad support—even from bodies that might be covered, such as Glasgow Life—for the benefits of being covered by the Freedom of Information (Scotland) Act 2002, but the bill does not introduce reform.

That brings me back to your question. We are now forming the view that section 5 of the act is, therefore, not fit for purpose. Despite promises that were made in 2002, that section has not been used and the consultation that is set out in section 5(5) is unbalanced because it seeks the views of the bodies that may be covered, not of people who may wish to exercise their section 1 rights. We are seriously of the view that we might seek the deletion of section 5 and an amendment to section 4.

On the specifics of royal correspondence, we are hugely disappointed that the Scottish Parliament, which has full capacity on the issue—it is a devolved matter and the Parliament can do exactly what it wishes to do—has decided to copy an amendment to United Kingdom legislation. You are therefore creating an inconsistency with the Environmental Information (Scotland) Regulations 2004. We do not think that the existing public interest defence has been abused in any decisions. In fact, a decision for disclosure is rare.

We suggest that you consider two recent decisions by the UK information commissioner, which may guide your deliberations on the matter. Those are two occasions on which disclosure was required; the decisions operate under the previous environment, because the UK legislation was not retrospective. One decision concerns the Ministry of Transport, the Duchy of Cornwall and correspondence relating to the Marine Navigation Aids Bill. That decision was issued on 8 February 2012. The other concerns the Department for Business, Innovation and Skills, the Duchy of Cornwall and correspondence regarding the Apprenticeship, Skills, Children and Learning Bill. That decision was also issued on 8 February 2012.

You are right that it is an important area. The Campaign for Freedom of Information has always been opposed in principle to an absolute exemption. We believe that a public interest exemption should be retained, and we urge the committee not to accept the bill on that point.

The Convener: I will correct you on something: the Scottish Parliament has not taken any decision on the issue. The Scottish Government has introduced a bill, and we are here to scrutinise it and decide whether we support it before it goes to the Parliament, which will take a decision on it.

Do you not accept that the Scottish ministers, as they have said, must address anomalies in the current legislation before they think about widening it to cover other organisations? A statement to that effect was made to the Parliament, and the committee has been informed that the bill is intended to make the current legislation more effective before its coverage is extended.

Carole Ewart: We are not persuaded by that argument because we have been promised consultation and the use of section 5 since 2002, but that has not happened.

The Scottish Government's analysis of the responses that it received to the 2010 consultation concludes with this point:

> "the Scottish Government also notes that the time of enactment of the Amendment Bill could provide opportunity for related Orders to come in to force, for example under Sections 5 and 59 of the Act."

The bill was published in June. That would have been the time to announce a specific timeline and a specific set of organisations to be brought within the scope of the extension.

There is also a problem with the nature of the consultation that took place in 2010. Section 5 of the 2002 act requires that the bodies to be covered are consulted. However, the only body that was included in the 2010 consultation was the Glasgow Housing Association and there are more than 50 other housing associations that could equally be brought within the scope of the legislation. That immediately creates a problem.

The Convener: Mr Sillars, your submission focuses specifically on the bill. You have two

concerns, one of which is the public interest test in relation to royal exemptions. Will you comment on that?

Secondly, you talk about

"the level of flexibility proposed",

which you fear could create a far more complex system. What drawbacks do you think that that might have?

David Sillars (Commission for Ethical Standards in Public Life in Scotland): The perspective that we have brought to bear is not policy driven. Rather, it is our observations of the potential for administrative difficulties a little further down the line. My comments have to be prefaced by saying that I appreciate that this is an enabling piece of legislation, which will be subject to further articulation in subordinate legislation. I understand that those issues have been thought about.

In relation to royal communications, depending on how the legislation is enforced, it may be that, further down the line, the result of the amendment bill might be to militate against the general thrust of openness—and increased openness—that underpins the legislative initiative. Again, that is not a policy-driven view or a particularly deeply-felt concern in relation to where we sit.

In relation to your point about historical records, the bill is drafted merely to allow different provision for:

"(a) records of different descriptions,

(b) exemptions of different kinds,

(c) different purposes in other respects."

At the moment, the definition of historical records has intrinsically different periods of time. Our concern is that the application, on a less-than-well-considered approach, might result in a kind of geometric progression of different timescales, which, as we say in our original consultation response, might produce confusion. It might be difficult to justify the differences, and the legislation might end up in a less user-friendly scheme.

I fully appreciate that you have considered the point. In their reflections on that part of the bill, a number of consultees welcomed the increased flexibility and sensitivity that might be brought to bear in the legislation. However, one consultee's increased flexibility might reflect, as it does in our case, a slight concern about increased complexity in terms of the outcome.

The Convener: Instead of a more flexible regime, what regime should be imposed by the bill?

David Sillars: In our original response, we say that there should be a set period for all the categories, which has going for it certainty and so on. However, I fully understand that that may be offset by how the legislation is used. I noted in the committee paper that thought would be given to the categories of information. I dare say that, as part of that, the most used aspects could be identified and thought could be given as to whether there could be consistency among the most used areas of inquiry.

I fully concede that our original response simply reflects a concern, principally, that at a later stage thought is given as to how different periods could be made usable and well known, and highlighted to the users, without it becoming particularly complex.

09:45

The Convener: One final thing before I open up the session to colleagues. What timescales should there be on the release of information?

Ms Ewart, that question is for you as well if you have a view on that in terms of release of documentation. Should historical records be released after five years, 10 years, 15 years, or 20 years? What is your view? The general view that has been expressed by ministers in the bill is that, where possible, records should be released earlier rather than later. Do you have concerns about flexibility? Should there be fewer categories? What timescales should we be thinking about?

David Sillars: To be honest, I do not have a strong view on that and I do not think that our organisation would have a strong view on that. Like everyone else, we certainly endorse the view that the material should be made available earlier. At the moment, in some cases we are talking about historical periods of 60 or 100 years, for example. I note the move towards release in 15 years rather than 30 years and so on—clearly, as a generality, we would welcome a move towards a shorter rather than a longer period.

This will sound like a lawyer's answer, but it does depend very much on the kind of material that we are talking about. It may not be appropriate for personally sensitive material, for example, to have such a short period, whereas I can well understand that for the purposes of research, general knowledge and so on there would be a desire to have material released earlier rather than later.

I might defer to my more expert colleague to give a thoughtful view on that.

Carole Ewart: I echo what David Sillars said. The Campaign for Freedom of Information in Scotland supports the public's right to know and it welcomes the initiative by the Scottish Government to be more realistic and less

dogmatic about timescales, so the earlier the better.

Michael McMahon (Uddingston and Bellshill) (Lab): This is a question for both witnesses—I am not sure which of you would most relate to it.

My understanding is that the exemption that is intended to cover the monarchy covers communications between ministers and the monarchy, so who would be protected by that amendment? Would it be the monarch or the ministers?

Carole Ewart: I will focus on the disadvantage and the impact of the amendment. The disadvantage would be that the public would never have the right to know, whereas, at the moment, if there is a public interest, the public has a right to know. The impact would also mean that whoever is writing the correspondence need never fear that it would be made public.

In principle, we are opposed to absolute exemptions. We cannot understand why that exemption has been proposed—why it has been copied. We see a hugely negative impact.

I stress that we support human rights. We support the right to privacy, so we are not looking at personal details. What we are standing up for is the public's right to know, if there is a public interest.

Michael McMahon: Have you any evidence of freedom of information requests that have been made in relation to such matters? Have there been any difficulties in that respect? Have ministers or the royal household had to defend rulings by the information commissioner that they were unhappy with?

Carole Ewart: The two cases that I cited from February in which disclosure was required, one in full and the other in part, break new territory. In the past, it has been very difficult to get information because the public interest test has applied. That response has been quite proportionate, and I think that we can trust public authorities and the UK information commissioner to exercise powers responsibly.

Michael McMahon: From your experience of the use of FOI requests in relation to public bodies, have you found any particular difficulty in getting information about the monarchy?

Carole Ewart: To be honest, the issue has never particularly bothered me.

John Mason (Glasgow Shettleston) (SNP): Thank you for your answers so far.

Last week, I suggested to the bill team that a number of councils—I cited Glasgow as an example—have in effect hived parts of themselves off into separate bodies, especially on the sport and leisure side of things. As far as I see it, what used to be covered by FOI is covered no longer, which means that the amount of information is reducing. Is that your understanding of the situation?

Carole Ewart: Absolutely. We believe that the right in section 1 of the 2002 act to access information is much weaker in 2012 than it was in 2002, when the Freedom of Information (Scotland) Bill was passed, and on 1 January 2005, when the legislation came into force. According to the Audit Scotland report that we quote in our submission, there are now 130 arm's-length external organisations, many of which are delivering services that used to be delivered by public bodies such as local authorities. Given the suggestion in the same report that it is likely that more services will be delivered by bodies set up by public authorities, we think that the problem is growing and, as a result, call in our submission for the bill to contain a section that makes it clear that its purpose is to entrench the public's right to know. As we cannot anticipate how public services or services of a public nature might be delivered in future, there must be a focus on ensuring that whatever body is created for whatever public purpose should be covered by freedom of information legislation.

John Mason: Dr Murray and I asked the bill team about some of these issues last week. Indeed, I think that in response to one of Dr Murray's questions the team suggested:

"there are other means of acquiring information from bodies that are not covered, and the wider transparency agenda is intended to cater for that."—[*Official Report*, *Finance Committee*, 5 September 2012; c 1473.]

Do you find that answer acceptable?

Carole Ewart: Absolutely not, because we are talking about an enforceable right to know. It could be argued that the whole strength of freedom of information legislation is the fact that it enforces the public's right to know. We have always had the right to ask, e-mail or phone up for information; sometimes it was given, sometimes not. What changed on 1 January 2005 was that the right could be enforced. Whether you call it a transparency agenda, an accountability agenda, a housing charter or whatever, we want a simple and accessible right that can be enforced and ensures that people know what freedom of information is. Research by the Scottish Information Commissioner shows that in Scotland there is a high degree of awareness as well as a great deal of respect and support for the right.

John Mason: We received a letter from Brian Adam, which I believe is on the public record. Is that correct, convener?

The Convener: Yes.

John Mason: Do you have any thoughts on the suggestion in the letter that the current climate might be a problem? Mr Adam says:

"In addition, the Scottish Ministers are acutely aware of the current economic climate and concerns over the impact additional regulation on hard pressed businesses could have at this time."

Carole Ewart: I have three thoughts about that. First, when the Scottish Government first mooted freedom of information in the consultation document published in 1999, it said that there would be no extra money for its introduction. It also saw it as a way of managing records more effectively.

Secondly, the number of freedom of information requests should be minimal because there should be proactive disclosure of information. If you disclose more proactively, you have less of a reason to deal with individual requests for information under section 1 of the 2002 act.

Thirdly, the Scottish Government's analysis of consultations raised the point that the cost factor was not hugely onerous, which was also the view of some respondents. The cost factor is a bit of a red herring. We have found out from freedom of information requests that ordinary members of the public who receive services can make FOI requests that ultimately lead to a saving of money and better concentration of scarce public resources.

John Mason: I do not know whether Mr Sillars cares to comment on any of those questions, which I have aimed more at Ms Ewart.

David Sillars: I do not have anything to add to what Carole has said.

John Mason: My final question involves another quote from Brian Adam's letter, which states:

"Responses also showed no compelling evidence of a problem or of unmet demand for information."

Do you agree that there is no unmet demand for information?

Carole Ewart: No. I saw the committee's evidence session on that last week.

Section 5 of the 2002 act, which requires consultation with those bodies likely to be covered, is skewed and unbalanced. There should also be a more effective consultation with those who may wish to access information, so that the formal process is balanced. In meetings that we have attended recently on the amendment bill, people have repeated examples of information that they would like to receive but have not got.

John Mason: Can you give us an example?

Carole Ewart: Housing associations. It is interesting to note that housing associations have used FOI themselves, so they understand its benefit. To go back to the cost issue, democracy costs money. We are sitting in a building that cost money. However, the fact is that if it is a treasured right—we believe that it is a fundamental part of a democracy—then although there will be a consequential cost, it is not a burden but a benefit of democracy.

Elaine Murray (Dumfriesshire) (Lab): As the deputy convener said, he and I have been pursuing the issue of extension with the bill team, perhaps slightly unfairly because it is more of a policy issue, which we can take up with the minister later.

I am interested in what was said about the Scottish social housing charter, because it reflects the answer that I received from the Scottish Government in respect of the difference between tenants of a registered social landlord just funded by tenants' rents, and tenants of a council housing department funded by tenants' rents. There seems to be a bit of an imbalance there.

The bill will amend an existing act. We were advised that we did not need to bring in the extension by primary legislation because it could be done by secondary legislation. Would you have preferred the amendment bill to introduce the extension into primary legislation so that it could be consulted on? Or are you happy with it being in secondary legislation but not happy about the lack of progress?

Carole Ewart: We think that, 10 years after the original legislation was passed, section 5 of the 2002 act is not fit for purpose because it has not operated in the way that it should have.

Elaine Murray: Should the extension be in primary legislation—in the bill?

Carole Ewart: The way around that is of course to have a public interest purpose section. If the point of the bill is the public's right to know rather than its current focus, which is what the public sector is prepared to share—both the content and at its own pace—then we think that a public interest purpose section would change the focus of how bodies are brought within the scope of freedom of information legislation. The focus would be entirely different.

Elaine Murray: Right, but would not that require consultation with all who might be interested at this stage?

Carole Ewart: In a sense, the consultation has been used as a delaying tactic, because we were promised consultation in 2002. We genuinely thought that section 5 would operate efficiently in that there would be consultation, a decision would

be taken and more bodies would be covered by freedom of information of legislation. That has not happened.

Elaine Murray: Would you be able to submit an amendment to the bill that we could consider at stage 2?

Carole Ewart: Yes. That is our intention.

Elaine Murray: I have another question on a slightly different issue. Certainly in my limited experience of freedom of information it is far from easy to get certain information, particularly when it involves details of correspondence. For example, just before the date on which I should have received a response to my FOI request, I got a letter that asked exactly what e-mails and documents I wanted, as if I would know what letters I wanted before the request had been answered. Are we missing an opportunity to make it easier for the public to get information? It seems to me that public bodies can prevaricate and put people off, so that in the end people just think, "What the heck," and give up.

10:00

Carole Ewart: It is a good idea to have a more nuanced approach to the operation of the 2002 act. I have heard similar stories about overlegalistic replies from public bodies that really put people off. People are warned about disclosure and copyright law and might think that they should not share the information with other parties. I agree that we need a nuanced debate about how the freedom of information legislation is operating.

To return to your point about the housing charter, at present, people do not need to quote freedom of information legislation to get the information that they request. We talk about the housing charter and a transparency agenda, but we expect ordinary members of the public somehow to know where their rights are and what box they are in. Freedom of information is a simple process. Research by the Scottish Information Commissioner proves that there is a high level of public awareness of it. There should be a simple, streamlined and enforceable right.

Mark McDonald (North East Scotland) (SNP): My question follows on from the point that Ms Ewart discussed with Dr Murray. It is to do with section 5 of the 2002 act. I seek clarity on your position because, on the one hand, you appeared to suggest in your earlier answer to the convener that section 5 should be done away with, but it now seems that you might be more amenable to an amendment to section 5 to cover some of the consultation issues that you have raised. What is your organisation's position? Is it that section 5 is a dead duck or could it be amended to deal with some of the issues that you have raised?

Carole Ewart: To be honest, we are refining our position on the issue because we have become so frustrated by the consultation process since 2002 and the more recent promises: we still have no timeline and no specific list of bodies to be covered. That has led us to a more rigorous examination of section 5 and to wonder whether it has ever operated in the way in which the Parliament intended and whether it could be fixed by an amendment. For example, the amendment could balance the consultation process so that the users of freedom of information have equal consideration in the deliberations. There could also be amendment to section 4 to take on some of the responsibilities of section 5. Our view is that the bill must include a purpose section and that the flexibility to add new bodies is actually less than what is currently in section 5.

Mark McDonald: I appreciate the frustration that you must feel given that, from 2002 until now, section 5 has not been used. Is it your belief that it will never be used or are you willing to take at face value the Government's comments that it will consider extending the scope once it has amended the legislation to make it fit for purpose?

Carole Ewart: We are really just fed up waiting. We emphasise that it is not just the current Administration that has broken promises. We still do not understand why, when the bill was published, there could not have been a timeline and a list of specifics. However, even if specific organisations were named, that would not go far enough, because we know from the Audit Scotland report that more bodies will be created in future and that, from our reading, those might not be covered by freedom of information legislation. That is why there has to be a purpose section in the amendment bill so that new bodies are more easily covered by freedom of information legislation.

Dave Thompson: I have a simple and quick question for our two witnesses. What is your view on the retrospective aspect of the reduction in the lifespan of exemptions? Should the reduction come in only for issues post the new legislation, or should it apply to everything? Basically, should the measure be retrospective?

Carole Ewart: Does David Sillars want to go first?

David Sillars: No. [*Laughter*.]

Carole Ewart: In principle, I do not like to miss such an opportunity. I will consider the point in more detail and write to you.

Dave Thompson: Will we have another letter from David Sillars?

David Sillars: To be fair, our observations are on a narrow range of issues. I suppose that I have a view but, given what we have submitted, it would be wrong for me to wing it now. I would like to reflect on the point. We have not formulated a view on the issue.

The Convener: I understand that the intention is to make the provisions retrospective, but we can clarify that with the cabinet secretary. I had intended to raise the issue, so I say well done to Dave Thompson for jumping in.

As Mr Sillars said that the commission is looking at specific provisions, Ms Ewart will probably answer my next questions. What is your view on the proposed change to the time limit for proceedings? As you know, a prosecution must be brought within six months of an offence being committed. The plan is that the bill will change that to six months from the date when evidence comes to light. Is that amendment a positive step in the right direction?

Carole Ewart: Absolutely. We were intrigued to find out that a problem has arisen with time limits. It is extremely disappointing that any documents could have been destroyed. The question is: why three years?

The Convener: I think that that is one of those things—the period is perhaps arbitrary, to be honest. Perhaps three years is thought to be reasonable—we can ask about that.

Last week, I asked the bill team how many cases had not been proceeded with because of the six-month rule, but we got no information on that. I hope that we will get information from the Scottish Information Commissioner, whom the bill team suggested that we should ask.

Carole Ewart: Powerful information has been disclosed today about the Hillsborough tragedy. That reminds us that timelines can be unhelpful. The focus must be on the public's right to know.

The Convener: Indeed.

David Sillars: For the record, we agree with the amendments on prosecutions and so on.

The Convener: Thank you for your time. We have exhausted our questions.

Carole Ewart: May I add a point? The Scottish Government's six principles provide an interesting framework for progressive reform of freedom of information, but I draw the committee's attention to principle 5, which is the duty to maintain

"effective relationships with the Scottish Information Commissioner and other key stakeholders"

and which mentions the Scottish public information forum. In my evidence, I have reiterated several times the need for a balanced perspective on freedom of information. We are not talking just about public authorities disclosing information, but about listening to people who want to access information.

We in the Campaign for Freedom of Information recognise that the Scottish public information forum provided a most welcome and almost revolutionary process whereby public officials met civil society—organisations such as ours. The forum met in places around Scotland and the public could attend and ask questions at its meetings. It afforded a most impressive level of scrutiny, so it is of some regret that that arrangement has not been maintained in the past couple of years. We hope that the forum will pick up again.

We emphasise that the bill should be about the public's right to know, rather than what the public sector chooses to disclose. That has formed the basis of our evidence to the committee.

The Convener: I thank you and Mr Sillars very much.

10:09

Meeting suspended.

10:10

On resuming—

The Convener: The committee will now hear from Rosemary Agnew, the Scottish Information Commissioner, and Euan McCulloch, who is from the commissioner's office. I invite Rosemary Agnew to make a short opening statement.

Rosemary Agnew (Scottish Information Commissioner): Thank you for giving me this opportunity to address the committee and to speak on the proposed amendments to the Freedom of Information (Scotland) Act 2002. Members will be relieved to hear that I do not intend to rehearse every single point that we put in our written submission, but there are three significant things that I believe warrant being highlighted at the outset.

The first picks up to some extent on something that Mr Gibson said earlier. In a process such as the drafting of a bill, it is sometimes too easy to focus on points of detail. It is correct that we do that, but there is a danger that, in doing so, we lose some of the big messages. My first point is to do with one of those big messages. I remind the committee that, overall, I welcome the proposed amendments to the 2002 act. On the whole, I agree that they meet the general aim of strengthening and clarifying the provisions. I have two significant areas of concern, but they should

not cloud the fact that there are many positives in the proposals.

I understand that there might be concerns about the relatively narrow scope of the amendments, but I take that narrow scope as a positive indication of the strength of the drafting of the Scottish legislation. Our act simply does not need the level of correction that the UK legislation went through because, in our original drafting, we addressed and learned from many of the issues that came out of the drafting of the UK Freedom of Information Act 2000. There are amendments to improve clarity, such as the changes to timescales and the offence in section 65, but they are about improving the 2002 act and do not represent fundamental change—with one exception, which I will come to in a moment.

The second area that I wish to comment on is the designation of new bodies. I will give a slightly different perspective on that. I appreciate that there are already powers in the 2002 act to allow for other bodies to be brought into the freedom of information net. I understand the logic of clarifying the act before extending its coverage, but I am disappointed that the opportunity has not been taken to have a discussion about how and to where we should extend it. In not doing that at the same time, we are missing some serious and significant issues, some of which have already been raised in one form or another.

It is easy to think of the designation of additional bodies as something of an expansionist approach under which we say, "Let's make it wider and bring more bodies in," but that misses two important issues. First, the focus should not be just on which bodies we bring in. We should also think about how we can extend designation to include information about public services, because we want to preserve and enhance people's right to information about how our public services are delivered. We should also think about whether organisations and bodies are appropriately designated. The designation of some bodies might have been appropriate 10 years ago, but with a review we might find that that is no longer appropriate. The world is changing rapidly, so let us review how bodies are designated.

10:15

The second point about designation is the most important one and is to do with preserving existing rights. No orders have been made under section 5 of the 2002 act since it was enacted. In that time, public services have been outsourced to private finance initiatives or handed to external organisations to deliver, but the right to information about those public services has not migrated with them. By standing still and not designating additional organisations, we have effectively lost rights to information in Scotland.

There is a graphic example of that in housing. Since FOISA came into force in 2005, 15,000 households have lost FOI rights as a result of the transfer of local authority housing stock. Those are not my figures; they are Scottish Government figures. That is just one area of public service.

When we are talking about legislation remaining fit for purpose, we should use our valuable collective experience to consider whether it remains appropriate to cover organisations that are already covered and where we should extend coverage to.

To pick up on some of the earlier discussion about section 5 of the 2002 act, we have not proposed an amendment to that provision. However, one of the weaknesses of section 5 is the opening line, which reads:

"The Scottish Ministers may by order".

The use of the word "may" makes it discretionary, not mandatory, to have the debate about, review of or consultation on designation. If we want to make an additional amendment, that might be something to think about. It is all very well giving us rights, but if they are not being exercised, there is not a lot of point in their being there.

The third and final area relates to the amendment to section 2 of the 2002 act, which impacts on section 41(a). We have all dubbed this the royal exemption, and I am sure that the committee is aware of the publicity around my concerns about the proposed amendment. I want to ensure that members properly understand where I am coming from. My concern, which has a raised a point of contention, is fundamentally about the creation of another absolute exemption. Making an exemption absolute further undermines and erodes rights to information. It removes from Scottish public authorities, including me and the Government, the flexibility needed to consider the public interest in relation to what can and cannot be disclosed.

Bearing in mind the fact that public authorities can be requesters themselves, we should note that not only does the bill introduce another absolute exemption but, unlike existing absolute exemptions—and this is a key point—the provision is very wide ranging. The proposed wording "anything which relates to" makes the scope of the provision very wide and, to a great degree, very uncertain. That is in contrast to other absolute exemptions, in which the information that is exempt is very clearly defined, with boundaries and edges. That approach would not exist under the proposed wording. The use of "relates to" makes the provision so wide that what it might cover is virtually unpredictable.

We have all heard the arguments that the existing exemption should be amended to make it consistent with UK legislation. Although I can see the point that people quite like consistency, a more important consideration is consistency with our own Scottish legislation. Making the proposed amendment to FOISA to keep it in step with the UK legislation—Ms Ewart used the word "copy"—will mean that our freedom of information legislation will be taken out of step with other Scottish legislation. For example, it will take us out of step with the Scottish environmental information regulations and with the European EIRs, because the Scottish regulations are derived from a European directive.

It is important to note that we could not automatically put that inconsistency right by amending the EIRs—we cannot simply amend them when that might lead to a restriction of rights, which is what an amendment would do. That would leave us with a somewhat ridiculous situation in which information could be withheld under FOISA but would have to be released under the EIRs, even if there was an absolute exemption under sections 2 and 41.

Such inconsistency is undesirable and is confusing for requesters and for those who have to respond to information requests—the public authorities that we have a duty to advise. The proposed change would make giving advice more difficult. We should not lose sight of that

We should also not lose sight of the fact that the UK's 2000 act was rushed through its late stages without full consultation. Here in Scotland, we are not rushing this amendment bill through; we are consulting widely. I strongly urge the committee to fully consider the impact of the proposal as it stands and what it will mean for us.

We also need to retain some perspective on the amendment to section 2 of the 2002 act. In reality, there are few requests or appeals to the commissioner. Although some might use that to argue that the amendment is therefore not a big deal, I argue the opposite. The fact that there are so few requests and that information has not been inappropriately disclosed indicates that the current provisions provide adequate protection and are effective. In other words, if it ain't broke, why are we bothering to fix it?

Fire away.

The Convener: Thank you. I am sure that you have answered many of the questions that committee members wanted to ask, but I have a couple that arise from what you have said, as opposed to what we have in writing. You said that we need an appropriate method of designating additional bodies to be covered by the legislation. What criteria should be used for designation? You talked about ALEOs as a potential example. How would you define the additional bodies that should be covered?

Rosemary Agnew: I am glad that you asked that question. It is not as simple as saying that designation should follow the public pound or that it should follow a function that has been transferred to another body. To pick up on something that Carole Ewart said, it is not just about consulting people who have information rights that might be lost. There should also be a focus on the provision of public services. That is a more difficult issue. At what point does a service stop being a public service if it is being delivered by a different type of organisation?

Part of the problem with setting out criteria is that because there has been no attempt under section 4 of the 2002 act to make an order under section 5 of that act, we have never discussed how to designate or what should be designated. I would welcome such a discussion because the answer is not simple. It is not as simple as having a tick list and saying what we think designation should cover. A good starting question could be whether the body falls under public and administrative law. Is it provided for under public law and, if so, should there be a right to information?

Where the public pound goes is an important consideration, but it is not the only one. I have nothing further to say beyond that.

The Convener: Okay. Thank you.

In the final paragraph of your written submission, you state:

> "I note the statement from January 2011 which set out Ministers' belief that it would be 'premature to extend coverage before the deficiencies in the Act could be put right'".

You also talked this morning about the Government moving swiftly. Would it be "premature to extend coverage" at this point? You said that the Scottish Government should propose further action if the bill is passed.

Rosemary Agnew: I do not think that it is ever premature to extend a right that existed back to where it was in the first place. My fundamental point about designation is about the rights that have been lost, and I cannot see that it is ever premature to re-extend rights that were there in the first place.

The Convener: So you do not accept the Scottish Government's premise that we should resolve the flaws in the legislation before extending its coverage?

Rosemary Agnew: I understand it, but I do not totally accept it. Removing the flaws will not involve huge changes to the legislation, which, on

the whole, works well, given the intention behind it. There is logic in saying that we should clarify it, but we could put things right and extend it at the same time. We are disappointed that the Government has not at least promoted a debate about that.

To pick up on Carole Ewart's point about timelines, I note that what we have is a provision in an act that says, "You may designate". We have nothing more than that, despite all sorts of people—including me and the previous commissioner—making the point over and over again that there have been no orders under section 5.

The Convener: One of the Scottish Government's six principles of freedom of information commits it to adjusting the regime where it is necessary and sensible to do so. Do you agree that the bill seeks to fulfil that principle?

Rosemary Agnew: The bill fulfils the "sensible" part, but I question the extent to which it fulfils the other aspects. The fact that lack of designation has led to an erosion of rights calls into question the extent to which the principle is being followed. Although I appreciate that some people might argue that the principle is a matter of timing, we have not had a clear statement of when that principle will be applied.

The Convener: I have two more questions before I open up the session to colleagues. Last week, I asked the bill team about the number of prosecutions that it has not been possible to proceed with. I am sure that you are well aware that this issue would be raised—the Scottish Government team suggested that we raise it with you, because it is a key issue in relation to the bill. How many prosecutions have been stymied because of the legislation?

Rosemary Agnew: We have given serious consideration to applying section 65 of the 2002 act in eight cases, and in seven of those timing was a factor. However, it does not matter whether it is one case or 1 million. The point is that the timing needs to be put right, so we welcome the amendment to section 65.

The Convener: Okay. You heard the questions that we put to Carole Ewart, who expressed concern about the three-year time bar in the bill. What is your view on that?

Rosemary Agnew: There has to be proportionality. I see the three-year period as a long stop because, in reality, it would be difficult to effect a prosecution after that time. I am fairly confident that anything that was going to emerge would emerge within 12 months of discovery. The key change here relates to discovery rather than commission, so I am not overly concerned about the three-year period.

Elaine Murray: Thank you for your evidence. You have covered many of the issues that we have been thinking about. You said that section 5 of the 2002 act could be strengthened by substituting "shall" for "may". Over the years, I have had arguments with Government ministers about such substitutions, and there is often resistance to putting in "shall" instead of "may".

Do you agree with Carole Ewart's point that the consultation provision is asymmetric because it concentrates on the public bodies that are the subject of FOI and there is not enough focus on consulting those who wish to use it? If we are to strengthen section 5, should we strengthen the consultation provision?

Rosemary Agnew: I think that it should be strengthened, because the whole purpose of FOI is to do with the right to know, not the right to provide. We should be asking people what they want the right to know about and from whom, rather than asking the providers of that information whether people should have the right to know about it.

10:30

Elaine Murray: I raised with previous witnesses the difficulty that sometimes arises in getting information and the ability of public sector bodies to prevaricate and obfuscate, for example by asking for further details of the information that has been requested. One of my colleagues got a ream of paper in response to an FOI request. It could be difficult for a member of the public to sift through that to get the information that they wanted. Could the bill make it easier for a member of the public to get the information that they are asking for?

Rosemary Agnew: I think that it could, although we are not necessarily ever going to provide for that absolutely in legislation. There is a duty on all public authorities to provide advice, information and guidance. I feel strongly about equipping authorities to give the right sort of advice and information, because if you give the person making the request the advice and guidance that they need when they are making the request, you have made an investment of time that makes it easier for you to answer the request and easier for the person making it to know what they are asking for and the form in which they are asking for it. We are talking about a cultural shift rather than a legislative shift.

Michael McMahon: I return to the question that I have asked other witnesses. I have been caught up in the issue about who would be protected by the absolute exemption. You seemed to indicate that it is not about whether the royal family or ministers are protected, because the system

seems to be working at the moment. Your concern is about having an absolute exemption.

Rosemary Agnew: That is right. An absolute exemption removes a right to information. It would be a retrograde step for us to remove such a right when we have no evidence that what is already provided for in the 2002 act is not doing its job well. In my view, there is already adequate provision for the royal family and for discussions that any public authority may need to have that are confidential, are covered by other rights or are a matter of national security. It is not just ministers; it is all public authorities. We already have those protections.

What the bill will do is simply take away that public consideration right. The public interest test is really valuable and powerful, and it already acts as an adequate safety net. I really have nothing more to say on absolute exemption, other than that I fundamentally disagree with it.

Michael McMahon: I do not have extensive knowledge of what the current legislation permits, but I assume from what you are saying that you think that a dangerous precedent would be set. There is no absolute exemption at the moment and therefore no evidence that it is required or would serve any purpose.

Rosemary Agnew: Absolutely. I do not think that it would serve any purpose other than to undermine the rights that already exist.

Mark McDonald: I was interested in what Dr Murray said about a response running to reams of paper. I have received such a response myself, the irony being that it was a response to a request about tree preservation orders. Dr Murray dealt with the point that I wanted to raise, which was about your concerns about section 5 of the 2002 act.

We heard evidence earlier that the weakness in section 5 is to do with who is consulted. However, your view seems to be that the weakness in section 5 is that it contains the phrase "may by order". My understanding is that that is quite a standard phrase in legislation. What would your view be if we were to change that to "shall by order"? Would that set a precedent for other legislation?

Rosemary Agnew: I was using that as an example of why the weakness exists—the word "may" makes the provision almost discretionary. It gives ministers the power but it does not make them use it.

I would not want today to go so far as to say, "Oh, I think you should change it to this or that". If there were to be any amendment to section 5, I would want to come back to the committee with a carefully considered suggestion for a form of words.

Mark McDonald: That deals with my supplementary, convener. I am done with my questions. [*Interruption*.]

John Mason: The convener seems to be having a conversation, so I will just carry on.

The Convener: I was actually discussing the committee's proceedings. I call the deputy convener—at least, he is the deputy convener for the time being. [*Laughter*.]

John Mason: Thank you, convener.

Commissioner, you have touched on certain issues that I have already raised; in particular—if I have understood you correctly—you have emphasised the fact that certain bodies have actually left the public sector and now fall outwith the legislation, which used to cover them. In that regard, you mentioned housing. In his letter, Brian Adam suggests that there is

"no compelling evidence of ... unmet demand for information".

Might there be confusion among the public with regard to housing? After all, a tenant will be able to get information if their landlord is the council, but not if their landlord is a housing association. Do you find yourself having to tell a lot of people who come to you looking for information that housing associations are not covered by the legislation?

Rosemary Agnew: I am not sure that I can say that we get many such inquiries, because they are more likely to have been dealt with at the first stage—when people contact local authorities, for example.

As for any lack of evidence, if you have not looked for evidence you will not have found it. I am not sure how much work has been done to establish whether people understand that that right has been lost. Carole Ewart made the important point that, under freedom of information, people do not have to know that they have a right in order to exercise it; all that they have to do is ask for information. Because of the way in which the legislation is drafted, simply asking for information invokes their right for them.

Housing is a good area to focus on, in that there are other ways of getting information. However, all people have is a channel for information; they do not have a right to receive that information. That happens in only one area; there are all sorts of public services that are now outwith the freedom of information regime. We need only consider the number of PFI contracts in Scotland covering schools, hospitals and prisons; people who want to know information about those things do not

have even the same rights as tenants of housing associations. I think, therefore, that the issue is much more serious and affects more than housing.

John Mason: I was just using housing as an example, because some landlords will be in the regime and others outwith it.

Am I right in thinking, then, that when people go to their housing association and ask for information under FOI and are told that the FOI legislation does not cover housing associations, they simply accept that and do not bother coming to you? Is that why you might not see such cases?

Rosemary Agnew: A few people come to us.

Euan McCulloch (Scottish Information Commissioner): During the time that FOISA has been in force, we have had a steady trickle of inquiries about the coverage of housing associations. As the commissioner suggested, there is also potential for inconsistency with the EIRs, which, unlike FOISA, might well cover housing associations. That, too, might lead to confusion.

John Mason: You said that as long as they ask for information people do not necessarily need to know that they have the right to it. I have the impression that when asked for certain information, councils might say no, but if the question is, "Can I have this information under FOI?", they tend to provide it. Is that your experience?

Rosemary Agnew: I cannot say that that is my personal experience; nevertheless, it highlights the importance of our work on assessments. My remit covers not only appeals under FOI, but assessment of practice, and in the assessments that we carry out we find that most front-line staff seem to know that they must treat every request for information as a freedom of information request. However, we still find ourselves having to make recommendations about training and raising awareness of what things mean. Coverage is not 100 per cent, although I cannot say what the actual percentage is.

Our view is that, on the whole, people know about these things and do what they should do, but it all comes back to something that I feel quite strongly about, which is that local authorities and public bodies should be equipped to deal with such matters. This is not just about helping requesters but about ensuring that the culture within the organisation is that the staff know that the right exists and that they have to go some way in the direction of helping people to exercise it.

John Mason: In his letter, Brian Adam also says that extension will be difficult in "the current economic climate", which suggests that there could be quite a cost to bodies that might be included. Do you share that view?

Rosemary Agnew: No. If you only ever look at these issues in cost terms, you will miss two things. First, as Ms Ewart said, democracy is not free. Secondly, there are benefits to be had from embracing freedom of information and understanding its value with regard to the organisation's wider communications—after all, we should remember that this is not just about freedom of information requests but about publication schemes, proactive publication and so on. There seems to be a fear that giving out information can put reputations at risk; however, not giving out information can have the same risk. If the issue was considered holistically at a very senior level in organisations and its benefits understood, that would go some way towards assuaging that fear. I certainly think that there are benefits for organisations; I cannot put a figure on that, but I do not believe that it is all about cost.

John Mason: My next question is linked to that point. Last week, the bill team mentioned other means of achieving transparency. Is that close to what you are talking about? Are you suggesting that if a good organisation adhered to industry standards it would publish information and that, following that logic, we would not need to extend FOI?

Rosemary Agnew: Perhaps the danger with transparency is that we tend to lump everything together and say, "If we're transparent, everybody will get what they ask for". Transparency works on the basis of the information you give out, the assumption being that you know and understand what everyone is ever going to want to know about. Many freedom of information requests are very personal and relate to specific information, and an approach that is based on transparency would go some way towards dealing with those—but not the whole way. Transparency is an important piece of the information puzzle but it is not the only one, and freedom of information rights are fundamental to ensuring that all the information that people need and want to know can be made available.

The Convener: On the question whether the bill should be retrospective—which Dave Thompson seems too shy to ask, even though he asked it in the previous session—your view is that the reduction in the lifespan of exemptions should be fully retrospective. Obviously I have your written comments on that, but could you put on record why you feel that that should be the case?

Rosemary Agnew: Historical records already exist. If it is being argued that such an amendment should be made now, why should it not also apply to existing records? After all, those very records must have given rise to these questions and this

debate in the first place. We fully support the bill being retrospective, because we think that this is all about access to information, not the timing of when that information can become available.

The Convener: Thank you for that. Do you have any final points to make?

Rosemary Agnew: I think that I have probably covered my main points, convener.

The Convener: I think that you probably have. Thank you very much.

We are well ahead of time, so I suspend the meeting until 10.55.

10:44

Meeting suspended.

10:54

On resuming—

The Convener: I welcome to the meeting Nicola Sturgeon, Deputy First Minister and Cabinet Secretary for Infrastructure, Investment and Cities, and her officials, Zoe Mochrie, Andrew Gunn and Mark Richards. I invite the cabinet secretary to make a short opening statement.

The Deputy First Minister and Cabinet Secretary for Infrastructure, Investment and Cities (Nicola Sturgeon): Thank you very much, convener. I am delighted to be here. Freedom of information was probably not the most remarked upon of my new responsibilities from last week's Cabinet reshuffle, but it is nevertheless an extremely important one that I am delighted to take over.

This is a good opportunity for me to provide evidence to the committee on the Freedom of Information (Amendment) (Scotland) Bill. I know that the committee heard earlier this morning from some stakeholders and I am happy to answer any questions later that arose from those sessions. Obviously, the Freedom of Information (Scotland) Act 2002 is a relatively new piece of legislation, but notwithstanding that, it is a positive sign that freedom of information is already embedded across our public authorities and widely recognised across Scotland as a key statutory right.

We should never be complacent, but it is good to note the former Scottish Information Commissioner's view that the freedom of information regime that we have in Scotland is widely recognised as being strong and able to withstand international scrutiny. As a Government, we are proud of our record in meeting our obligations under the 2002 act, as well as in proactively making information available wherever possible. Information is released in response to the vast majority of the requests that we receive. More than 70 per cent of decisions from the Scottish Information Commissioner have gone either wholly or partially in our favour. It is also worth noting, although it is quite a daunting statistic, that in the interests of openness the Scottish Government website contains about 600,000 pages of information.

As the committee will be aware, the bill has its origins in the desire to remove what are perceived to be two weaknesses in the 2002 act. The intention is to pave the way for more information to be made public earlier and to allow the provisions for a prosecution for an offence under the 2002 act to be strengthened. Speaking more generally, the bill seeks to improve the operation of the 2002 act. For example, as I indicated a moment ago, the bill will promote further openness by allowing reduced lifespans for exemptions; it seeks to clarify some unclear drafting in the 2002 act; and it will provide some additional protection for personal data.

The most controversial element of the bill has been around the limited change to the public interest tests in respect of communications with Her Majesty. The intention of that amendment is to ensure consistency of approach across the UK in respect of both the current and the future head of state. I am sure that that is one of the issues that we will touch on later in the evidence session.

One further item that I want to touch on, because I know that the committee has discussed it and will want to discuss it further, is around the extension of coverage. As I think my officials said last week when they gave evidence to the committee, the bill is not about the extension of coverage. We are clear about that. The issue of extension has been subject to consultation, as required by the 2002 act. A decision has been deferred until the Scottish Parliament has scrutinised the amendment bill.

I reiterate—I will expand on this point later, if members wish me to—that the 2002 act already contains the power to extend coverage. Our view is therefore that primary legislation is not required to extend coverage. We should not see formal extension of coverage as the only means of ensuring access to information held by bodies that are not currently covered by the 2002 act. For example, the committee is probably aware of the recent conclusions of the House of Commons Justice Committee when it was doing post-legislative scrutiny of the United Kingdom Freedom of Information Act 2000. The committee said that contracts often provide a more practical basis for applying FOI to outsourced services than partial designation of commercial companies under the act.

I understand the desire for more access to information, but we must be mindful that primary legislation is not necessarily required for that and that there may be more than one way of achieving it. I am sure that we will discuss those issues later after we have—I hope—passed the bill.

Finally, I reaffirm the Government's commitment to promoting transparency and operating as openly as possible. As I said, I am new to the subject and I am keen to have discussions with the committee, today and in future, and with other stakeholders, about how we continue to give life to those principles. We plan consultation with key stakeholders later this year on the development of a Scottish transparency agenda, and I hope that the committee will take an interest in that—I am sure that it will do.

I am happy to take questions.

11:00

The Convener: Thank you. As usual, I will kick off with questions before opening out the discussion to other members of the committee. It would be remiss of me not to start with what is probably one of the most contentious issues: the royal exemption. There are concerns that the exemption is more wide ranging than it requires to be, that it was not consulted on and that it is a retrograde step.

I understand from your comments and information that we have received about the bill that you want to ensure a consistent approach across the British isles, given that we have a shared monarchy. However, as Rosemary Agnew pointed out just before you arrived, the proposed approach will be out of step with Scottish legislation, particularly in relation to EIRs. How do you square the circle, so that there is a consistent approach in the UK, when there is not necessarily consistency with our legislation, because if the bill is enacted a person will be able to put in an FOI request under the EIRs but not under freedom of information legislation?

Nicola Sturgeon: On the scope of the bill and the consultation, we will listen carefully to the views that are expressed at stage 1 by stakeholders and, ultimately, the committee, which will inform our thinking for stage 2. I am very interested to hear the points that are being made.

It is important to reiterate the motivation for the amendment to which you refer: it will bring Scottish legislation into line with legislation in the rest of the UK. The Queen and her successors are head of state of Scotland as well as the rest of the UK, and there is a strong and compelling argument that the arrangements for dealing with communications between the monarch and, for example, the Prime Minister's office, should be the same as the arrangements that pertain to communications between the Queen and the First Minister's office. The point about consistency is important.

It is important to remember that information relating to Her Majesty, as well as to other members of the royal family or the wider royal household, is still subject to the 2002 act. There is no automatic requirement to apply exemptions to relevant information. Not too far away from here, in the Republic of Ireland, information relating to the President is simply not accessible via Irish freedom of information legislation. That point is worth making.

The exemption that we are talking about has rarely been applied—certainly by the Scottish ministers—in responding to information requests. Annual reports show just two instances of that since 2008, and all three decisions that the Scottish Information Commissioner has issued to date have upheld the application of the exemption. In one case, however, there was a ruling in favour of release, in the public interest.

On inconsistency between the FOI regime and European regulations, it is important to say that we are not dealing with a like-for-like situation. The origins of the two regimes are very different: one originated in Europe, the other is very much a devolved issue. There are already significant inconsistencies between the freedom of information and European regulations regimes. Whether we think that that is good or bad, it is a statement of fact that there are a number of inconsistencies between the two regimes. There is no easy match-up of exemptions and exceptions, and the terminology differs considerably, as does the scope of exemptions. We could eliminate inconsistency only if we combined the two regimes. What we are doing in the bill is ensuring that we do not open up inconsistency in the positions of Scotland and the rest of the UK when it comes to dealing with communications from Her Majesty.

The Convener: I have a couple of points in response. First, the Queen is also the head of state of Canada, New Zealand and Australia and I do not believe that they have consistent relations with the UK on this issue. We have a shared monarchy, but we do not necessarily have to have the same rules and regulations. I invite you to comment on that point.

Secondly, the Scottish Information Commissioner has stated clearly that absolute exemptions are not regarded as good practice and that she considers the measure to be unnecessary. Overwhelmingly, the evidence that the committee has received shows that there does not seem to be much support for such an amendment and that it is considered to be a

retrograde step because it will narrow the opportunities for people to access information under FOI.

Nicola Sturgeon: On your point about Canada and Australia, my remit does not yet extend to speaking for their Governments, they will be relieved to hear. It is not appropriate for me to comment directly on their freedom of information regimes.

I do not want to repeat myself, because I have already set out the Government's motivation for the change in question. However, I will say that it would be strange to have a situation in which communications between the monarch and the Prime Minister were treated differently from communications between the monarch and the First Minister. That is the motivation for the change.

On your more general point, I appreciate that I am new to this responsibility and that I have some work to do to outline my approach to FOI and to persuade those who believe, rightly, that we should have openness, transparency and access regarding information wherever possible that I, too, passionately believe that; that is the spirit in which I will conduct my responsibilities. I agree with the Scottish Information Commissioner that absolute exemptions are not measures that we would want to apply lightly, or regularly and frequently. Where there is a proposal to do that, it must be well founded. The consistency argument that I have given is the foundation for that and I think that it is a strong one.

The Convener: Thank you. You said that openness should follow public money when public services are outsourced and that that can best be achieved through clear and enforceable contract provisions rather than by designating commercial companies in the bill. How does the Scottish Government encourage national health service boards and local authorities to prepare clear and enforceable contract provisions?

Nicola Sturgeon: I was looking to the future in what I said. As I said in my opening remarks, the bill is not about the extension of coverage. I am new to this brief and my position is to be open minded about extension of coverage. The Government has said clearly that, after we have had parliamentary scrutiny of the bill, we want to consider the issue of extension of coverage and have a debate and discussion about it to inform any future decisions that we might take in that regard.

The point that I made earlier was two-fold: first, the power to extend coverage is already in the Freedom of Information (Scotland) Act 2002. To those who say that we should address extension of coverage in the bill, I simply say that we do not need primary legislation to give us the ability to extend coverage, because it is already there. The fact that the provision may not have been used does not mean that the power is not there.

My second point was not that this is my settled view; it was simply that, when we have the discussion on the extension of coverage, let us ensure that we consider all the options that exist. It may be that the use of the existing power in the 2002 act to formally extend coverage is something that we should do in particular circumstances. However, it may be better to consider in future how we make contract provisions stronger around the public's right to access information where public money is in play. I am therefore simply saying that there are different options; I am not saying that I have a settled view one way or the other on what option is best at this stage.

You asked about NHS boards. Obviously, they are subject to freedom of information legislation at the moment. With regard to contracts—whether they are NHS contracts with commercial organisations, or those of local authorities or other public authorities—there is a debate to be had about how we ensure that we have the right balance between commercial confidentiality and the public's right to access appropriate information.

The Convener: I appreciate that a power to extend the number of bodies that are subject to FOI is available under the 2002 act, but there is concern that, over the past decade, that power has not been used. The issue is not directly addressed in the bill, and there is concern that there has been no statement on when there is likely to be an extension. There is also concern that a number of bodies that used to be covered by the 2002 act are no longer covered because they have been taken out of the public sector or whatever.

Many people have made those concerns clear in their submissions to the committee. Indeed, Professor Colin Reid of the University of Dundee school of law stated that designation is

"the most serious issue in need of attention".

When will the Scottish Government look to increase the number of bodies? What criteria will it use to do that?

Nicola Sturgeon: On your first point, I do not dispute that, over the past decade, that provision in the 2002 act has not been used. I am simply saying that that does not mean that it is not there. My point was that we do not need new primary legislation to create such a power, because the power already exists.

We have said that we want to defer a discussion about extension of coverage until after the bill has

completed its parliamentary process. I am happy to give the committee a commitment and an assurance that I will come back at that time and discuss with you in broader terms how the Government might take forward that consideration. Given that we have taken that decision to defer, it is important that I do not get into a pre-emptive discussion about particular bodies. I know as well as you do some of the bodies that could be involved and the contracts that people want access to information about, but it is important that I do not pre-empt the discussion by starting to name individual organisations now.

There is a debate to be had about the matter. I am certainly up for that debate and I would welcome the committee's contribution to it. If you want to invite me back to have that discussion after the bill has completed its parliamentary process, I will set out at that time a process and a timescale for the consideration that you and the stakeholders to whom you have spoken want, and which we have already said we want to have as well.

The Convener: I am sure that we will be more than happy to do that. I will open up the discussion to colleagues in a moment. I have just one further question. Will the reduction in the lifespan of exemptions be fully retrospective, as recommended by the Scottish Information Commissioner?

Nicola Sturgeon: Yes. As you know, the Scottish Government already operates to a 15-year rule rather than a 30-year rule. The reason for the amendment to the 2002 act is to ensure that other public bodies take the same approach. At present, we can apply only a blanket reduction in the lifetime of exemptions, whereas there might be some categories of information, for example around child protection, for which it would still be appropriate to have a longer period. For other categories of information, a shorter period could be appropriate. Under the 2002 act, we cannot discriminate in that way because the provision allows only a blanket reduction. The bill will allow us to look at particular categories, and when it has been enacted it will be our intention to bring forward secondary legislation to put that into practice.

Elaine Murray: Thank you for explaining why the matter is on your long list of tasks. You must be able at multitasking—like many women, I think.

You said that the bill is not about an extension of coverage because the act contains powers to introduce secondary legislation to extend. Why is that? Surely the bill represents an opportunity to extend coverage. I do not know whether you or your officials had an opportunity to listen to the evidence that we heard earlier, but there is clearly disappointment that successive Governments over 10 years have promised to consult and indeed have consulted, yet it has not resulted in any extension of coverage.

There has been a suggestion that amendments could be lodged to strengthen the bill. As I said earlier, I have had debates with ministers over the years about substituting "shall" for "may" in legislation. Does the bill not represent an opportunity to address some of the concerns about the lack of progress on extension?

Nicola Sturgeon: I will divide my answer and comment on two points—first, the demand, the call and the support for greater coverage, which I recognise, and secondly what primary legislation is required for and what the bill seeks to do.

The original act—the Freedom of Information (Scotland) Act 2002—includes a power to extend, by secondary legislation, the act's coverage, so we do not need to enact new primary legislation to give ministers that power. I acknowledge that some people are frustrated that successive Governments have not exercised that power, and there is a debate to be had about whether and to what extent we should exercise that power in future. I am open to that debate, and I will listen carefully to the views that stakeholders are expressing. However, we do not need to address that issue in the bill, because we already have the primary legislative power.

11:15

The bill is relatively narrowly drawn, because it looks to tidy up some aspects of the original act. In one respect, at least, it tidies up the drafting of the original act to make it clearer. It also deals with two perceived weaknesses in the act, one of which—the way in which the lifetime of exemptions can be reduced—I have already spoken about. The second perceived weakness relates to prosecutions under the act. Because of the way in which our freedom of information regime works, the framing of the act rendered prosecutions virtually impossible.

I am not by any stretch of the imagination saying that I do not recognise that people want to have a debate about the extension of the act's coverage, but that debate does not hinge on the bill, nor is it the case that we need to change primary legislation to have that debate or to make progress in that direction.

Elaine Murray: But there is a concern about the people who require to be consulted about such secondary legislation, which is that only the bodies that would be subject to freedom of information requests, and not those parties who might represent the interests of people who want to make such requests, require to be consulted. Is it

not the case that that might need to be amended in primary legislation?

Nicola Sturgeon: I do not think that that is necessarily the case. In my previous ministerial portfolio, I always took an open approach to consultation. The legislative process, both for primary and secondary legislation, is laid down. That is the process that Parliament goes through. The committees have a role to play in considering secondary legislation and, in my experience, they are not shy in making their views heard on secondary as well as primary legislation.

I am strongly of the view that, notwithstanding what the strict interpretation might be of what is required as far as secondary legislation is concerned, if we are to have a debate about extending the coverage of freedom of information, we would want that debate to be as wide as possible. Again, I am happy to give a commitment that that is what we would seek to do.

Elaine Murray: I am sure that it is an issue on which we could have further discussion, because some organisations have offered to produce amendments for consideration at stage 2.

Nicola Sturgeon: Sure.

Elaine Murray: A slightly different issue, on which the Scottish Information Commissioner did not think that it was necessary to legislate—although several of us have expressed concerns about it—is the way in which some sections of the public sector can prevaricate, obfuscate and make it difficult for people to get the information that they ask for. The Information Commissioner thought that that was less a matter of legislation and more one of providing guidance and so on. Will you return to that?

Nicola Sturgeon: I go back to a fairly recent experience that I had as Cabinet Secretary for Health, Wellbeing and Cities Strategy. A decision was issued by the present Information Commissioner's predecessor that said that Ayrshire and Arran NHS Board had not applied the principles and the letter of the law on freedom of information appropriately. In my view—I made this clear publicly as health secretary at the time—that is completely unacceptable. Public bodies and agencies that are covered by the act have an obligation to live up to the principles and the letter of the act. As health secretary, I instructed Ayrshire and Arran NHS Board to get its house in order, and I ensured that the learning from what was not done properly there was applied across the wider NHS. We should always challenge any public authority that is seen or found to be not complying with the principles of freedom of information.

It is in the nature of the thing that there will be many examples of situations in which a public body will have a particular interpretation of the provisions of the act that will differ from the interpretation of the person who seeks the information. Of course, it is for the commissioner to determine what interpretation is or is not correct, or, ultimately, for the courts to do that. We in Scotland—not only the Government but other parties and Scottish society generally—are committed to the principles of openness and free access to information, and public bodies should ensure that they abide by those principles.

John Mason: I note the points that you have made—the fact that the Government does not consider that this is the opportunity to extend the coverage of the 2002 act has already been raised. However, the reality is that amending the act requires primary legislation, so there is an expectation out there and people see the opportunity to extend the act.

Do you accept that it is not just a question of extending the act? I know that you did not want to go into too many specific examples, but perhaps I can give some. In Glasgow, many things, such as housing, car parks, street wardens, leisure centres and Kelvingrove art gallery, that used to be under the control of the council and subject to freedom of information are now outwith the council and not subject to freedom of information. Therefore the amount of information that the public can access has reduced.

Nicola Sturgeon: I do not challenge that view—it is a view that I recognise for many reasons, not least as a Glasgow constituency MSP who frequently has frustrations because of the outsourcing of services by the council and the implications of that for the ability to hold people to account, access information and respond to legitimate constituent queries.

I hope that people are hearing me loud and clear when I say that, as the new minister in charge of this area of work, I am up for the debate about how we improve the public's access to information, particularly where public money—often large amounts of public money—is being spent. In having that debate, we need to look at the extent to which improving that access to information requires formal extension of the coverage of the 2002 act. There may well be instances where that is the case, but there also may be different ways in which we improve the public's access to that information. As I said earlier, I do not have a fixed view on which route is the best—it may be a combination of the two—but I am signalling to you clearly that I am up for having that debate, and I hope that the committee as well as the other witnesses you have heard from this morning will be a part of that.

John Mason: If you accept that what the bill is trying to do and a demand for more bodies to be

included are two separate issues that are in many ways unrelated, either they could run in parallel as of now or they could both appear in the bill. I do not necessarily have a particular preference, but could we not quickly start the consideration process?

Nicola Sturgeon: I am happy to consider that. The Government's commitment and the decision that it took—which is the Government's standing decision—was that we would begin that process following the legislative scrutiny of the bill. I am not averse to going away and looking at that to see whether there is work that we can do if the committee has an appetite for that. That is very much a separate issue from the slightly more technical issues that we are dealing with in the bill, and it is important that people see that the two are not one and the same.

John Mason: Following that logic, I see no particular reason why one strand of work has to wait until the other is complete because, presumably, it would not be a problem if there were an overlap between the two.

Nicola Sturgeon: The other way of looking at it is that—assuming Parliament agrees the bill—it will not be particularly long until the bill is on the statute book.

I am happy to look at, and come back to the committee on, the timescales and the processes for facilitating the debate that you are asking for. A lot of factors have to be weighed up and balanced, and it may be that, as we get into that debate, there are issues on which I will take a different view from that of the committee or some of the stakeholders but, as I said, I am coming to the matter with a perfectly open mind.

John Mason: Earlier, we mentioned that contracts are one way of getting openness, and I think that in some cases that is probably the case. My gut feeling is that Glasgow City Council paid over the odds for PFI secondary school contracts. If that was the case, neither the council nor the private sector wants that information out in the open. There you have a contract where both parties want it kept secret, yet we the public want to see it. How can we tackle that?

Nicola Sturgeon: As I said, it may well be the case that some of these issues are best tackled by formally extending the coverage of the 2002 act to include, at least partially, some of the commercial organisations that are involved in public contracts. Alternatively, it could be that, for the future, we look at making specific some of the things that we would expect to be agreed in contracts that would allow the public to get access to some of that information. There is a debate to be had about the best way of allowing the public to get access to information that is, as you are right to point out, very much in the public interest in many cases.

John Mason: Your predecessors and you have made the point that, under the 2002 act, ministers already have the power to act. The crucial point for some of the outside bodies is that they want the power to be with the public rather than with ministers. Do you see a distinction there?

Nicola Sturgeon: As you know, ultimately it has to be Parliament that approves secondary legislation so there has to be something in the legislation, as there is at the moment, that allows Government to initiate the process that would result in the formal extension of the act. I am not sure how that would work in a different way in a formal sense.

As we have the debate about the extent to which the act might or might not be extended and the other issues, such as improving the public's access to information, I agree with you that what the public want and the public's view are extremely important, and it is important that we garner that information as part of the process.

Mark McDonald: I thank the cabinet secretary for coming. I, too, was unaware that FOI fell within her responsibility. As I recall, it used to be the joke that John Swinney was the cabinet secretary for everything; that mantle might have been passed on.

Nicola Sturgeon: I am happy for him to keep it.

Mark McDonald: I have also made a note to ask questions before Elaine Murray does in future, because that is three times in a row that she has pre-empted most of the questions that I wanted to ask.

Following on from the discussion that you had with Elaine Murray about section 5, if I paraphrase the Scottish Information Commissioner correctly, I think that she was talking about the notion that we should look not just at the bodies that are covered but at how we designate the delivery of public services when we are considering extending the 2002 act. Do you have sympathy with that view?

Nicola Sturgeon: Although I am not articulating it in the same way or as well as the Information Commissioner will have done, that is the point that I am making. I guess that the objective that we want to achieve is improving and extending the public's access to information. The mechanism for doing that depends to some extent on the kind of information that the public want to access. In some ways, that will be about extending the act and, in other ways, it will be about looking at different mechanisms. As the convener and John Mason have outlined, many public authorities are fundamentally changing the way in which they

deliver public services, so that has got to be part of the discussion as well.

Mark McDonald: Thank you. Given that you have put on the record your open-mindedness about many of the other issues, my other questions have been more or less addressed.

Michael McMahon: I am mindful of the Information Commissioner's guidance to us not to get hung up on an argument about what the impact would be of the absolute exemption for the royal family, but I have to say that I found your argument a bit inconsistent. When the convener asked you to look at comparisons with Canada and other Commonwealth countries and their relationship with the monarchy and freedom of information legislation, you were not prepared to comment. However, in your defence, you cited the relationship between freedom of information and the President of the Republic of Ireland. Why is a comparison allowed there but not with countries that are part of the Commonwealth?

I also want to look at what we are trying to get. The Information Commissioner was talking about getting the best legislation for Scotland and addressing any issues that might come up in relation to that. She could not provide any evidence that we have a problem that needs to be addressed. I am looking for the consistency that you have argued for in your answers. I do not see how you can argue for consistency with the rest of the UK when the change there came about in a less robust way than how we achieved our freedom of information legislation. Our freedom of information legislation has been working well, according to the evidence. Your argument is that we should follow the lead of Westminster but, in my view, that is inconsistent.

11:30

Nicola Sturgeon: I think that that is a slightly pejorative way to characterise my argument, but I will not go further down that road. I simply cited the case of Ireland as a country where the head of state is completely exempt from freedom of information legislation. That is not what we are proposing and it is a legitimate difference that should be noted.

Everyone at this meeting knows my political philosophy on Scotland's governance, but I think that it would be a somewhat strange position to hold even if Scotland was independent, as I hope that it will be in the not too distant future, if the monarch's communications with the Prime Minister—the monarch is constitutionally bound to take the advice of her Government but is able to advise and to express views privately—were treated differently from exactly the same communications between the monarch and the First Minister of Scotland. I think that that would be a very difficult and unusual position to have. This exemption is not something that is likely to have a very great impact. As I said earlier, we can find only two previous examples of the exemption for royal communications having been applied. It is fairly limited in its intent and will be very limited in its impact. It is meant to avoid the kind of situation that I have described, which would be odd, to say the least.

Michael McMahon: Will you concede that the concern is not about the monarch's relationship with the Prime Minister, the First Minister or the Prime Minister of Canada? Rather it is about the principle of not having absolute exemptions in our freedom of information legislation.

Nicola Sturgeon: I have already said that absolute exemptions should be used very rarely and should not be undertaken lightly. I take issue with you when you say that this is not about those relationships. If communications between the monarch and the Prime Minister were treated differently in freedom of information terms from communications between the monarch and the First Minister, that goes to the fundamental nature of the relationships. Consistency is important, but I am not arguing with the committee that we should get into the habit of applying absolute exemptions. By their very nature, they are instruments that should be applied only where there is good reason, and in this case I think that there is good reason. That said, I will listen very carefully to the evidence given to the committee and to the conclusions of the committee in its stage 1 report. If we consider that, in light of that report, stage 2 amendments are required or appropriate, we will be happy to consider that.

Dave Thompson: Good morning, cabinet secretary. I have a wee worry about the consistency argument, because that would lead me to think that if Westminster changed the legislation in the future to extend it beyond the heir and second in line to the third, fourth or fifth in line, we would be duty bound to change our legislation to follow that.

However, that is not what my question is about. I want to return to the issue of broadening the scope of how freedom of information is to be extended. The procurement reform bill is going through Parliament at the moment. I am not sure whether that is one of the minister's responsibilities—

Nicola Sturgeon: It is indeed.

Dave Thompson: In light of comments about contracts and freedom of information, will the opportunity be taken to build something into the procurement reform bill to ensure as much freedom of information as possible?

Nicola Sturgeon: Yes, we are looking at that aspect of the procurement reform bill. I assume that I will be back before the committee before too long to discuss the procurement reform bill and we will have that discussion then. Initiatives such as the Scottish housing charter and the Public Records (Scotland) Act 2011 also have the intention of promoting greater transparency and openness as a key objective. That is something that we will seek to do through the procurement reform bill if possible.

The Convener: I will mention one other thing about the royal exemption, which is a major issue in the feedback that we have been getting. One of the concerns was that the bill was rushed through at Westminster and that it is not necessarily a good piece of legislation. We are, in effect, just accepting the legislation without proper scrutiny. Because it went through just before the 2010 Westminster election, it was not effectively scrutinised. Is that not a concern of the Scottish Government?

Nicola Sturgeon: One of the advantages of being new to the brief is the fact that I have the chance to look at things with a fresh eye. I have given you what I think is a strong reason for the change that we propose, and I will not repeat that. As I always try to do with committees, I am keen to hear the concerns and, at later stages of the bill, seek ways in which we can address legitimate concerns that are raised. I am more than happy to reflect on the points that have been made and consider whether we could lodge amendments that would retain the objective that we are trying to achieve. Notwithstanding Dave Thompson's point, the consistency arguments are important and we will look to see whether we can do anything to allay the concerns that have been expressed.

The Convener: Thank you. We have not really touched on a lot of the issues with other parts of the bill. Some of them have been covered in previous evidence sessions, and I do not intend to repeat the questions that have been asked of those who have given evidence already today. However, I will finish with a couple of points on which I would like your comments. The first is about flexibility, which has not come up in this evidence session. The Commission for Ethical Standards in Public Life has said that the level of flexibility proposed will lead to a more complex and less successful freedom of information system. Can you comment on that?

Nicola Sturgeon: I have not seen that particular comment, so I apologise if I am interpreting it wrongly. I do not accept that that is the case, although I will look carefully at what has been said.

One of the weaknesses of the 2002 act is its inflexibility regarding the reduction in the lifetime of the exemptions. We could apply a blanket reduction in the lifetime of an exemption, but we could not decide to apply different lifetimes for different categories of information. The bill seeks to build more flexibility for very good reasons—I have covered that point.

If your point is about something completely different, I am happy to look at it and get back to the committee in writing with an appropriate response.

The Convener: I think that the point that is being made is that, if there are different time periods for different organisations, the bill will be less user friendly. It may also make it more difficult for organisations to respond timeously to requests.

Nicola Sturgeon: We have a job of work to do in the guidance or whatever accompanies the bill to ensure that that does not happen. I will flip that on its head. Although the Government right now operates to a 15-year rule rather than a 30-year rule, if we were to insist that all other public authorities did that, we would have to insist either that all of them did it regardless of the kind of information that they hold or that none of them did it and we kept things the way they are. Some public bodies will hold information—for child protection, for example—for which, frankly, it is appropriate to have a longer period to which the exemption would apply. If we do not have flexibility, all that will happen is that we will not make any changes that promote the early release of information. The provision is about promoting the earlier release of information where that is appropriate. If we do not build in the flexibility that allows us to do that, apart from what the Government does, we will be stuck with a 30-year timescale for every other authority and we will potentially not get any of that information released earlier.

That is a pretty good objective. Nevertheless, I take the point that the provision must be introduced and explained in a way that the public understand and that the user-friendliness of the legislation must not be undermined.

The Convener: Just for completeness—no one has raised this in any of the evidence sessions this morning—I ask you to comment on the refusal notice. We have received conflicting evidence on the issue. For example, the refusal notice allows an authority to respond to a request by "neither confirming nor denying" whether information exists or is held if to reveal whether information exists or is held would be against the public interest. Evidence that we have received states that that is

"one of the most important proposed amendments",

as

"that ability is in itself a protection of that personal data."

However, a contradictory comment is that the amendment

"will adversely affect the right to access information from public authorities".

Where do you think the balance is on that amendment? What was the thinking behind the amendment and how confident are you that it will do what it says on the tin?

Nicola Sturgeon: It is quite an important amendment that we are proposing. Over the past few days, as I have been preparing for this session, I have looked at it carefully. I understand that it was the former Scottish Information Commissioner who recommended the change in his special report.

As you know, currently, where information falls within certain exemptions the answer can be to neither confirm nor deny that the information is held, but that answer cannot be given if the exemption is because the information is personal information. It is important that that option exists. Let us say that the police were asked for information that impinged on personal data. Even for the police to say that they have information on that person—although they are applying the exemption and not releasing the information—could alert somebody to the fact that they are under surveillance, for example, in connection with a criminal investigation. I understand that elsewhere—I am not sure whether this is the case in Scotland—police authorities have been among the proponents of the proposed change. There will be other examples, as well.

The exemption is not automatic—it would have to be applicable in terms of personal information—but it is important to have that option. In the bill, we probably get the balance more right than it is in the 2002 act.

The Convener: Thank you. That has exhausted questions from committee members.

Nicola Sturgeon: It has exhausted me.

The Convener: Ach, away. You have been here only 45 minutes. Do you have any further points to make to the committee?

Nicola Sturgeon: No. I simply reiterate the point that, although the bill is quite narrow in its scope, that is not intended to suggest that there is not a broader debate out there. I am up for that debate and look forward to it. I am happy to engage on it further in due course.

The Convener: Thank you for your attendance and the attendance of your officials. That completes the committee's oral evidence sessions on the bill today and, indeed, at stage 1. I thank all the witnesses for their contributions, which will assist us in our scrutiny of the bill.

The committee agreed at its meeting last week to take the next item in private, and we agreed at the beginning of this meeting also to discuss our approach to scrutiny of the draft budget 2013-14 in private.

11:42

Meeting suspended until 11:50 and continued in private thereafter until 12:12.

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