The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

FINANCE COMMITTEE

Wednesday 5 December 2012

Session 4

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FINANCE COMMITTEE
32nd Meeting 2012, Session 4

CONVENER

*Kenneth Gibson (Cunninghame North) (SNP)

DEPUTY CONVENER

*John Mason (Glasgow Shettleston) (SNP)

COMMITTEE MEMBERS

*Gavin Brown (Lothian) (Con)
*Jamie Hepburn (Cumbernauld and Kilsyth) (SNP)
*Michael McMahon (Uddingston and Bellshill) (Lab)
*Elaine Murray (Dumfriesshire) (Lab)
*Jean Urquhart (Highlands and Islands) (Ind)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Nicola Sturgeon (Deputy First Minister and Cabinet Secretary for Infrastructure, Investment and Cities)

CLERK TO THE COMMITTEE

James Johnston

LOCATION

Committee Room 5

Scottish Parliament

Finance Committee

Wednesday 5 December 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 32nd meeting in 2012 of the Scottish Parliament's Finance Committee. I remind everyone present to turn off mobile phones, tablets, BlackBerrys and so on.

Agenda item 1 is to decide whether to take items 4 and 5 in private. Do members agree to take those items in private?

Members *indicated agreement.*

Freedom of Information (Amendment) (Scotland) Bill: Stage 2

09:30

The Convener: Item 2 is stage 2 of the Freedom of Information (Amendment) (Scotland) Bill. For this item, we are joined by the Cabinet Secretary for Infrastructure, Investment and Cities. Good morning and welcome to the meeting, cabinet secretary.

Members should note that, as officials cannot speak on the record at stage 2, all questions should be directed to the cabinet secretary. Members have the marshalled list of amendments and the groupings. We will take each amendment on the marshalled list in turn. The running order is set by the rules of precedence that govern the marshalled list. I will call the amendments in strict order from the list, and we cannot move backwards on it.

There will be one debate on each group of amendments. I will call the member who lodged the first amendment in the group to speak to and move that amendment and to speak to all other amendments in the group. Members who have not lodged amendments in the group but who wish to speak should indicate that by catching my attention in the usual manner.

The debate on each group will be concluded by me inviting the member who moved the first amendment in the group to wind up. I will invite the cabinet secretary to contribute to the debate just before I move to the winding-up speech. Following the debate on each group, I will check whether the member who moved the first amendment in the group wishes to press it to a vote or to withdraw it. If they wish to press ahead, I will put the question on the amendment. If a member wishes to withdraw their amendment after it has been moved, they must seek the committee's agreement to do so. If any committee member objects, the committee will immediately move to the vote on the amendment. If a member does not want to move their amendment when it is called, they should say, "Not moved." Please note that, under rule 9.10.14 of standing orders, any other MSP may move such an amendment. If no one moves the amendment, I will immediately call the next amendment on the marshalled list.

Only committee members are allowed to vote. Voting in any division is by show of hands. It is important that members keep their hands clearly raised until the clerk has recorded the vote. The committee is required to indicate formally that it has considered and agreed each section of the

bill, so I will put a question on each section at the appropriate point.

Let us move to the business.

Before section 1

The Convener: Amendment 8, in the name of Elaine Murray, is in a group on its own.

Elaine Murray (Dumfriesshire) (Lab): During our consideration of the bill at stage 1, I asked the Campaign for Freedom of Information Scotland to suggest any amendments for stage 2 that it would like the committee to consider. I am grateful to Carole Ewart of the campaign for proposing the amendments that are lodged in my name. I am also grateful to Frances Bell of the Parliament's legislation team for all her hard work in shaping and rewording the amendments, which she did until the wee small hours to ensure that they were ready in time for publication. The amendments in my name are also supported by the union Unison.

The Campaign for Freedom of Information has argued that the public's right to know is now far weaker than it was when the Freedom of Information (Scotland) Act 2002 was passed, because section 5 of the act has never been used and, at the same time, a variety of bodies is no longer within the remit of the act.

A number of freedom of information laws around the world contain a purpose clause, including those in New Zealand and Canada, which were used to inform the drafting of amendment 8. The Campaign for Freedom of Information considers that a purpose clause is necessary, as the Freedom of Information (Scotland) Act 2002 has not operated as intended. Many of the bodies that have been created by public authorities since 2002 are not covered by the act. Parliament needs to be clear about its expectations of the act and of public sector bodies. The CFOIS wants the rights to be retained and therefore it wants newly created bodies to be subject to the act.

Amendment 8 aims to achieve an increase in the availability of information and reflects recent commitments on the transparency agenda. It would introduce a purpose clause to the 2002 act, which would mean that the public's right to know would remain effective even if the delivery of public services changes in future.

The purpose clause reiterates the three founding principles of the Scottish Parliament—openness, accessibility and accountability—and requires the availability of information that is held by Scottish public authorities to increase progressively, rather than to decrease, as has been the case in the 10 years since the act was passed. That requirement promotes public participation and the accountability of public authorities and facilitates informed discussion, thereby improving governance. The purpose clause also confers on the Scottish public an enforceable right to access information about all public services and services of a public nature.

I move amendment 8.

John Mason (Glasgow Shettleston) (SNP): I have some sympathy with what Elaine Murray is saying and all of us, I think, agree on the principles of openness, accessibility and accountability. If we were writing legislation from scratch, I would kind of agree that it should contain a purpose clause, but I have reservations about adding in a purpose clause as an amendment, as that would change the fundamental ethos of the legislation and the other amendments to the bill.

We are where we are, with existing legislation that we are amending, and I have reservations about inserting a purpose clause at this stage.

The Deputy First Minister and Cabinet Secretary for Infrastructure, Investment and Cities (Nicola Sturgeon): I listened carefully to the committee during stage 1 and will continue to do so. Last week, I met representatives of the Campaign for Freedom of Information and said to them the same thing that I will say to the committee just now. Even though I am asking the committee to reject amendments this morning—including amendment 8—for specific reasons, I will continue to consider the scope for introducing amendments at stage 3 that try to encapsulate the views of the campaign and the committee, where that is possible.

Amendment 8, as Elaine Murray said, advocates the insertion of a purpose clause. Like John Mason, I am not unsympathetic to the thinking behind the amendment, but I question the need for it. More importantly, I am concerned about the possibility that introducing such a clause as an amendment might, as John Mason said, lead to unintended consequences. I do not agree that such a clause is required in order for the legislation to continue to deliver on its underlying principles. As a matter of good lawmaking, if the act were failing to deliver on those principles—which I do not accept that it is—the proper way to address that would be through careful amendment of the act's provisions, rather than by overlaying the provisions with a purpose clause, the effect of which would be uncertain. There is also the potential for such a clause to cause doubt to be cast on how the act operates; it could have unknown and unintended consequences for the operation of the existing legislation as a whole.

I recognise that there is frustration about the failure, to date, to extend the 2002 act and to designate new bodies, but I do not believe that the weakness of the act is down to a lack of clarity about the act's purpose, which I think is clear. The long title states that the act makes provision for

"the disclosure of information held by Scottish public authorities or by persons providing services for them",

and section 1(1) of the act states:

"A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority."

Further, in the application of the public interest test, there is an underlying presumption in favour of disclosure.

The committee should not necessarily be bound by this but, in 2002, the lead committee on the bill that became the 2002 act stated in its report that it was not persuaded of the need for a purpose clause.

Those are my reasons for saying that I do not believe that a purpose clause is necessary. I am saying not that the act is perfect or that the way in which it is being applied is perfect, but that I have a fundamental objection to the amendment, which links to the points that John Mason made. Like him, I worry about the unintended consequences of overlaying a purpose clause on an existing act via an amendment to an amending act, without having full consultation on the issue and scrutiny of what those consequences might be.

The 2002 act has been the subject of considerable interpretation and implementation by the Scottish Information Commissioner and has been subject to substantial consideration by the courts. If the purpose clause were added at this stage, the commissioner and the courts would have to reconsider the meaning of all the provisions in the act against the new purpose clause. That would produce a substantial degree of uncertainty for authorities and for the public who wish access to information. Adding such a clause in that manner would be unpredictable, because it could lead to the act being interpreted in a very different manner from the one in which Parliament originally intended it to be interpreted. As I said, we would also be adding it without the normal consultation and proper in-depth scrutiny of what the consequences might be.

For those reasons, although I am not unsympathetic to the motive behind amendment 8, I ask the committee to reject the amendment. I mentioned the issue of extension earlier and I will no doubt touch on that issue in relation to further amendments.

I recognise the frustration that is felt and I certainly have a willingness and a determination to address it, but I do not believe that the way to address it is through a purpose clause, which is not necessary and could have quite significant unintended—or, at the least, unpredictable—consequences.

Elaine Murray: On a point of information, in relation to unintended consequences and having to reconsider all the provisions, are you implying that some of this might be retrospective, in terms of having to reopen old cases?

Nicola Sturgeon: No, that is not what I mean. There is already case law—court case law and decisions that the Scottish Information Commissioner has made. I am not suggesting that cases that have already been decided would have to be reopened but, in future, interpretations of clauses of the act—that are perhaps well understood and settled—would have to be looked at afresh in light of a new purpose clause. "Unintended" is perhaps not the best word in relation to the consequences; "unpredictable" is a better one. We do not know what the amendment would mean for settled interpretations of aspects of the act.

If Parliament is going to do something like that, there is a better, more considered way of doing it than by introducing an amendment to an amendment act. I believe that doing it in that way potentially has unpredictable consequences. Although I acknowledge the frustrations about the act, I do not believe that they stem from a lack of clarity about the purpose of the act; so far, they stem from the unwillingness—or failure—of successive Administrations to use powers in the act to extend its coverage.

Elaine Murray: I appreciate what the cabinet secretary says about the unpredictability of interpretation of the act, particularly as the amendment only arrived on the last day for publication of amendments, so there has not been much opportunity for the Scottish Information Commissioner or anybody else to consider the amendment's implications. Given that, I am happy to withdraw the amendment.

Amendment 8, by agreement, withdrawn.

Section 1—Royal exemption

The Convener: Amendment 1, in the name of the cabinet secretary, is in a group on its own.

Nicola Sturgeon: Amendment 1 addresses what was undoubtedly one of the most contentious provisions in the bill. In my response to the committee's stage 1 report, I set out the Government's reasons for proposing that information relating to communications with the current and future heads of state should be given additional protection. I will not rehearse all of those arguments but, in summary, it was to ensure consistency of approach across the United Kingdom to the handling of the same or similar information and in the interests of safeguarding the political neutrality of the monarchy by giving appropriate regard to the confidentiality of communications between Her Majesty and Scottish public authorities.

As I noted previously, many access to information regimes contain protections that are tailored to their nations' heads of state. However, I said at the time of the stage 1 debate, in reflecting on the clear view that the committee expressed in its stage 1 report, that I would give further consideration to whether the existing public interest test provides adequate protection. I looked at how the royal exemption has been applied in Scotland and whether experience in Scotland in fact necessitates the same approach as is now taken elsewhere in the UK.

I have given that further consideration and my conclusion is that this part of the bill is not strictly speaking necessary. The exemption is seldom applied and although it has rarely been tested, it is generally fully upheld by the Scottish Information Commissioner. I also note the original understanding of what constitutes an absolute exemption and, in essence, they are of a technical nature and support the effective operation of the legislation.

My decision to lodge an amendment to remove section 1 from the bill took account of views that were expressed during consultation, during the committee's consideration and during the stage 1 debate. We will continue to apply the exemption in the interests of protecting the constitutional position of the monarchy, with full regard to the established conventions of confidentiality, in particular in respect of communications to and from Her Majesty. However, I have been persuaded, not least by the committee, of the importance of retaining consideration of the public interest in relation to disclosure of that class of information.

I move amendment 1.

09:45

Gavin Brown (Lothian) (Con): 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 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 ... The consistency argument that I have given is the foundation for that and I think that it is a strong one."

It would be

"odd, to say the least,"

to have different positions, and the issue

"goes to the fundamental nature of the relationships ... I have given you what I think is a strong reason for the change that we propose".—[*Official Report*, *Finance Committee*, 12 September 2012; c 1521-2, 1523, 1532, 1533.]

That is what the cabinet secretary said a few short months ago, when she told the committee why section 1 was important and ought to be included. I was persuaded by the cabinet secretary at the time. I agree with what she said about consistency being important. On that basis, I encourage the cabinet secretary not to press amendment 1 and I encourage members to vote against it.

Elaine Murray: I disagree with Gavin Brown. It is refreshing that the cabinet secretary has been prepared to listen to the arguments of the majority of committee members, which reflected the strong evidence that we received at stage 1. Despite the desire for consistency, when the United Kingdom Parliament has passed inappropriate legislation, which I understand was not fully discussed prior to its passage, it would be folly for the Scottish Parliament to go down the same lines.

John Mason: I was not going to speak on amendment 1, because I am perfectly comfortable with it, but I was slightly wound up by Gavin Brown's comments, especially his remark that he was "persuaded" by the cabinet secretary's arguments when, as far as I am aware, he had made up his mind before and might not even have been at the meeting to which he referred.

I echo what Elaine Murray said. I am encouraged that the Government and the cabinet secretary, in particular, listened to the arguments, which did not come just from the committee but largely reflected the views that we heard from people outside the Parliament. The committee system in the Parliament has sometimes been criticised, but this is a good example of a committee taking a firm line and the Government listening and responding, which is to be commended.

Jamie Hepburn (Cumbernauld and Kilsyth) (SNP): I was not a member of the committee when it took evidence on the issue. I am sure that there is an argument for the position that the Scottish Government initially advanced, but I am instinctively uneasy about the application of absolute exemptions to freedom of information provisions. I am not convinced that just because the UK takes a certain position, it follows that the Scottish position must necessarily be the same. A body of evidence was presented to the committee and the Government should be commended for listening to the committee. We should support amendment 1.

Nicola Sturgeon: I say to Gavin Brown that there is a strong argument for the view that I articulated at stage 1, but I have listened to the counter-argument that was made. Opposition members frequently say that the Government should listen more to committees. I take committees' views seriously and, on this occasion,

the committee was right and reflected opinions that had been presented.

My reflection took me to the view that having in place different processes north and south of the border does not inevitably lead to inconsistent outcomes. As the limited experience so far shows, the application of the public interest test will in many cases lead to communications with the monarch remaining confidential. However, the public interest test must be passed. That is appropriate and strikes the right balance.

For all those reasons, I press amendment 1.

The Convener: The question is, that amendment 1 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Gibson, Kenneth (Cunninghame North) (SNP)
Hepburn, Jamie (Cumbernauld and Kilsyth) (SNP)
Mason, John (Glasgow Shettleston) (SNP)
Murray, Elaine (Dumfriesshire) (Lab)
Urquhart, Jean (Highlands and Islands) (Ind)

Against

Brown, Gavin (Lothian) (Con)

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

Amendment 1 agreed to.

After section 1

The Convener: Amendment 2, in the name of the minister, is grouped with amendments 2A to 2F, 9 and 7. Members have already been informed that the Presiding Officer has determined under rule 9.12.6C that, if amendment 9 were to be agreed to, the bill would require a financial resolution. As no resolution has been agreed to, amendment 9 may be moved and debated but I cannot put the question on it.

Nicola Sturgeon: I apologise for making lengthier comments about this group, as I will try to cover all the amendments in it.

The issue of extending coverage is separate from revising the freedom of information legislation to ensure that it remains fit for purpose. The Government's approach has always been that we will return to the question of extension once the bill has completed its parliamentary passage. However, I appreciate that the failure to extend coverage so far has disappointed a lot of people who see the extension of coverage as closely related to ensuring that the legislation remains robust and fit for purpose. Of the two issues that have created most debate about the bill, extension is undoubtedly more substantive and has more long-term significance.

Critics rightly note that three consultations have been held on extending coverage and that, before the 2002 act came into force, expectations were high that the section 5 power would be used early. That has not proved to be the case. I fully accept that one way in which Scotland can, and must, seek to maintain its reputation for progressive freedom of information rights is by regular assessment and, when necessary, use of the power to keep the act's coverage up to date.

The mechanisms through which public services are delivered are changing rapidly—the committee commented on that at stage 1. Legislation must keep up to date but, to be perfectly frank, this legislation has not kept up to date with all the changes. I said at stage 1 that I intend to produce an order in early course to extend coverage. At stage 3, I will say more about the coverage of that order.

Amendment 2 was developed from proposals that the Scottish Information Commissioner made. It will ensure that appropriately focused consultation takes place and that ministers are made clearly accountable to Parliament for the use or otherwise of the power. The amendment allows more extensive consultation than the 2002 act provides for, without mandating full public consultation in every case, because that is not always appropriate or proportionate.

The amendment strikes a balance on reporting at three years. I stress that that does not mean that only one order could be made every three years. We seek to have a timescale that will enable appropriate consultation to be undertaken on a draft order and allow appropriate time for scrutiny and consideration of any order by Parliament. The report to Parliament can and should give full clarification of how and why the power has or has not been used and include a helpful indication of any intention to use it. The measures in amendment 2 on both consultation and reporting on the use of the section 5 power are responsible and proportionate.

I accept and sympathise with the approach behind Elaine Murray's amendments, but I believe that the Government amendment's approach is preferable, as Elaine Murray's amendments are in certain respects ill defined and in other respects overly bureaucratic.

I will deal with the amendments in turn. Amendment 2A removes a standard consultation obligation and replaces it with an obligation to consult

"members of the public and other interested parties."

The "other interested parties" are not defined, which begs the question of who they are if they are not members of the public. What does "interested" mean for the purposes of that

provision? What would be the consequences if someone who had not been consulted later asserted what they described as an interest, and how would that interest be defined and adjudicated on?

Amendment 2B is not wrong, but it is unnecessary. It is already a matter of administrative law that due regard is given to the results of a consultation, so the amendment adds little by restating an existing obligation of ministers and legislating for it in the text of the bill. The purpose of legislation is to change the law, but the amendment would not do that because administrative law already requires ministers to give due regard to consultation results.

The timescales that are proposed in amendment 2C would mean that, within two months of commencing the provision, the first report would be due, which is not appropriate. We all know the position right now, which is that the power has not been used; I am not sure that we need a report in a few months' time to tell us that.

Our proposed provision for reporting in three years is designed to better align the reporting period with the lifespan of a session of Parliament, which will appropriately cover any consultation period and any subsequent orders that are made on that timescale. That is a more reasonable approach. Again, I stress that it does not mean that an order will not be passed before then—indeed, as I noted earlier, I have already said that we will introduce an order, on which I will give details at stage 3.

Amendments 2D and 2F require an annual report, which would lead to a never-ending cycle of reporting without adequate time for due scrutiny, consultation and consideration. Amendment 2E is unnecessary: if we have consulted, we are likely to report on that, particularly as our amendment requires us to state whether the power has been exercised during the reporting period.

I note that amendment 9 will be debated today but will not be voted on due to the Presiding Officer's decision that it requires a financial resolution. Amendment 9 would result in bureaucratic overload, with a lot of confusion on top of that. There appears to be a lot of overlap between amendments 9 and 2, but they still appear to do different things. Perhaps Elaine Murray will clarify how those amendments would fit together.

Amendment 9 requires annual reports to be laid regarding the exercise of the power to extend the coverage, and for draft instruments to be laid following each report. It similarly requires a report to be laid shortly after the commencement of the provision which, as I have explained, seems to be of little value. From one reading, it appears that it would require two reports to be laid in a very short space of time.

Amendment 9 creates an obligation on ministers first to report and then to designate bodies every year. It is not clear how that would sit with the need to carry out proper consultation, including building in appropriate time periods for that to take place and for ministerial decisions to be made. Are we really saying that it will always—every single year—be appropriate to use the power? How do we know that there will not be years when we have reached the point at which there are no bodies that are appropriate for designation?

An instrument that is laid so soon after a report is hardly a recipe for appropriate scrutiny and reflection. It would lead to an extension process becoming automatic rather than resulting from deliberation and proper consideration.

Amendment 7 is a technical amendment to the bill's long title to reflect the provisions concerning the power to designate authorities in amendment 2.

In many respects, the Government's amendment 2 and all the other amendments in the group, which have been lodged by Elaine Murray, try to do the same things. I simply argue that amendment 2 will achieve those things in a proportionate way that builds in sensible timescales and which, crucially, allows appropriate opportunities for Parliament to scrutinise and ministers to consider decisions with due care and attention. I look forward to hearing what Elaine Murray has to say, and I hope that I will be able to persuade her to support amendment 2.

I move amendment 2.

10:00

Elaine Murray: The majority of my amendments are amendments to amendment 2. I welcome the provisions that amendment 2 proposes. My amendments to it are an attempt to find out whether what it seeks to do can be taken a little further.

As the cabinet secretary said, amendment 2A seeks to replace the requirement on Scottish ministers to consult

"such other persons as they consider appropriate"

with a requirement to consult

"the public and other interested parties"

when authorities are designated to be included in the Freedom of Information (Scotland) Act 2002. I hear what the cabinet secretary says about the definition of "other interested parties". That phrase was used because the Campaign for Freedom of Information in Scotland was concerned that it would not be covered by the term "members of the

public". If the cabinet secretary can confirm on the record that the terminology in amendment 2 would cover such bodies, we would be able to reassure COFIS that it would automatically be consulted.

Amendment 2B would require ministers to have due regard to the consultation responses

"in deciding how to proceed in relation to the order."

The cabinet secretary has put on record the fact that that is already a requirement in law, so I do not intend to move amendment 2B.

Amendment 2C would require the first report on the section 5 power to be laid on or before 30 June next year rather than on or before the same date in 2016. Members of the committee will be aware that the Scottish Information Commissioner raised concerns about the length of time before a report would have to be laid before Parliament under amendment 2. Under the current drafting, the first report would not be presented to Parliament until 14 years after the original act was passed. We should recall that, when the 2002 act was passed, the then Minister for Justice, Jim Wallace, promised early consultation on the extension of the act to cover registered social landlords and companies involved in major public-private partnership/private finance initiative projects. To date, progress has been fairly slow. It may be that 2013 is too soon, but it could still be argued that 2016 is too late. Perhaps there is room for a compromise.

Amendments 2D and 2F would require annual reporting rather than reporting every three years. Their purpose is to ensure that the strength of the legislation in relation to timelines will be retained.

Amendment 2E seeks to replace the provision that the report may summarise the responses to any consultations that are carried out on the exercise of the section 5 power with a requirement to report more broadly on whether any consultation has been carried out, to summarise the responses and to explain how they were taken into account when a decision was made on whether to exercise the section 5 power. Amendment 2E's intention is to make the process more transparent and to illuminate the Government's reasoning. In that way, the public can be reassured that the correct process was undertaken diligently, even if the public disagree with the conclusion of the report.

The drafting of amendment 9 has been a difficult process. COFIS proposed it because successive ministers have undertaken consultations that repeatedly supported additions that were not actioned. The Scottish Executive consulted in 2006 but subsequently declined to act. It promised further consultation. In 2008, the Scottish Government launched a discussion paper and a consultation was issued in 2010, which commanded wide support for the designation of new specified bodies. However, to date no timeline has been published for the addition of new bodies, and no action is expected until next year, when the bill has been passed. That was confirmed recently by the First Minister.

Amendment 9 would require Scottish ministers to be proactive on the designation of additional bodies and to set out timescales for action. COFIS wishes to see the designation of those public authorities on which there was consultation in 2010, and action on further designation. The amendment was drafted by the legislation team, who put a fair amount of work into reflecting the policy intention in legislation. That is probably the cause of some of the duplication, as it was a difficult task to find an appropriate legislative way of interpreting the policy intention. They wished the amendment to act in three ways: setting out a timetable for designated public authorities to be covered by the act; drawing up a second list of organisations to be covered by the act; and embarking on a third consultation on a new list. They cite the fact that the 2010 consultation included the Glasgow Housing Association but not other registered social landlords.

Amendment 9 would require a draft statutory instrument to be placed no later than 20 days after the report setting out the proposals for exercising the order-making powers, and the first report to be laid on or before September next year and subsequent reports to be laid annually. In effect, it is intended to ensure that at least one public authority is designated each year, except under exceptional circumstances, which ministers would be required to explain.

As we know, the Presiding Officer has advised that amendment 9 would require a financial memorandum to be provided by the Scottish Government, so it can be only debated today and no question on it can be put. Again, because of the difficulties in interpreting the policy intention for legislation, I am interested in hearing the committee's comments. No question on the amendment will be put, but it would be useful to have the committee's thoughts on whether some policy intentions could be translated into legislation for stage 3.

I move amendment 2A.

John Mason: First, I welcome amendment 2 and the fact that the Government has again listened to what the committee has said. At Westminster, I served on two public bill committees, but I do not remember any significant compromise on the part of the Government at the committee stage. Specifically, amendment 2 is welcome because it definitely strengthens the overall position and the reporting back to Parliament, which I am certainly supportive of.

Frankly, however, I think that the Government's amendment 2 and Elaine Murray's amendment 2A are quite weak in some respects. Amendment 2 has the wording

"also consult such other persons as they consider appropriate."

I am not sure that that means much. However, I am not sure that it would be better to replace that wording with

"members of the public and other interested parties."

I am not enthusiastic about either wording, but there we go.

I think that both Nicola Sturgeon and Elaine Murray have accepted that amendment 2B would not add much. The issue of consultation with the public is interesting, because I think that some of the public view it as a kind of voting contest or a referendum and that those who return the most responses should be listened to. However, I do not think that that should be the case. There would be little point in having a consultation if ministers did not listen and have some regard to it. I do not see that writing that down would make a huge difference.

The amendment that I am most sympathetic to in this batch of Elaine Murray's amendments is amendment 2C, which would replace the 2016 date with 2013. I accept Nicola Sturgeon's point that 2013 is probably too close given how the bill is going. I think that June 2013 would certainly be too close, but I wonder whether the cabinet secretary would consider whether the date could be brought forward a bit from 2016. If we were starting from scratch again, the three-year period might be acceptable. However, because of the history of the legislation and people's feeling that there has been such a long delay with it, it might be better to choose the date of 2014 or 2015, both of which would have the advantage of being within this session of Parliament. The June 2016 date is after the next election, which might be a slight disadvantage.

On amendment 2D, I accept the arguments on both sides: three years is quite long and 12 months is too short. I wonder whether it would be possible to compromise with two years.

Jean Urquhart (Highlands and Islands) (Ind): I support amendments 2C and 2D, which I think should be considered because 2016 seems a long way off into the future.

On the Presiding Officer's letter on the financial implications of amendment 9, there may be something that I am just not understanding. I have some sympathy for the amendment because it would bring in other organisations, including arm's-length external organisations. All of the work that was done prior to an ALEO being established was eligible for freedom of information as part of the local authority's everyday work, if you like. Most ALEOs have been set up to run leisure and arts activities and so on, so it seems to me that there would be no financial implication from that, although perhaps I am being naive. In that case, should ALEOs in particular be separate from the considerations that apply to other organisations such as housing associations, or would that be the same thing? I cannot quite understand.

The Convener: The position is that the Presiding Officer has ruled that we cannot move on the issue, so we cannot move on it—it is as simple as that. I do not see that there is any point in debating the issue further, given that we cannot take it forward. However, that does not mean that the issue cannot be raised again at stage 3.

Michael McMahon (Uddingston and Bellshill) (Lab): Convener, I apologise for my late arrival. Every Wednesday morning, every broken-down lorry in the central belt seems to arrive on the M8 in front of me. I also apologise to the cabinet secretary.

To reiterate Elaine Murray's comments, there is essentially nothing wrong with amendment 2, but it would be helpful to have some clarification of the intention, because there are some concerns that the amendment does not say clearly how far it is intended to go. If that could be made clear and if some commitment could be given to strengthen the matter in guidance or what have you, that would be helpful to those who have an interest in the bill. As Elaine Murray said, the other amendments are add-ons, if you like. Once amendment 2 is in place, the other amendments would follow in tightening up and strengthening the provision in line with the evidence that we heard during the consultation.

On "other interested parties", lots of legislation goes through without a clear definition in the bill of exactly what every aspect of it means. Such matters can be found out in the guidance, which can be negotiated, discussed and added to as things move forward. To include "other interested parties" in the bill would not necessarily create a problem; it would just create an environment in which the definition of "other interested parties" could be clarified in guidance.

On amendment 2C, I know that there are concerns about requiring the report next year, but a lot of the information, as previous speakers have mentioned, has already been collected and is already known, although it is not currently covered by the legislation. Therefore, if we were to pass the bill this year in a form that required the report to be produced by the end of December 2013, I do not believe that it would be beyond the ability of the Government to pull together within one year a report based on a lot of evidence that already exists.

On amendment 2D, once that information has started to be processed, annual reporting would not be such a problem. The on-going matter would be to add to and build on what already exists. I just do not see why there would be a huge issue if Elaine Murray's amendments were added to the bill for clarification. The provisions could then be expanded on in the regulations or guidance that might follow on from their inclusion in the bill.

On amendment 9, which I know that we are not going to discuss, I just want to make one point.

The Convener: We can debate and speak to, but not move, amendment 9.

Michael McMahon: If there was a period in which there were no bodies to be added, it would be better to know that there was nothing to be added than to be left in the position where we do not know whether trusts or ALEOs have been created that could come under the remit of the bill. To say that we should not have that clarification just because there might not be any body that needs to be added does not seem to me to be a particularly strong argument for rejecting the possibility of adding all the other bodies that might need to be added in subsequent years.

10:15

Jamie Hepburn: I join other members in welcoming amendment 2. It is useful to have a degree of clarity about how an order can be consulted on, reported on and acted on. We should listen closely to the cabinet secretary's points about amendment 2C. I welcome the fact that Elaine Murray has lodged her amendments in the group, because it is useful to debate some of the details. However, the cabinet secretary has made it clear that, just because the date for the first report is set some time in the future, that does not preclude the prospect of earlier action. Indeed, there has been a commitment on that, and we will hear some details on that at stage 3. If we take that in good faith—as we should—I am not convinced of the necessity for amendment 2C.

I have much the same feeling about amendment 2D. The requirement to produce a report every year might be somewhat onerous and would not allow for adequate scrutiny. I have no doubt that dialogue on the specific details will continue but, at this stage, I am not convinced of the necessity for amendments 2C and 2D.

Nicola Sturgeon: I thank Elaine Murray for lodging her amendments, and I thank all members who have contributed to the debate, which has been worth while, because there are no absolute rights and wrongs in relation to the timescales and who we consult. The issue is about trying to get the legislation proportionate and balanced so that it does the job that it is designed to do.

I will start with some of the timescale issues. Under amendment 2, a first report would be laid in 2016. I have sympathy with the view that has been expressed that that is too far into the future, particularly in light of the length of time for which the 2002 act has already been in existence. A requirement to produce a report next year would be going too far in the other direction, but I am happy to give further consideration to whether we could bring the date forward by a year. I was struck by John Mason's point that we should try to produce the report in the current session of Parliament, and I have a lot of sympathy with that. If amendment 2 is agreed to, I will give consideration to an amendment at stage 3 that would perhaps change the date from 2016 to 2015.

Even if we stick with 2016, I hope that it will give members some reassurance to point out that we are not setting a date in a vacuum, if you like, with nobody knowing whether the power to introduce an order will be used. I have given a commitment that there will be an order. Therefore, by the time we get to 2016, the first order will have been introduced. Nevertheless, the points are well made, so I am happy to give the issue further consideration in advance of stage 3.

Similarly, we have set the timescale for regular reporting at three years, because we think that that strikes the right balance. I strongly believe that annual reporting would be too frequent and would not allow for proper consideration of orders. It would give a committee no time to scrutinise an order before the next report was due. Therefore, annual reporting would be too frequent. A three-year period feels right to me, although I have heard people say that two years might be a better balance. I received a letter yesterday from the Scottish Information Commissioner—I am sure that the committee did, too—suggesting that two years might be a better balance. It is incumbent on me to give that proper consideration. Therefore, I am happy to tell the committee that, if it agrees to amendment 2, I will consider introducing a further amendment at stage 3 that would change the period from three years to two. I am not giving an absolute commitment to do that, but I am certainly giving a commitment to consider it.

On the issue of who is consulted, amendment 2 tries to strike the right balance. A consultation needs to be sufficiently focused, given that a plethora of organisations could be brought into the ambit of FOI and that the same reach of consultation will not necessarily be appropriate for every single one of them. I do not think that a full public consultation will be proportionate or necessary in every instance. Equally, however, the current wording of the 2002 act is too narrow. We have tried to strike a balance between being sufficiently focused and allowing enough scope to

consult as required, for example, with the consumers and users of organisations. It is inconceivable that the Campaign for Freedom of Information would not be considered an appropriate body to consult in any consultation on an extension of the act.

Michael McMahon suggested that the wording of the act could be fleshed out in guidance. I am happy to consider how that can be done to make clearer the kind of organisations that we are talking about in specific circumstances. That might be a useful compromise.

Finally, if Elaine Murray is minded not to press her amendments today, I am willing to discuss with her how amendment 2 could be further amended at stage 3 to incorporate some of the key points that have been made about timescales. I would be happy to ask my officials to have a direct conversation with Elaine Murray in advance of the deadline for the submission of stage 3 amendments to see whether we can find some common ground on how what I think amendment 2 does to strengthen the legislation could be strengthened further in some of the ways that we have spoken about.

Elaine Murray: I am happy to hear the cabinet secretary's assurances and offer of further discussion. I lodged the amendments to air some of the concerns, to look at whether they could be resolved, and to identify whether there are any particular problems in the wording of the amendments that could be resolved later. I am happy, therefore, not to press amendment 2A and to support amendment 2 on the understanding that there will be further discussion to achieve some of the aims of amendment 9, which, if moved, cannot be voted on.

I applaud the legislation team for the work that it did to interpret that policy intention. There are clearly still some issues around that that might need to be revisited at stage. I will not press amendment 2A.

Amendment 2A, by agreement, withdrawn.

Amendments 2B to 2F not moved.

Amendment 2 agreed to.

Amendment 9 not moved.

The Convener: Amendment 10, in the name of Elaine Murray, is grouped with amendment 11.

Elaine Murray: When the Freedom of Information (Scotland) Act 2002 was passed, it was expected that the public's rights would be exercised in relation to existing bodies as well as bodies created in future to deliver public services or services of a public nature. Those provisions are encompassed in sections 3, 6 and 7 of the 2002 act, although section 7 refers to the right of access to information only in respect of information that is held by the authority and which relates to public services or services of a public nature.

However, since the passage of the 2002 act, many public services have been moved to bodies that the act does not cover, such as arm's-length external organisations, and, through council housing stock transfer, registered social landlords. Amendment 10 seeks to place the duty back on the public body that creates the new body or transfers the function or service to another body that is not covered by the 2002 act. If amendment 10 were agreed to, it would apply not retrospectively but only to future transfers, and Scottish ministers would not have to readmit bodies to which services had been transferred retrospectively through the use of the section 5 power. The duty would rest with the public authority to ensure that the right to freedom of information remained. The public authority would therefore be required to provide information under the 2002 act on the services that it had transferred.

Amendment 11 is similar to amendment 10, but refers to public sector contracts of a value that exceeds £1 million. The duty to provide information again would remain with the public authority rather than transferring to the contractor. That would maintain the simplicity of the freedom of information process. Members of the public could make a request and it would not be necessary even to mention the 2002 act. If the person was dissatisfied with the answer, they could refer their complaint to the Scottish Information Commissioner. That is now a fairly familiar process.

Information about public services, or services of a public nature, will be associated with a public authority, such as a health board or a local authority, rather than with the individual contractor who is providing the service.

The simple solution with regard to the provision of information about public sector contracts is, therefore, to ensure that the freedom of information duties remain with the public authority rather being transferred to the contractor, so that members of the public can seek that information through the commissioning public authority.

I move amendment 10.

John Mason: Again, I have sympathy with what Elaine Murray seeks to do with amendment 10. However, I feel that her proposed mechanism is quite cumbersome. The 2002 act is set up to list the organisations that are included, and I have concerns about the roundabout way of doing that that the amendment proposes. For example, if bits of Glasgow City Council—a body that I am interested in—were chopped off and allowed effectively to leave the freedom of information

regime, the onus would be put on the council to include them. I find that a bit unsatisfactory in comparison with listing individual organisations.

As I said earlier with regard to the purpose clause, if the 2002 act had been set up in that way, that would be fair enough. However, I wonder whether the suggestion is perhaps too roundabout a route, even if it might be marginally quicker. I will be interested to hear what the cabinet secretary has to say on the matter.

I have slightly more sympathy with the intention behind amendment 11, because I do not think that such contracts would normally be covered at all, as private sector organisations would not normally be included in the freedom of information regime. I believe that the suggestion has been implemented in other countries. I am happy to listen to what the cabinet secretary says on that point.

Nicola Sturgeon: Again, I do not lack sympathy for the amendments, and there is a great deal of attraction to the idea of putting an obligation on public bodies, not least because that would take the obligation away from the Scottish Government, to some extent. However, I struggle to understand how amending the legislation in the way that is suggested will achieve the objective that Elaine Murray is aiming at. I have been thinking about the ways in which that objective could be achieved, and I am certainly happy to continue to think about it, but I really do not believe that amendments 10 and 11 achieve the aim.

It is not clear to me how the provisions will be put into effect in practice once the statutory bit of the work is done. It is not clear how they would be regulated or enforced. The 2002 act has rights that are clearly understood and, crucially, enforceable. Amendments 10 and 11 seem to be saying that every public authority would be able to make its own arrangements. What would be the terms of those arrangements? There is potential for huge inconsistency among public authorities. I am not sure how such arrangements would have the equivalent of the force of statute if the arrangements themselves were not embedded in statute. For example, what right would a member of the public have to ensure compliance in relation to a person who was not a public authority and with whom they had no relationship?

For the reasons that John Mason outlined—the amendments seek to bolt something on or do something by the back door—we run the risk of creating considerable confusion. At the moment, however imperfect and badly in need of extension it might be, the 2002 act is simple and straightforward, is understood to a great degree by the public and is enforceable, with a clear route to enforceability.

The 2002 act is simple, in that it applies to bodies that are clearly named in it and bodies that are wholly owned by public authorities. The power to extend by designating bodies and legal certainty about the coverage of the act should remain within the scheme of the existing act, with the exercise of powers by a minister subject to parliamentary scrutiny. The proper way to address the extension of the application of the act is through the use of section 5. It has not been used, and we all understand the frustration around that, but I still think that that is the correct route.

10:30

On amendment 11, it is unclear whether the concern relates to information that is held on behalf of a public authority—in which case, it is already subject to the 2002 act—or information that is otherwise held by the contractor. The amendment would provide that the relevant information is

"information, relating to the performance of the contract,"

but the meaning of that is not precise or clear. Contracts can cover a broad range of activities, including functions of an authority. Information relating to performance of a contract might cover more than simply information on the performance of a function. To define information in such a way is to risk straying into areas that are not appropriate for coverage by the act.

A practical concern is that the provision could be made effective only by the authority imposing contractual obligations on the contractor to ensure that, in the event of a request for information, the contractor and people further down the supply chain would provide the information. That immediately raises issues of enforcement. How would the approach be enforced in practice?

There is also an issue to do with the relationship with the provisions in the Public Records (Scotland) Act 2011. I can go into more detail about that if the committee wants me to do so.

I have some sympathy with the aims of amendments 10 and 11, but I come back to the view that the 2002 act has a mechanism for extending its coverage. The fact that the mechanism has not yet been used does not mean that it is not fit for purpose, and I have given a commitment to use it.

I am willing to discuss with Elaine Murray whether we can progress the issue. I do not want to raise expectations, because the area is incredibly difficult for the reasons that John Mason gave, but I am happy to see whether we can get to common ground in advance of stage 3. My fundamental view is that we need to use section 5 of the 2002 act rather than provide for different mechanisms, which have lots of imperfections, simply because there is frustration that section 5

has not yet been used. I ask Elaine Murray not to press amendment 10 or move amendment 11.

Elaine Murray: May I ask for clarification in respect of amendment 11? Can the issue to do with large-scale public contracts be resolved by designation under section 5?

Nicola Sturgeon: My understanding is that there could be designation—

Elaine Murray: Jim Wallace intended to do it, but it was not clear—

Nicola Sturgeon: I would certainly welcome further discussion about whether the aims of amendment 11 could be met by section 5 or whether there is something more that we could do.

I will be frank and say that I am not giving guarantees that the discussion will lead to Government amendments at stage 3. I understand what Elaine Murray is trying to achieve, but I think that the route to achieving it is through use of the existing mechanism in the 2002 act rather than the creation of a new mechanism because of frustration that section 5 has not been used.

Elaine Murray: My intention in lodging amendment 10 was to simplify the situation so that, as councils or other bodies created ALEOs, ministers would not continually have to make section 5 designation orders to bring the new bodies into the scope of the legislation. I was trying to circumvent that problem. However, I take on board what the cabinet secretary said about it being inappropriate at this stage to provide for a mechanism that is different from the one in the 2002 act.

There is a significant issue to do with accountability in relation to the performance of contracts that involve large amounts of public money. I am happy to withdraw amendment 10, with the committee's agreement, and I will not move amendment 11, but I am interested in further discussion about how the intention of amendment 11 might be met by use of the section 5 power.

The Convener: The question is, that amendment 10 be agreed to. Are we agreed?

Elaine Murray: Convener, I was seeking leave to withdraw amendment 10.

The Convener: Sorry. I thought that you said that you would press amendment 10 but not move amendment 11.

Elaine Murray: In that case I have caused confusion. Although my intention was to circumvent the need for ministers to keep exercising the section 5 power, I heard what the cabinet secretary said and I accept that adopting a different mechanism might cause problems. I am happy to withdraw amendment 10, if the committee is content for me to do so.

Amendment 10, by agreement, withdrawn.

Amendment 11 not moved.

Sections 2 and 3 agreed to.

Section 4—Historical periods

The Convener: Amendment 3, in the name of the cabinet secretary, is grouped with amendments 4 to 6.

Nicola Sturgeon: First of all, I must apologise to the committee for the technical nature of these amendments. I also stress at the outset that they do not change the policy intention behind the bill but simply ensure that the bill is drafted in a way that fulfils its policy intention.

Members will be aware that in 2009 the Government decided to open its files containing historical information at 15 rather than 30 years. As a result of that decision, National Records of Scotland has opened 12,000 files, which has contributed to our having a greater awareness and understanding of Scottish affairs than would have originally been the case. The experience has been positive and is a tangible sign of our commitment in Scotland to progress freedom of information legislation in its broadest sense.

However, the decision to half the release period was a policy decision, not a matter of law. As we discussed at earlier stages of the process, simply reducing by means of the order-making power under section 59(1) of the 2002 act the 30-year lifespan to 15 years for all relevant records is not considered appropriate in all cases. Nevertheless, the present legislation does not allow for the creation of separate provision for particular exemptions for different types of records. As it stands, the bill seeks to provide greater flexibility with regard to the order-making power. For example, it allows for the making of different provisions for records of different descriptions and for different individual exemptions.

That said, it has become apparent that the bill's provisions do not contain sufficient vires to enable the intended policy objective to be met. The Government has already publicly set out its intentions in respect of all 30-year exemptions, with the aim of introducing an order in early course to reduce the lifespan of most relevant exemptions to 15 years. However, in order to address sensitivities around confidentiality, the section 36 exemption is likely to remain at 30 years.

In addition, it is proposed that the rules in relation to the exemption concerning communications with Her Majesty, members of the royal family and the royal household be capable of being amended by order to take into account a particular event. The term "event" has been left undefined to confer a measure of flexibility in linking the period to particular circumstances, such

as the death of a relevant member of the royal family. The proposal is that, in such cases, the specified period for historical records should be the later of 20 years after the creation of a record or five years after the date of the death of the relevant member of the royal family. However—I hope that members are following me—that could increase the lifespan of the exemption to more than 30 years. For example, if someone dies 30 years from now, the five-years-after-the-death provision could take the lifespan of the exemption to 35 years. The current order-making power only enables a reduction in the period of time at which a record is classified as historical in relation to the royal exemption.

As a result, in order to deliver the policy intention—which, as I have said, is not being changed—amendment 3 seeks to modify further the order-making power to allow for greater variation in the definition of "historical record", and the power is framed to enable an order to make the necessary provision with regard to rules around the meaning of "historical period", for example, to cover different types of record in different time periods relating to particular records.

The exemption set out in section 41(a) of the 2002 act allows the period to start either with the date of the record's creation or with another event, such as a death. In either case, the period specified must be no more than 30 years after the starting point. For exemptions other than those under section 41(a), the maximum period that can be specified in an order will continue to be 30 years from the creation of the record.

Amendments 4 and 6 seek to make consequential changes, and amendment 5 seeks to allow an order to make ancillary provision to ensure the smooth transition from one set of rules to another.

Although I understand that there might be concerns about legislating for the possibility of increasing as well as reducing the period of time at which a record becomes historical, we have always been very clear that our intentions in this regard relate very specifically to the royal exemption. I also note that in his response to the consultation on the draft bill, the former Information Commissioner explicitly stated that were the exemption to remain subject to consideration of the public interest—which amendment 1 ensures will be the case—he could accept the revised lifespan in section 41(a).

I also point out that, under amendment 6, the relevant power will remain subject to the use of the affirmative procedure in the Parliament and that the order putting the Government's proposals into effect will be subject to further consultation.

I hope that the committee has stayed with me through what has been at times a technical explanation. I move amendment 3.

The Convener: I thought that that was all pretty straightforward. [*Laughter*.]

Nicola Sturgeon: Maybe it was just me who found it difficult to understand.

The Convener: No members wish to speak on these amendments. Do you wish to wind up, cabinet secretary?

Nicola Sturgeon: I only ask the committee to support the amendments.

Amendment 3 agreed to.

Amendments 4 to 6 moved—[Nicola Sturgeon]—and agreed to.

Section 4, as amended, agreed to.

Sections 5 to 8 agreed to.

Long title

Amendment 7 moved—[Nicola Sturgeon]—and agreed to.

Long title, as amended, agreed to.

The Convener: I am pleased to say that that ends stage 2 consideration of the bill. I thank the cabinet secretary for attending. The bill will now be reprinted as amended and will be available tomorrow morning. Although the Parliament has not determined when stage 3 will take place, members are now able to lodge stage 3 amendments with the legislation team and will be informed of the deadline for amendments once it has been determined.

Given that, last week, we agreed to take the next item in private and that, at the start of today's meeting, we agreed to take items 4 and 5 in private, I close the public part of the meeting to allow the public and official report to leave.

10:42

Meeting continued in private until 12:04.

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