



The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

FINANCE COMMITTEE

Wednesday 5 September 2012

Session 4

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FINANCE COMMITTEE

21st 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:

Iain Gray (East Lothian) (Lab)

Andrew Gunn (Scottish Government)

Colin McKay (Scottish Government)

Zoe Mochrie (Scottish Government)

John Swinney (Cabinet Secretary for Finance, Employment and Sustainable Growth)

Ondine Tennant (Scottish Government)

CLERK TO THE COMMITTEE

James Johnston

LOCATION

Committee Room 2

Scottish Parliament

Finance Committee

Wednesday 5 September 2012

[The Convener *opened the meeting at 10:00*]

Decision on Taking Business in Private

The Convener (Kenneth Gibson): Good morning, everyone, and apologies for the brief delay. Welcome to the 21st meeting in 2012 of the Scottish Parliament's Finance Committee. I welcome everyone back from the summer recess, and I also welcome to the public gallery Jane Hutt AM, who is the Minister for Finance and Leader of the House in the Welsh Assembly Government. I understand that the minister is meeting the cabinet secretary and was keen to attend our meeting. I hope that you find our work of interest, minister.

I remind everyone to turn off mobile phones, pagers and BlackBerrys. I will just check—yes, mine is definitely off. We have received apologies from Gavin Brown MSP.

Agenda item 1 is a decision on whether to take in private items 6, 7, 8, 9 and 10. Are members agreed?

Elaine Murray (Dumfriesshire) (Lab): Can I raise something? Some of us were talking about how, in the early days of the Parliament, there was a presumption against taking items in private. It is not just this committee—in general, we seem to be sliding into taking quite a lot of items in private. Do we need to discuss things such as the work programme in private? Could we not put such discussions on the record?

The Convener: I understand that Labour members have been raising that issue in all committees. We are 16 months into the session and, before today, no one has raised the issue at this committee.

James Johnston (Clerk): Obviously, it is a matter for the committee to decide whether to take items in private. As a rule, the reason why agenda items are put forward for a decision on their being taken in private is to allow the clerks to provide frank advice in the accompanying papers. If items are taken in public, the paper—for example, on issues such as suggestions for witnesses—would be public as well. Taking items in private allows the clerks to provide full and frank advice to the committee on work programme areas.

The Convener: So if we do not go into private it makes the clerks' job more difficult.

There are some papers that we cannot discuss if they are not taken in private. One example is the paper on the Commonwealth games. If we did not discuss it in private, it would be withdrawn from the agenda. Are there any particular items that you feel we should not discuss in private?

Elaine Murray: I fully understand the issue in that case—there is no way that that paper could be discussed in public.

However, I can recall a time in the 2003 to 2007 session when members of the convener's party argued that discussion papers and committee reports should be discussed in public. There has been a slight change of direction. There are areas in the work programme that could be of public interest, relating to how, in general, the committees are considering going forward and the issues that they want to take up. There is a degree of public trust in that.

The Convener: The cabinet secretary is waiting. Jim Johnston suggests that we discuss this issue at the end of the meeting before we reach the item on the work programme. We can go on with the meat of the agenda. Would you be happy for the other items to be taken in private?

Members indicated agreement.

The Convener: Michael?

Michael McMahon (Uddingston and Bellshill) (Lab): Yes, fine.

The Convener: Okay. We will discuss that when we come to it and we will not keep our guests waiting any longer.

Scotland Act 2012

10:04

The Convener: I welcome Alistair Brown and Sean Neil from the Scottish Government and invite the cabinet secretary to make an opening statement.

The Cabinet Secretary for Finance, Employment and Sustainable Growth (John Swinney): Thank you, convener. I welcome this opportunity to discuss with the committee the progress that has been made by the Scottish Government on the arrangements for the implementation of the new financial powers under the Scotland Act 2012. I am also here to discuss a further agenda item with the committee, on a legislative consent memorandum.

I would like to make three points at the outset of the discussions on the implementation of the new financial powers. First, the additional responsibilities under the Scotland Act 2012 will be taken forward as part of our approach to demonstrate financial competence and effective delivery in all that the Government undertakes. We recognise that the act has delivered additional responsibilities for the Parliament; of course, the Government believes that more could have been achieved through the act, but our approach will be to use the new devolved tax powers not only as a way of managing the public finances, but to ensure that they help to deliver sustainable economic growth.

That thinking has been implicit in the early publication—before the summer recess—of consultation documents on the land and buildings transaction tax. We will look to innovative ways to shape, deliver and collect the new taxes. A wide range of stakeholders can help us with that. Active preparation and planning are essential to ensure that we can deliver, utilise and maximise the benefits of the new financial powers when they begin to come into force from April 2015.

My second point is that the Scottish Parliament will have a key role to play in oversight and assurance as we develop our approach to delivering the new financial powers. I stress at the outset my enthusiasm and anxiety to ensure that we engage properly with Parliament and the committee about the way in which the Government can fulfil the commitments that we have made on the implementation of the new responsibilities. For example, in the exchange of letters between Mr Crawford and the Secretary of State for Scotland, we made clear the importance that we attach to consent and to parliamentary scrutiny of the approaches many of the implementation

arrangements to do with the financial powers under the Scotland Act 2012.

It is important at the outset that the committee and Parliament are fully involved in setting out their expectations on how they wish to be involved in that process, so that the Government can fulfil the commitments that we made in our exchange of correspondence with the secretary of state and our commitments to Parliament. Those expectations need to be established in a number of areas. There need to be sufficient levels of assurance regarding the arrangements that have been put in place and the operation of the budget-setting process, which it is clear will be different. We must have full sight of the interests and perspectives of the committee and of Parliament on the development of the policy approach to the implementation of any of the new tax arrangements. HM Revenue and Customs will also be involved in that process, although that is separate from the areas for which I carry responsibility to the committee.

Thirdly, I reassure the committee that good progress has been made on the implementation of the provisions in the Scotland Act 2012. As the committee will be aware, the Government has published its consultation paper on the land and buildings transaction tax. The consultation closed on 30 August. The consultation responses are being assessed, and they will influence the shape of the bill that the Government introduces—which it will do, as the First Minister confirmed yesterday, during this parliamentary year.

We will consult on a landfill tax in the autumn—that document will be published relatively shortly. We will, of course, engage fully on the surrounding issues. Before the summer recess, I set out to Parliament a clear perspective on our approach to establishing revenue Scotland as a distinct tax administration function for assessing and collecting both the devolved taxes in Scotland. We are determined to ensure that those operations are progressed in an efficient and effective fashion.

I hope that today's session marks the start of an extensive and constructive dialogue that will help us as we move forward with the implementation of the Scotland Act 2012. We must use the powers and opportunities that have been presented to reinforce Scotland's reputation for effective service delivery and financial management. I look forward to working with the committee to provide Parliament and the committee with the necessary assurance on the implementation and management of the functions in question, which I look forward to discussing with the committee.

The Convener: Thank you very much, cabinet secretary.

I should apologise to Iain Gray, the convener of the Public Audit Committee, who will also participate in this morning's session. I am sorry for forgetting to mention you before we commenced, Iain.

As members are aware, we will be the lead committee on the land and buildings transaction tax bill, the landfill tax bill and the tax management bill, so we will be very much involved with the cabinet secretary in terms of taking this area forward.

On 30 August, you wrote to me about the establishment of revenue Scotland. Could you talk about that process, for the benefit of the committee?

John Swinney: You will recall that, before the summer recess, I made a statement to Parliament that set out my intention to establish revenue Scotland as a distinct tax administration and collection facility for the landfill tax and the land and buildings transaction tax.

Essentially, I see revenue Scotland operating in consort with established bodies that are already involved in the collection of some elements of the tax arrangements in those areas of policy. For example, Registers of Scotland is already a participant in the collection of stamp duty and, therefore, the role that I envisage for revenue Scotland will be to complete that process and fully collect the revised land and buildings transaction tax that the Government will introduce. That will enable us, within the confines of Registers of Scotland, to establish the basis for collecting that particular taxation.

Similarly, on landfill tax, the Scottish Environment Protection Agency is involved in a significant amount of collection of payments from organisations that have some liability for environmental charges, if I may use that terminology. Therefore, extending its scope to take in the responsibilities around the landfill tax appears to be a sensible and efficient way to proceed.

The concept of revenue Scotland is to provide an overarching umbrella above that in order to bring together all those functions in a coherent and cohesive way. I see that as the efficient way to proceed for two reasons. First, there is already part involvement by those organisations in the process of tax collection and, secondly, the comparative cost estimates that I have worked on based on this approach versus a maintenance of the status quo option—if I may call it that—involving HMRC show that the proposed option is cheaper over the forthcoming years.

We have now appointed the first director of revenue Scotland, Eleanor Emberson, who is currently the chief executive of the Scottish Court

Service. She has established a strong reputation for financial efficiency and effectiveness. She will join the Government in that role on 1 October, but she will also assume wider responsibilities as director of financial strategy in the Scottish Government in the early part of the new year, when the existing occupant of that post retires. There will be a handover period, in that respect.

The Convener: You mentioned costs. You will be aware that, in written evidence to the committee, HMRC stated that the

“cost of implementing the Scottish rate of income tax is estimated at £45 million with an annual operating cost of about £4.2m”.

I know that the Scottish Government hoped that those costs could be shared but HMRC and the United Kingdom Government are of the view that the Scottish Government should bear all of those costs. Do you have any further indication of what the costs would be? Are those figures accurate? Will there be significant savings as a result of the changes to the administration of stamp duty and landfill tax that you touched on?

10:15

John Swinney: Your last point was about any financial benefit from the termination of stamp duty and landfill tax on a United Kingdom basis. If there is an administrative saving, the secretary of state has confirmed that that would, in essence, be netted off in relation to the cost of introducing the Scottish rate of income tax. At this stage we do not have any further information on that that I could share with the committee, but the point of principle is welcome, in relation to the offsetting of costs.

With regard to the Scottish rate of income tax—I stress that that is a separate issue to the questions around revenue Scotland, and the administration and organisation of the Scottish rate of income tax will continue to be exercised by HMRC—development work has been undertaken by my officials with HMRC and the Treasury on the memorandum of understanding to take forward the implementation arrangements. However, I do not have any revised cost estimates beyond those that were in the command paper that was published by Her Majesty's Government. I will, of course, update the committee when there is any further detail on that point. I will be happy to do that.

The Convener: There is also the issue of additional devolved taxes as we go forward. I know that the Scottish Government is keen on the devolution of corporation tax and air passenger duty. Is the Scottish Government pursuing or considering the devolution of any other taxes, assuming that we retain the devolution settlement?

John Swinney: As you know, we have discussed with the UK Government a range of points in connection with the Scotland Act 2012 and we pressed for the devolution of a number of areas of taxation responsibility, a couple of which you mentioned. We also pressed on the question of adding corporation tax into the bargain and on issues regarding the Crown estate. The UK Government made clear its unwillingness to devolve those responsibilities. Perhaps it did not make it explicitly clear that it was not prepared to do so, but implicitly it made it clear by closing down issues of consideration around the act. The questions on further tax devolution are somewhat embedded in the debate around the referendum, which will, of course, take place in 2014.

The Convener: Thank you.

I am aware that we are tight for time today, because we have three evidence sessions and 10 items on our agenda. Therefore, rather than do my usual and hog the limelight, I will open out the questioning to members of the committee.

Paul Wheelhouse (South Scotland) (SNP): Welcome to the committee, cabinet secretary. I would like to ask questions on two areas, the first of which is the Holtham model. Do you have any concerns about how the Holtham model will work and are you satisfied that it will protect the Scottish Government's budget from undue volatility in tax revenues?

The second area regards some of the principles that were set out by the Joint Exchequer Committee regarding predictability. Given the uncertainty about exactly how much income tax is raised in Scotland, and the fact that the forecast methodology that will be deployed will evolve over time, do you have any concerns that you may have a risk of difficulty in predicting income tax receipts? You have to announce by December what the Scottish Government intends the SRIT to be, yet the UK Government may make changes to tax thresholds in its budget in March, and you have no advance knowledge of that.

John Swinney: A number of points arise. At the very outset of discussion of the Holtham methodology, I should pay tribute to my colleagues in Wales who have helpfully contributed it to the wider debate. It is appropriate that my colleague and counterpart, the Minister for Finance in Wales, is here to hear me say that.

The Holtham methodology is a welcome change from the provision that was implicit in the Calman recommendations. The Government was concerned about the disadvantages that would emerge from the block grant adjustment mechanisms in the Calman methodology, which we considered would be damaging to Scotland's public finances. Essentially—to put a complex

piece of financial architecture in a slightly more straightforward context—the Holtham methodology links the Scottish tax base with the performance of the Scottish economy, which is a welcome and appropriate connection.

The Holtham methodology does not, of course, remove the potential for volatility; we accept that that is an implicit part of the Scottish rate of income tax. In areas in which we exercise greater financial control over revenue-raising activity, it is necessary to manage any volatility. That is why I argue—unsurprisingly—for a full range of taxation powers to be devolved to the Scottish Parliament, which would enable us to manage the differences between and changes in different elements of taxation.

In dealing with any potential volatility around the Scottish rate of income tax, the Scotland Act 2012 provides for the establishment of a cash reserve to balance out some of the fluctuations that may exist in year-to-year taxation arrangements. That is one tool that can be used. However, to answer the point at the heart of Mr Wheelhouse's question, we want to be in a position to manage the ebbs and flows in taxation that happen from day to day, month to month or year to year, such as the Treasury experienced with regard to tax collection in July. Having a broad range of tax powers at the Administration's disposal would be an effective way to take that forward.

We will have to strengthen some of the work that we have undertaken—or rather, develop new activities—in relation to forecasting, because we must be very confident about that with regard to the judgments that have to be made in setting expectations around the Scottish rate of income tax and the wider budget-setting process.

Paul Wheelhouse: Thank you for that. I will restrict myself to one supplementary question, because I know that other members want to come in.

On forecasting, the Government expenditure and revenue Scotland figures are the best data that are currently available to us. We have discussed with Robert Chote from the Office for Budget Responsibility its forecasting methodology, what the OBR does with the UK Government's tax receipts and how it might evolve forecasts for the Scottish Government. First, can steps be taken to beef up the resource that is available in the OBR, or outwith it but supporting its work, to ensure that there are sufficiently robust forecasts for Scotland?

Secondly, some of the data that you rely on to make those judgments are to do with gross domestic product and other measures of economic performance, but publication of the data for Scotland tends to lag behind that for the UK. Can

we take any steps, either in Scotland or through the Office for National Statistics, to speed up production of those data so that we have them more or less in real time, or at least on the same timescale as the UK Government has its data?

John Swinney: I appreciate that Mr Wheelhouse knows that I have no operational jurisdiction over the OBR. However, given its responsibilities and constitution, the OBR must be able, if it is given a role in this whole process, to carry out an element of forecasting and estimating, and it must be satisfied that it has the capability and effectiveness to do that effectively for Scotland.

Given the importance that is attached to those estimates, I would expect the OBR to indicate clearly if it felt that it did not have sufficient resources or information or the appropriate quality of data to enable it to provide quality advice to the Scottish and United Kingdom Governments. The independent nature of the OBR makes that an absolute requirement. That is a key point that the OBR must address.

On the second point, which was about statistics and the evidence base, we seek at all times to strengthen the statistical base in Scotland. The committee has had discussions with the chief statistician on some of those issues. The chief statistician is keen for us to advance on many of those questions as effectively as possible. At present, I do not feel that the information base is a significant constraint on the activities that we undertake, but that is clearly a conditional view. As we go through the process of working out detail on the Scottish rate of income tax and all that is associated with it, I will want to be satisfied that the quality of data that is available to us in those new areas of activity is sufficiently robust to enable me to provide assurance to Parliament on those questions. That is an important caveat that I insert into the process at this time.

The Convener: Do you have any concerns that, since the establishment of the OBR, it has consistently overestimated UK growth rates? Are you concerned about the possible effect on Scotland if that continues?

John Swinney: The OBR has not been alone in overestimating in growth forecasts. To put the issue into context, I note that growth forecasts have been higher than the reality, which is a relationship that certainly gives me cause to think twice about some of the assumptions that the UK Government has made on the public finances. Clearly, an element of forecasting will now be involved in a major part of Scotland's public finances. The caveat that I put into my answer to Mr Wheelhouse a moment ago was that we have to be attentive to that detail to ensure that it properly reflects the impact that any errors that

might emerge in forecasting of revenues could have on Scotland's public finances, which would be more significant after the implementation of the Scotland Act 2012 than it would be today.

The Convener: I understand your point that the OBR is not the only one that has overestimated, but the day after we took evidence from the OBR, I met senior executives from the Royal Bank of Scotland and found that, whereas the OBR had said that growth this year would be 0.8 per cent, those executives said that it would be 0.2 per cent, although even that now seems wildly optimistic. There seems to be a slight bias in favour of overoptimism in the OBR. We must be somewhat cautious about that as we proceed.

John Swinney: The OBR is a relatively new concept—it is about 18 months old. We need to assess the effectiveness of the estimations that are undertaken. One point that the committee could helpfully consider is the extent to which the dialogue on how we provide assurance to the committee and Parliament on the implementation of the Scotland Act 2012 could be influenced by a broader understanding of a range of estimates on some of the points of detail. That would enable a broadly based view to be taken as we arrive at those important decisions. It is clearly a matter for the committee to decide how it wishes to take forward those points.

Michael McMahon: My question is not dissimilar to the previous ones, although it is more about the practical aspects of the relationship between revenue Scotland and HMRC. I am sure that you are at great pains to avoid ever getting into a dispute with any Whitehall department, but that might happen—government happens that way sometimes, and there are disputes and disagreements. You might want a cogent and cohesive relationship, but things might not always function in that way, given the volatility and practicalities. Do you envisage any areas in which disputes might happen? Is an agreement in place on dispute resolution? Where is the backstop and who decides if you cannot agree on collection and administration?

10:30

John Swinney: I suspect that Mr McMahon's question gets to the nub of sensitivities in all of us. It is not just about revenue Scotland and HMRC; such issues are played out in the correspondence between Bruce Crawford and the secretary of state about how we reach agreement, and it might be best if I answer the question in that context.

The Government was able to arrive at an agreement with the UK Government on the implementation of the Scotland Act because it was accepted that our approach would be consistent

with the principles of the statement of funding policy, which was helpful. I remind the committee that the principles are broad and cover accountability, autonomy, transparency, economic efficiency, stability and predictability, discipline and, crucially, consent. On consent, the principle is:

“the system commands the support of governments, parliaments and people and is equitable and predictable in operation.”

Let me labour the point about consent. The importance of reaching joint agreement is the essence of the correspondence between the Scottish Government and the UK Government. If there is a sense that something has been—let me put it in this way—done to us, that will not create an environment that is conducive to agreement. Therefore, making the process consistent with the principles, going through the good practice of evidence gathering and respecting the Parliament’s decisions and influence are important elements in the formulation of agreement between the UK Government and the Scottish Government.

I do not think that it will come as a great revelation to Mr McMahon if I say that most issues come down to money. Ultimately, the block grant adjustment mechanism will be a key feature in how issues are resolved and agreement is reached. The committee might want to spend time considering how the mechanism will operate, to inform the debate and influence the Scottish Government in relation to what we take to discussions with the UK Government—that is just a suggestion, but such work would certainly help me in the context of my duty to give assurances to the Parliament. If I know what the Parliament is looking for, I will have a better sense of what I might achieve in negotiations with the UK Government.

We discussed with the UK Government how we might construct a process that would enable us to reach agreement. I readily accept that there is a fair question to be asked about what happens if we cannot get agreement, and I suppose that my answer is that well-established dispute resolution mechanisms operate in the interplay between the Scottish Government—and all the devolved Administrations—and the UK Government. We have tested the mechanisms on one occasion, and there was a satisfactory conclusion.

Work is being done at official level to develop a memorandum of understanding between the Scottish Government and HMRC—by extension, that involves the UK Government—about how we undertake much of the detailed operational work. That will help, by providing further processes to assist us if necessary.

Michael McMahon: Thank you. I wanted to ascertain whether work remains to be done and

there is scope for us to look at the issue. Your suggestion is helpful.

John Swinney: The committee will tell me when it thinks that I should mind my own business, but I have been giving some thought to how I fulfil my duty to assure the Parliament about the nature of the agreement that we have reached with the UK Government. The more that I can have a strong sense of what Parliament expects of ministers in that process long before we get involved in that discussion, the better, as that enables me to fulfil my duty to Parliament.

Michael McMahon: That is helpful.

John Mason (Glasgow Shettleston) (SNP): There was a very positive reaction when you set out the principles of the Scottish tax system, because although we are introducing only two relatively small new Scottish taxes, they are the first ones and, I presume, set a precedent for the way ahead. To what extent can we do things a little bit differently? In particular, can we introduce simplicity and enable people to understand taxes better? The Westminster system has been widely criticised for being so complex. The UK Government brings in rules and there is avoidance, so it introduces more rules and there is more avoidance. Can we avoid going down that route?

John Swinney: Mr Mason made an important point at the outset. We should have a clear sense of the scope of what we can do. We can, if we so choose, change the character of two tax provisions: the land and buildings transaction tax, which is a replacement for stamp duty, and the landfill tax. In my statement back in June, I set out the principles that we would apply to that activity: the taxes would be proportionate to the ability to pay; there would be certainty for the taxpayer; there would be convenient and easy payment; and there would be efficiency. Those four points of principle essentially emerged from the thinking of Adam Smith. I have tried to apply them in relation to the land and buildings transaction tax and I will do exactly the same in relation to the landfill tax.

Mr Mason characterised the reaction to my statement fairly. The response from a range of stakeholders to the nature of our proposals—to move away from a slab tax to a more progressive tax, which essentially fulfils our commitment to the tax being proportionate to the ability to pay—has been broadly positive. My guidance to officials is that we should aim to use every opportunity to simplify the process. That has to be an advantage of having control over these responsibilities.

We can do more by linking Registers of Scotland to the collection and administration of the land and buildings transaction tax, and by linking SEPA to the landfill tax. Those organisations are

already in that space, so linking those tax provisions to their wider responsibilities and competencies strikes me as a way of making it easier for consumers to relate to those tax provisions. We will take that principle forward as part of the discussion.

I am keen to involve, and we have involved over the summer, a range of professional organisations, such as the Institute of Chartered Accountants—an organisation of which Mr Mason may even be a member; I shall clarify his declaration of interests on his behalf—

John Mason: I declare an interest.

John Swinney: We also involved the Law Society of Scotland and the Chartered Institute of Taxation. Those organisations have provided helpful input into how the aspirations that Mr Mason mentions would assist in the process.

Elaine Murray: The introduction of the new financial powers will require some changes to the Scottish budget process, which will be agreed with the committee in due course. The committee has had preliminary discussions about how the process might change. Bearing in mind that people are a great deal more interested in budgets when that involves what they pay in taxes as well as how the money is spent, have you had any thoughts about how the budget process in the Scottish Parliament might change as a result of the new powers?

John Swinney: If I may issue a caveat to my remarks, I am in Parliament's hands on that point. My officials are willing to work constructively with the committee, its clerks and its adviser to test out ways in which the budget process can be revised to take account of the responsibilities that we will have. The key consideration is that we must be able to synchronise all the input information—if I can call it that—about the revenue that we expect when we set the budget.

I will give a parallel with the current situation. When I set an annual budget, I declare my expectation of non-domestic rates income and then have to guarantee it. That declaration is important because it forms part of the overall financial envelope that the Government distributes to the range of different public services that it can support.

It is important that whatever other inputs of income come into the budget process be synchronised to ensure that a complete picture is set out for the Parliament and that we can have confidence in the estimates that are made on the provisions that emerge as a consequence of the detailed budget.

It strikes me that a key part of what we need to ensure is that, at the outset of the budget process,

the Parliament is given the complete picture of information, as currently happens at the start of the budget process.

My impression is that parliamentary scrutiny of budget provisions is comprehensive at subject committee level and in its summary form, when it comes to the Finance Committee, before we move to consideration in the chamber at stages 1 and 3 of the process. It strikes me that we require not further opportunities for scrutiny—that process is pretty well established—but to ensure that synchronised and complete information is available to the Parliament, despite the fact that, to return to Mr Wheelhouse's point, there may be questions about the predictability of that information.

Mark McDonald (North East Scotland) (SNP): I am interested in the landfill tax. I note that the Scottish Government has indicated its intention to replace the landfill tax and that there will be a consultation on that. Is the cabinet secretary willing to share some of his early thinking on that?

John Swinney: My key consideration is that the landfill tax must effectively and implicitly support the good progress that is being made on encouraging the improvement in recycling in Scotland as we move towards the zero waste objective. We must establish that link and, ideally, find ways of incentivising further improvements in that practice. It is possible to achieve that, and a wide range of stakeholders in Scotland can help us to think through some of the opportunities that exist to do that.

Mark McDonald: Before I was elected to Parliament, I served as the chair of an environmental organisation that was in receipt of landfill tax funding. That funding is currently administered by Entrust, which is a UK-wide body. Does the cabinet secretary envisage something similar being replicated in Scotland, or has he not given that matter detailed consideration yet?

John Swinney: That issue is under consideration in the formulation of the consultation document. I recognise the very good work that has been undertaken over a 15-year period on the implications of the landfill communities fund, and we will seek to encourage a continuation of that activity. We have not concluded whether there is a better or more effective way to provide that funding, nor will we do that until after the consultation document has been issued and submissions have been made. I see that as an essential element of the whole approach to delivering the zero waste agenda that the Government is determined to secure.

Iain Gray (East Lothian) (Lab): As might be expected, the Public Audit Committee has begun to take an interest in the audit and accountability

arrangements around the new tax powers that we have been discussing—particularly around the rate of Scottish income tax, given that that involves Her Majesty's Revenue and Customs, which is not a body that the Parliament normally has a role in auditing. The Public Audit Committee may have been a little concerned to hear HMRC say in evidence to this committee that, as the Scottish rate will be part of the United Kingdom income tax system, it will be difficult to separate accountability for one aspect of the delivery of the income tax system from accountability for the rest. The Public Audit Committee would take the view that there must be some separation of accountability so that both the Scottish Government and the Scottish Parliament can reassure themselves that the Scottish taxpayer funding that is spent by HMRC in operating the system—[*Interruption.*]

The Convener: I am afraid that I must suspend the meeting while the fire alarm sounds.

10:46

Meeting suspended.

10:58

On resuming—

The Convener: Iain Gray has the floor.

Iain Gray: As we have lost so much time, I will cut to the question. Cabinet secretary, you have talked a number of times about the on-going work to develop the memorandum of understanding with HMRC. What progress has been made on, and what are your aspirations for, audit and transparency in the relationship between the National Audit Office, the Scottish Government and this Parliament? What arrangements would you like to ensure transparency in the operation of the Scottish income tax?

11:00

John Swinney: There are a number of points to make in answer to Mr Gray's question. When I dealt with Mr McMahon's question, I referred to the secretary of state's letter, which says that the principles of the approach that will be taken are to be consistent with the principles that are set out in the statement of funding policy. As I said to Mr McMahon, that encompasses a range of factors. However, the principles that are relevant to the points that Mr Gray has raised are those of accountability, transparency and consent. I would want to construct an approach that was consistent with those principles.

The second point is about what we have begun to discuss within the Joint Exchequer Committee. The secretary of state and I supplied this

committee with papers and minutes from the JEC's previous meetings. The minutes of 18 June, which were supplied to this committee just yesterday, show that the JEC noted a number of points, one of which is that

"the accountability of HMRC would be enhanced by the appointment of the additional HMRC accounting officer who would be responsible for the Scottish Rate. The role of this individual in reporting to the Scottish Parliament and its Committees was intended to be directly analogous to the role of HMRC's principal accounting officer in respect of the UK Parliament and its Committees".

I think that that is a significant commitment.

My third point is to make the same suggestion to Mr Gray and the Public Audit Committee as I made to this committee, which is that the Public Audit Committee needs to form its expectations of what would be acceptable to it in this process. I will require a certain amount of assurance from HMRC because I will be dependent on it for information, collection capability and a variety of elements of this—[*Interruption.*]

That fire alert announcement will make a fascinating addition to the *Official Report* and I look forward to seeing how it ascribes those words.

Iain Gray: You should probably have saved that interruption for a more difficult, future committee appearance. [*Laughter.*]

John Swinney: As Mr Gray correctly said, I have had somebody nudging the fire alarm system in other parts of the building.

To be serious, I should say that my final point is the important one, which is that, as finance minister, I will require to be assured about a variety of issues in respect of HMRC's performance in the collection of the Scottish rate of income tax and all the arrangements that go with that. Equally, the Public Audit Committee and the Finance Committee must be fully and properly assured by those arrangements. I think that we would be well served by developing an approach that is consistent with the points in the statement of funding policy and that ensures that the aspirations of the parliamentary committees are properly taken into account. My approach and that of my officials would be to work closely with the committee in that respect.

Iain Gray: That is extremely helpful. Certainly, I will discuss with my committee the suggestion that we might be able to suggest what we think would be acceptable. I just wonder what kind of timescale there is around the negotiation of the memorandum. Obviously, once that is agreed it would be more difficult to make an input.

John Swinney: Work is continuing on the memorandum of understanding and it has not come to me yet. I am happy at this stage for the

committee and its clerks to talk to my officials about the points that have been raised. I am happy to facilitate such discussions. Clearly, as part of the assurance process before I sign off a memorandum of understanding I have to be confident that I am fulfilling my duty to Parliament in the fashion that I spoke to Mr McMahon about earlier and that the Parliament and its committees are going to be broadly comfortable with what I have signed up to. The earlier that we have that dialogue, the better.

Iain Gray: That is very helpful—thanks.

The Convener: Thank you very much. That appears to have exhausted the questions from committee members. I thank the cabinet secretary and his colleagues for coming to the committee. I will not suspend the meeting, but I will allow 45 seconds for a change of witnesses.

Enterprise and Regulatory Reform Bill

11:05

The Convener: Item 3 is the second of our two sessions with the cabinet secretary and concerns consideration of the Enterprise and Regulatory Reform Bill legislative consent memorandum. Accompanying the cabinet secretary are Dr Linda Pooley and Stuart Foubister from the Scottish Government. I invite the cabinet secretary to make an opening statement explaining the legislative consent memorandum.

John Swinney: I thank the committee for providing the opportunity to discuss the provisions of the Enterprise and Regulatory Reform Bill. The vast majority of the provisions in the bill are reserved to the United Kingdom Government. However, part 1 makes provision for the Green Investment Bank, and the clauses in that part—other than clause 6, which deals with the laying of documents before the Westminster Parliament—fall within the legislative competence of this Parliament in so far as they extend to Scotland. The provisions in that part allow Her Majesty's Treasury to give the Green Investment Bank financial assistance as long as it is more than half owned by the Crown and as long as two further conditions are met: first, that the Secretary of State for Business, Innovation and Skills has provided the Green Investment Bank with an operational independence undertaking; and, secondly, that, as the constitution of the Green Investment Bank allows, it engages only in activities that contribute to the achievement of one or more of the green purposes in the UK.

The green purposes of the Green Investment Bank are defined as being the reduction of greenhouse gas emissions; the advancement of efficiency in the use of natural resources; the protection or enhancement of the natural environment; the protection or enhancement of biodiversity; and the promotion of environmental sustainability. Those are areas in which Scotland has considerable policy responsibility and are priority areas for the Scottish Government. Those green purposes complement each other and have a broad reach across the low-carbon agenda. Ministers welcome the fact that they are in the bill and that they will underpin the operational decision making within the institution.

I should also mention briefly that the provisions in the bill that relate to the Green Investment Bank do not control board or other appointments, do not set its location and do not set out any expectations of how it will operate financially in terms of any borrowing powers or financial products that it must

offer. Those matters will be dealt with through the corporate governance procedures.

Ministers are content that part 1 will ensure that the Green Investment Bank has a low-carbon focus at the heart of its operation. Furthermore, the Scottish Government believes that the Green Investment Bank will prove to be a beneficial tool in efforts to improve the landscape of investment in our low-carbon economy, and therefore we welcome the initiative. For this purpose, ministers were content to contribute £103 million of the fossil fuel levy moneys to the initial £3 billion capital for the Green Investment Bank. We agreed to that because we were confident that Scotland's low-carbon sector is at the forefront of demonstrating the economic case for green growth and will be in a position to present investment-ready projects that are suitable for the Green Investment Bank's support.

The Green Investment Bank potentially will bring much needed investment where market failures have held the sector back. In addition, the announcement in March 2012 that Edinburgh had been chosen as the base for the Green Investment Bank's headquarters, with the transactions team based in London, was great news for the city and a ringing endorsement of Scotland's leading place in the UK's green economy. The manner in which Scottish commercial, academic and civic society—including all parties in the Parliament—came together to support Edinburgh's bid was evidence of the consensus of opinion that Scotland is well placed to be at the centre of the shift to a low-carbon economy.

Scottish ministers believe, therefore, that it is sensible that the provisions in the bill relating to the establishment of the Green Investment Bank and its green purposes should be considered by the UK Parliament on the basis that there is no evident benefit in separate legislation, which would add unnecessary cost and delay. Therefore, I ask the committee to support the draft legislative consent memorandum that has been laid before it.

The Convener: Thank you, cabinet secretary. Like all MSPs, I welcome the establishment of the Green Investment Bank in Edinburgh.

I have a couple of questions. I am concerned that, under the bill, the Green Investment Bank will not be able to borrow until debt is falling as a percentage of gross domestic product. That delay and restriction will damage the ability of the Green Investment Bank to leverage investment from the private sector. Has the Scottish Government made any representations to the UK Government on that issue?

John Swinney: Borrowing is an issue that we are materially absorbed in with the UK

Government. Our view has been that, in the wider economic debate, there is an argument for a level of discrete borrowing to support capital investment that can support economic growth. That is a core line of argument that this Government has made to the UK Government, given the current economic circumstances.

We are involved in active discussion with the UK Government on the composition and operations of the Green Investment Bank. Borrowing is an issue on which the UK Government has made clear its position, but we would be happy to make those points to the UK Government as part of our wider representations on the importance of having an effective level of borrowing to support capital investment in our economy.

The Convener: Thank you—that is much appreciated.

There is one other issue that I want to raise. As I understand it, the focus of the GIB will be on offshore wind, non-domestic energy efficiency and waste. Its focus does not seem to include tidal or wave energy. Given that Scotland is leading the world in some of those technologies, that is an opportunity missed. Would the Scottish Government be prepared to raise that issue with the UK Government in the context of the bill?

John Swinney: The UK Government spelled out at the outset the areas of active interest for the GIB: its activities are about encouraging investment in particular sectors. To be fair, although those areas of activity have been set out, they have not been set in stone for all time. There is an explicit acceptance that the areas of focus will develop as the GIB develops its operations.

I am aware of the concern about the marine sector. We must ensure that we put in place effective support for that sector's development. In my introductory remarks, I mentioned the £103 million of fossil fuel levy money that has gone into the GIB; another £103 million is coming into renewable investments in Scotland, which will add to the £200 million for renewables that has already been budgeted for in the three-year spending review. I suspect that a lot of that will end up going in the direction of the marine sector, as we try to develop the capabilities of new devices and products.

In the context of the finance that is available through those channels and the possibility of other support being available through the Green Investment Bank in the medium, as opposed to the short, term, I think that there is an acceptable way forward for the marine renewables sector. However, we will continue to have dialogue with the UK Government about what the right focus is for the GIB. We want to ensure that the capability

and potential of the marine sector in Scotland are fulfilled through the investment programme.

The Convener: I open out the discussion to other members.

Paul Wheelhouse: The convener has helpfully covered some of the issues that I had intended to cover, but a concern that WWF raised in a briefing on the bill that it sent to members of the UK Parliament was about

“the advancement of efficiency in the use of natural resources”,

which is the second of the green purposes that is listed for the GIB. WWF’s concern was that it might be used to justify investment by the GIB in the more efficient use of fossil fuel, such as coal, or in nuclear or what WWF would regard as unsustainable biofuels. Rather than express my own opinion on that concern, I invite the cabinet secretary to comment on it.

11:15

John Swinney: I recognise the sensitivity there. It is important not to view the green purposes in compartments—they must be viewed together. The purposes include

“the protection or enhancement of the natural environment”

as well as

“the promotion of environmental sustainability”

and

“the reduction of greenhouse gas emissions”.

I understand the sensitivity of considering that purpose within a compartment but, considered in the round, the green purposes give effective clarity on what would be a reasonable set of activities for the Green Investment Bank to be involved in.

Paul Wheelhouse: Thank you—that is helpful.

Elaine Murray: Some of the points that I wanted to raise have been covered. I preface my question by making it clear that agreeing to the LCM on the Green Investment Bank does not imply agreement with other aspects of the Enterprise and Regulatory Reform Bill, which some committee members find offensive and would oppose.

Have you had assurances from the UK Government on whether the headquarters of the bank will remain in Edinburgh in the event of constitutional reform post-2014?

John Swinney: I acknowledge Dr Murray’s point about the scope and extent of the bill. I was clear in my comments that the issues that are at stake for the Scottish Government are those in part 1, which relates to the Green Investment

Bank. There is no question of further considerations being applied in that respect.

On Dr Murray’s second point, there have been no discussions with the UK Government on that question.

The Convener: The committee has to report to Parliament on its views on the LCM. Do members have any particular issues to raise in the report or are they content for it simply to refer people to the *Official Report* of this evidence session?

Members indicated agreement.

The Convener: Are members therefore content with the terms of the legislative consent memorandum and content to report accordingly?

Members indicated agreement.

The Convener: I thank the witnesses for attending and suspend the meeting until 11.25.

11:17

Meeting suspended.

11:24

On resuming—

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

The Convener: Everybody is in position, so we will start one minute earlier than I suggested, as we still have a fairly packed agenda.

Item 4 is the first of four oral evidence sessions in the committee's stage 1 scrutiny of the Freedom of Information (Amendment) (Scotland) Bill. Today we will take evidence from the Scottish Government bill team. I welcome to the meeting Zoe Mochrie, Heike Stephenson and Andrew Gunn, and I invite a member of the bill team to make an opening statement.

Andrew Gunn (Scottish Government): The Freedom of Information (Scotland) Act 2002 is widely regarded as an effective piece of legislation that sets rigorous standards for public authorities to follow when responding to requests for information. It was acknowledged by the first Scottish Information Commissioner as being strong and able to withstand international scrutiny. The former commissioner also considered the law to be progressive, with authorities complying with their obligations and the public making widespread use of their FOI rights.

The act has been in operation for more than seven years and, in that relatively short period, has been successfully established as being integral to the day-to-day business of public authority administration, and has resulted in more information being made public, in the interests of accountability and transparency.

However, although the act is generally considered to be effective, weaknesses have been identified—primarily around the inflexibility of the order-making power, with regard to revising the live standard exemptions, and also in the inability to bring a prosecution. Therefore, although they are generally small-scale, the key amendments in the bill will pave the way for more information to be made publicly available earlier, and for a prosecution to be brought in the event of information that has been the subject of a request being deliberately destroyed or concealed, with a view to preventing its disclosure.

Two other amendments—one that will add clarity and another that will increase protection for personal data—are taken from the special report that was presented to Parliament by the former information commissioner. We anticipate taking forward other recommendations that are contained

in the report by means of guidance or the statutory code of practice.

The limited scale of the bill is in line with the second of the Scottish Government's six principles of freedom of information that were set out in June 2007, which commits the Government to adjusting the regime where it is necessary and sensible to do so. It is perhaps also worth noting that, in its recent report following post-legislative scrutiny of the UK Freedom of Information Act 2000, the House of Commons Justice Committee made very few recommendations for revision, although several of the recommendations would bring the UK legislation more into line with the Scottish act—for example, in terms of setting statutory timescales and on treatment of research material. To some extent, that reflects the close relationship that the two pieces of legislation have always had. When the initial freedom of information bill was being debated, emphasis was put on the need for general compatibility between the separate regimes. The same arguments seem to apply today—for example, in ensuring consistency of approach to information relating to communications with Her Majesty, given the commonality of the monarch as shared head of state.

The bill specifically does not address the extension of coverage. Extension has been the subject of consultation and Scottish ministers are clear that a decision has been deferred until Parliament has considered the amendment bill. The power to extend is already in the legislation, and, as such, it would not be in the spirit of the original act to extend coverage by means of primary legislation.

Finally, the bill, as well as resulting in anticipated secondary legislation that will result in more information being made public, also forms one of the legislative strands of the Scottish Government's developing transparency agenda. Consultation on that, in the form of initial engagement with stakeholders, is anticipated for later this year, as the Government seeks to promote greater openness and accountability across the wider public sector.

The Convener: Thank you. I have to say that it is most frustrating to realise, when one wades through such a mountain of information, that almost every question that one wanted to ask seems to have been already answered in all the documents that have been provided. It seems to be inverse—the more work one puts into reading documents, the less one has to ask, because so many questions are already answered. I will try, nonetheless, and I am sure that colleagues will do likewise.

Communication with Her Majesty is obviously a key point in the bill, and you talked about the

Scottish Government mirroring the UK Government's position. The UK bill passed through its stages in a timescale that one would suggest would not normally provide enough scrutiny—for example, its passage through the House of Lords within three days. What is your view on that and how has it impacted on legislation that we are hoping in effect to mirror?

11:30

Zoe Mochrie (Scottish Government): That is a difficult question to answer, but I hope that the Scottish Parliament is given ample opportunity to scrutinise the provision, unlike your equivalents south of the border.

There was much criticism of the late introduction of the royal exemption amendment. I think that it is a reasonable amendment, and our intention is to ensure a consistent approach across the UK with regard to information of similar types. Hopefully, the committee will have sufficient time to explore quite how that will operate.

The Convener: Indeed. I asked the question because we are building on existing legislation.

Unison raised concerns about the application of the public interest test. The documents have provided an answer but, for the record, can you say why the bill team does not believe that there is, in terms of communication with Her Majesty, a public-interest issue with regard to the position of the monarch, the heir to the throne and the second in line to the throne?

Zoe Mochrie: The proposed change will ensure that the long-standing constitutional convention surrounding the monarchy and its records is upheld. Ministers do not believe that the Freedom of Information (Scotland) Act 2002 was intended to supersede those long-standing conventions. The issue of public interest is, by its nature, a subjective test, and it is difficult to see how one would be able appropriately to apply that test against the constitutional convention and the monarch's duty and right to counsel, warn and advise her ministers.

The Convener: Why do the Environmental Information (Scotland) Regulations 2004 provide a much wider definition of Scottish public authorities than the bill does? Why did you decide on the definition in the bill?

Zoe Mochrie: It is partly a matter of the origins of the two different regimes. The Environmental Information (Scotland) Regulations 2004 implemented a European directive and—as you rightly note—include no protection for communications with the monarch. That protection exists, however, in the 2002 act, and we think that it is reasonable to ensure that the confidentiality of

communications with the royal household is upheld through this legislation.

The Convener: Can you talk about the flexibility in the timescale for the operation of the act? In evidence, we have heard differing views about whether the period of operation should be 30 years—as it is at the moment—or 15 years, or whether there should be flexibility.

Andrew Gunn: As you say, the consultation responses have indicated varying views on the approach to exemptions. The 2009 consultation threw up the fact that a one-size-fits-all approach is problematic. At the moment, the 30-year rule covers eight exemptions. However, with regard to a desire to reduce the lifespan of those exemptions, we must acknowledge that there are, around certain categories and classes of information, sensitivities such as commercial sensitivity and confidentiality.

The act does not at the moment contain the power to enable an exemption-by-exemption approach to be taken. We hope to get the power to be able to do that although, obviously, the stated position of the Government is that we will reduce the majority of the exemptions to 15 years but maintain protection with regard to confidentiality and royal communications.

The Convener: You talked about the fact that the bill does not provide enough leeway to enable pursuit of prosecutions. Over the period since enactment, have there been many situations in which you would have liked to prosecute but have been unable to do so?

Andrew Gunn: The Committee might want to ask the Scottish Information Commissioner about that when you take evidence from her next week. We understand from her that there have been—I think—seven occasions on which there was potentially sufficient evidence to proceed with a prosecution but, because of the six months time bar, it was not possible to pursue those further.

Mark McDonald: Many of members' questions appear to have been addressed, although I have a brief question. I understand that if the changes on restrictions that are proposed by the bill had been in place at the introduction of the Freedom of Information (Scotland) Act 2002, only one freedom of information request would have been impacted. Is that correct?

Zoe Mochrie: Do you mean in terms of the royal exemption?

Mark McDonald: Yes.

Zoe Mochrie: I believe that one Scottish Government request would have been impacted on, but I cannot speak for the wider range of bodies that are covered by the Freedom of Information (Scotland) Act 2002.

Mark McDonald: Okay. I thank you for that.

Elaine Murray: I want to explore the extension of coverage. I understood the panel's argument to be that it is not necessary to look at extension in the context of the Freedom of Information (Amendment) (Scotland) Bill because secondary legislation would cover it. However, might one not make the perhaps quite controversial argument that the level of consultation is much higher for primary legislation, so there could be a case for including extension in primary legislation in order to enable that degree of consultation with the bodies that might be affected? For example, it seems strange to me that a council housing department, which is supported by tenants' rent and the Scottish Government, is subject to FOI legislation, while a registered social landlord who may have received stock from the council—again supported by tenants' rent and the Scottish Government—is not and tenants are aligned with what the regulator is prepared to publish about its inquiry. Is it because the issue is technical that we are not looking at extension at this point? Is it likely that there will be secondary legislation on extension?

Andrew Gunn: There has certainly been no lack of consultation on the extension of coverage—it goes back several years. Scottish ministers are anxious to take a proportionate approach. Obviously, the power to extend coverage is in the act and the provision is there in order to extend coverage. It would not be in the spirit of the original legislation to use primary legislation to put into practice a power that already exists.

Clearly, there are anomalies with the situation. However, the position of Scottish ministers is clear; we have consulted and a decision will be deferred until—this is a sequential issue—Parliament has considered the Freedom of Information (Amendment) (Scotland) Bill.

It is also important to place the matter in context. Extension is sometimes seen as a be-all and end-all, but there are other means of acquiring information from bodies that are not covered, and the wider transparency agenda is intended to cater for that. For example, "The Scottish Social Housing Charter" is opening up routes to information. That is not extension; it is another route through which to access information.

Elaine Murray: The point about primary legislation is that it is subject to a degree of parliamentary scrutiny to which secondary legislation is not subject. If organisations have concerns about extension, primary legislation provides a better opportunity for discussing their concerns. However, that may be an unfair matter to raise with you, as it is a policy issue.

Andrew Gunn: It is a policy issue, and the minister will attend the committee next week. We have been through consultation and business regulatory impact assessments have been undertaken. The position is clear—the decision will be deferred.

Paul Wheelhouse: Welcome to the committee. In his letter to the committee, the Minister for Parliamentary Business and Chief Whip mentions an issue that relates to the proposed procurement reform bill. There has been concern among the public about the lack of access to information on the same basis from private sector organisations under the freedom of information legislation and the minister states:

"I would urge the Committee to consider the very real impact that procurement reform could have on the availability, to the public as well as to the private sector, of information relating to public sector spending."

I regard that as referring to public contracts that are given to private sector organisations, and the need to open that area up and establish greater transparency. How does the Government bill team view the interaction between that proposal and what is happening through procurement reform to open up and make more transparent the relationship between Government and the public sector and private sector organisations? There is an obvious public interest in what happens in that regard.

Andrew Gunn: At present, we are only at the consultation stage of the procurement reform bill. There will be on-going contact between officials in order to incorporate elements of transparency in the bill.

To go back to the previous answer, we view the issue as forming part of the wider transparency agenda. There are already freedom of information clauses in contractual arrangements, so it is not as if the information is not accessible. The Public Records (Scotland) Act 2011 is also putting in place structures and records management policies that increase access to private contractual information. There is a multistrand approach, of which the procurement reform bill will form one element, but there are discussions to be had.

Paul Wheelhouse: So, you are highlighting that element as part of a wider programme of transparency.

To pick up on Dr Murray's point about consultation on primary legislation, the proposed procurement reform bill gives you an opportunity for extensive consultation and open discussion in the appropriate committee on that issue as it relates to private sector organisations that contract with the public sector. We can open that discussion out a lot more.

Andrew Gunn: That proposed bill is certainly recognised as being an opportunity within the transparency agenda on which we are committed to consulting, and we certainly envisage, and are committed to taking forward, stakeholder engagement later this year. It is one element of that agenda.

John Mason: I will start with the royal family. The point has been made elsewhere that, in other areas of legislation, the privilege—or whatever you want to call it—of the royal family is gradually being reduced. It has been said that royal privilege is a long-standing convention, but this Parliament is not afraid of changing long-standing conventions. Why do we have to be so protective in the area of freedom of information when in other areas we are becoming more relaxed about the royal family?

Zoe Mochrie: It is about equality of treatment under the two regimes that operate in the United Kingdom. As Andrew Gunn said, there has always been a degree of complementarity between Scottish and UK acts in areas of common interest. Where it is considered advisable to ensure cross-border co-operation, exemptions in Scottish legislation are intended to be compatible with the relevant provisions in the UK freedom of information legislation. Ministers believe that the same argument applies to the commonality of the shared monarch.

John Mason: Why is the monarch treated differently? We treat charities differently in Scotland to how they are treated in England, even when they are the same charities, so why is there a fear of treating the monarchy differently?

Zoe Mochrie: The monarchy occupies a unique position in British life. The monarch is appointed for life and has the right and duty to counsel her ministers and her Government, which includes the Scottish ministers and the Scottish Government as much as the UK ministers and the UK Government.

John Mason: Okay.

Secondly, the point has been made that the voluntary sector may be reluctant to use the freedom of information legislation because it might affect its relationship with those from whom it requests information. Is that just something that we cannot do anything about, because the voluntary sector might be afraid to use whatever legislation is in place?

11:45

Zoe Mochrie: The trend is worrying. We are not quite sure why voluntary organisations are so reluctant to use the legislation. It is useful that the Scottish Information Commissioner's office has

undertaken research on that and brought it to public authorities' attention. What we should do to encourage such organisations to make better use of the 2002 act is not entirely clear.

John Mason: Perhaps we need to follow that up with organisations.

My third point follows up what Dr Murray and others talked about and concerns extending the number of bodies that the legislation includes. I take the point that the power exists, but that is a little academic, given that—as far as I am aware—it has not been used. As councils hive off parts of themselves—that has happened in Glasgow—does the amount of information that is covered by FOI legislation reduce? Big chunks of information are leaving the public sector and going into arm's-length external organisations, trusts or whatever the bodies are called. The amount of bodies that are covered seems to be contracting, so it is—even to stand still—surely necessary to expand the number of bodies that are included.

Andrew Gunn: Ultimately, extension is a political decision. The Scottish ministers' view on that is clear. They have consulted contractors, Glasgow Housing Association and various other bodies and the decision was made to defer the decision on extension.

I take your point about ALEOs and so on being hived off. The consultation on extension did not show significant unmet demand—indeed, it showed almost no evidence of unmet demand for information, which should still be available in the majority of cases through the commissioning public authorities. A route to information should still exist; after all, commissioning authorities are responsible for funding such organisations. Consultation has shown that most members of the public prefer to go to a commissioning public authority as a first port of call for information.

John Mason: I take the point—that is right in some cases. Glasgow City Council has instructed some of its ALEOs to adhere to the legislation, but I am not sure whether that is the case for Glasgow Housing Association, which the council does not control as much.

I am a little surprised that you say that there is no evidence of unmet demand. For example, some of us have tried to find out about Glasgow City Council's private finance initiative contracts with the private sector. The assumption must be that the council and the private sector are both embarrassed by agreements and do not want them to be in the public domain. It is in neither side's interests to get the information in the public domain, and we as the public have no way of accessing it. Surely that is not transparency.

Andrew Gunn: As far as I am aware, Glasgow Housing Association operates in the legislation's

spirit. It will be interesting to see the impact on the issue of the criteria and the outcomes that are set under “The Scottish Social Housing Charter” to make more information transparent and accessible. The Scottish Housing Regulator regulates that.

John Mason: What about, say, a contract between a council and the private sector that neither wants to let the public see?

Andrew Gunn: A council will be subject to the legislation, so if it holds a contract, the standard request process can be followed. If a council invokes exemptions, that is its right. The ultimate appeal is to the Scottish Information Commissioner.

John Mason: If a confidentiality agreement exists, the result of all that process is that we do not get access to the information. Surely the whole point is to make everything more transparent, is it not?

Andrew Gunn: The Scottish ministers are certainly fully committed to transparency, but the decision on whether to extend the legislation to contractors and housing associations is ultimately political.

John Mason: Thank you. I will raise the points with other people.

The Convener: I thank committee members.

I still have some questions to ask. With regard to the lifespan of certain exemptions, the Scottish Government has said that it has near-universal support for the changes to the definition of historical records. However, the Commission for Ethical Standards in Public Life in Scotland has said that it is

“concerned that the level of flexibility proposed will lead to a more complex and less accessible Freedom of Information system.”

What is your response to that?

I do not see much in the financial memorandum to suggest that introducing flexibility will cost more to implement. Is your view that there will be zero cost? What is your view on the suggestion that flexibility will make the system less accessible?

Andrew Gunn: We are certainly aware of the comment about increased complexity. There is no denying that removing more exemptions from the blanket list of 30 exemptions—putting in more subsections to take out more records—will increase complexity. We are committed to consulting on a draft order before putting it into effect, which will give us another opportunity to tease out any issues around complexity that public authorities may envisage. However, we feel that there will not be a significant increase in the level of complexity, and that any increase will be more

than counterbalanced—in fact, outweighed—by the gain in the increased amount of information that will be made public.

There is a balance to be struck, which I would anticipate being teased out during consultation on the draft order. However, allowing for a slight increase in the level of complexity, more information will be made public, which is, after all, the ultimate goal.

In terms of costs—

The Convener: I am sorry to interrupt, but the financial memorandum states:

“Information requests are estimated to cost the Scottish Government £236”.

Would additional complexity add to the cost of delivery?

Andrew Gunn: That is a slightly different issue. The calculated cost of an information request to the Scottish Government is £236. The fact that different exemptions will apply is unlikely to have a significant impact—if any—on the number of requests that come in to an organisation. The overall costs of responding to FOI requests—which would currently be absorbed in the day-to-day running costs of any public authority—are very unlikely to change.

The Convener: I would have thought that there would be additional costs. Even the need for someone to check which particular regime they are following would surely take time and add to the cost.

Andrew Gunn: I suspect that there is the potential for a minimal impact in that respect. The consultation process should tease out any relevant cost implications.

On the same point, it is important to stress that the intention to release further information is not necessarily proactive. If and when the order-making powers come in, it is not necessarily the case that all public authorities that are faced with different exemption lifespans will overnight be releasing information 15 years earlier than they would do at present; that would be entirely up to the individual public authority.

In all probability, the release will be reactive, as it has been before, so that the new lifespans will be applied when a request comes in. The changes will not necessarily create any more requests—it is just that slightly different rules and regulations will apply when an authority responds to a request. It will be entirely up to the individual public authority whether it takes a proactive or reactive approach.

The Convener: In my view, complexity always seems to add to costs.

You will be aware of concerns that were expressed to Universities Scotland by its members. The organisation says:

“Notwithstanding the exemption for on-going research ... any limit on a University’s ability to accept information in confidence for an extended period may prejudice its ability to secure access to such data and therefore its ability to conduct the highest quality research.”

Are you able to provide any reassurance that such FOI exemptions will not be reduced to 15 years, given the impact that that might have on flexibility?

Andrew Gunn: As I think we set out in our proposals, we are aware of concerns across the university sector, primarily with regard to research data and donations to libraries for research purposes. Largely for that reason, the Scottish Government is not proposing to change the lifespan of the section 36 exemption, which relates to confidentiality.

The Convener: Thank you for that clarification.

On the £236 figure, how much does the Scottish Government currently spend a year on responding to FOI requests?

Andrew Gunn: I think that our most recently published cost data, which I believe came out in 2010, estimated costs to the Scottish Government to be in the region of about £500,000. However, I can certainly get back to the committee on the matter.

The Convener: That means that you respond to just over 2,000 requests a year.

Andrew Gunn: The figure is just slightly under that, but I can certainly provide the committee with infinite detail on costing arrangements.

The Convener: Obviously you hope that a benefit of flexibility and people being able to get information in less than 15 or 20 years is that they will not have to make so many requests. Surely, however, most requests are fairly short term in nature; people who submit requests to the Scottish Government often want to find out information about things that happened six months or a year previously. Will there be a significant difference? After all, the financial memorandum says:

“it is premature to identify long term savings from the Scottish Government’s policy of early release of information.”

Andrew Gunn: I do not believe that the bill will make a significant difference—for exactly the reasons that you have just given. The vast majority of requests are for current information and under current Scottish Government policy information is released after 15 rather than 30 years. That is a general rule—for the past two or three years, for example, the National Archives of Scotland has been opening its files at 15 years—and I do not think that there is as yet any tangible

evidence that the number of requests has come down.

The Convener: I note that the Scottish Government has tried to bring information into the public domain perhaps earlier than it needs to under legislation.

That brings this evidence session to a close. Despite fire alarms and what have you, we are actually two minutes ahead of schedule. I thank the witnesses for their attendance and contributions, and I thank colleagues for their questions.

Before I call a one-minute suspension to allow for a change of witnesses—after which we will carry on with agenda item 5—I remind everyone that the committee will continue its stage 1 scrutiny of the Freedom of Information (Amendment) (Scotland) Bill at its next meeting, when it will hear its remaining three oral evidence sessions, including the minister, Brian Adam.

11:58

Meeting suspended.

12:00

On resuming—

Scottish Civil Justice Council and Criminal Legal Assistance Bill: Financial Memorandum

The Convener: Item 5 is consideration of the financial memorandum to the Scottish Civil Justice Council and Criminal Legal Assistance Bill. I welcome to the meeting Colin McKay and Ondine Tennant from the Scottish Government bill team. Do you have an opening statement for us?

Colin McKay (Scottish Government): No, but we are happy to take questions.

The Convener: Oh, God—straight into questions. I will fire away then.

I want to comment on the submissions to the consultation. Consumer Focus Scotland said that it

“did not think the SCJC would be able to undertake the range of functions identified without significant additional resources being committed by the Scottish Court Service ... In its early life, the SCJC is likely to have a substantial workload preparing the rules required to implement the reforms of the civil courts.”

It went on to say:

“We are disappointed that remuneration of Council members is not included in projected costs of the SCJC, despite such remuneration being permitted by the Bill”

as

“this may be a key means of opening up the membership to people not otherwise in a position to apply for such a post.”

Will you comment on those points?

Colin McKay: Certainly. On the first point, obviously the more resources the civil justice council has, the more it can do. The estimated costs that we have put in the financial memorandum for the council to do its normal state functions and the projected costs for the implementation of the civil courts review, should Parliament pass that legislation, are pretty frugal. That reflects the fact that public finances are under tremendous strain. We have had to pare down the costs to what we think are the minimum that we can afford while allowing the council to have the impact that it needs to have.

There are a host of civil justice issues that I am sure a council could usefully devote time to, if it had more resources. However, given the difficulty in finding money for new functions, we feel that we have allowed the council enough resource to do the things that it needs to do. In his submission to the committee, Lord Gill has confirmed that he is content that, within those parameters, the financial

details are reasonable. We worked closely with the Lord President's private office to develop the costs of the CJC.

On your second point, about remuneration of council members, as I understand it there has not been a tradition of remuneration of members of the current Sheriff Court Rules Council and Court of Session Rules Council. We recognise that there may be people who genuinely cannot be expected to do the work for nothing, which is why the bill makes provision for that. The Lord President may be minded to provide remuneration for certain members of the council.

However, the reality is that most of the people on the council will be on it in connection with their professional or personal roles, for example solicitors or advocates. I am not sure that we would want to make a commitment at the moment that those people would get paid, or certainly not that they would be paid at the rates that they would normally expect to be paid for their time. The Lord President will have to strike a balance between the desirability of remuneration for some members of council and other pressures on the council's budget.

Ondine Tennant (Scottish Government): We worked out how much the maximum remuneration might cost the council over a year, based on quite regular meetings, which would be once a month for council meetings and once a month for committee meetings. Assuming a maximum of 12 eligible members for remuneration, the bill carves out additional payment for certain members, such as the judiciary, on top of their current salaries. We calculated that as possibly up to £72,000 a year, depending on the level that remuneration was set at. We used the sum of £250 on the basis of the current levels of other remuneration—for instance, for the Judicial Appointments Board—but the figure could be reduced if the remuneration were for a financial loss rather than a set payment. That was just to emphasise that the figure could range to quite high levels.

The Convener: Some individuals could get remuneration, but not all.

Ondine Tennant: That is certainly possible under the bill.

The Convener: The Scottish Court Service has said that Scottish ministers' proposals

“should include consideration of the future costs associated with supporting the work of the SCJC beyond its initial period of operation.”

Do you have any comments on that?

Colin McKay: I think that the proposals do that. We have set out a steady-state cost of the SCJC, which is a modest increase above the current cost of the two existing rules councils to reflect the

policy function that the SCJC would take on. Separately, we have allowed for what we anticipate would be the cost of the major project of implementing the Gill reforms, should those be legislated for.

The Gill reforms will take several years to work through the system, and quite what the civil justice system will look like in six or seven years is difficult to estimate. Nevertheless, as far as we can, we have estimated what the body doing the kind of things that we think that it needs to do would cost either if the Parliament did not legislate for Gill—although the intention is clearly to do so— or once the Gill work was completed.

The Convener: Legal aid is an important issue given the likelihood that people will be asked to make a contribution. The Scottish Government considers that, in the current “challenging financial circumstances”, those who can afford to contribute towards the cost of their criminal legal aid should do so. It believes that introducing contributions could save up to £3.9 million a year. However, it seems to me from looking at your figures that about 83 per cent of people will not have to make contributions. Only those above a certain level of disposable income or capital will be asked to pay a contribution.

Although I have read through the documents and have seen some figures, it is not entirely clear to me who will and who will not be asked to make a contribution. Can you elaborate a wee bit on the level that we are talking about? I realise that you cannot give hard and fast details, as the calculation will take into account individual circumstances such as family size and responsibilities, but what is the ballpark figure that we are talking about? What is the level at which people will have to make a contribution to their own legal aid costs?

Colin McKay: As you say, it is slightly difficult to express that. The figures that are set out in the financial memorandum relate to the figures that are used currently to assess contributions. As you will be aware, people who are in receipt of civil legal aid are already assessed for a financial contribution. Indeed, in some criminal cases, people already pay a contribution under the assistance by way of representation—ABWOR—scheme. By and large, those are people who are pleading guilty rather than not guilty. Therefore, the idea of a contribution towards legal aid costs in the criminal legal system is not totally new.

The figures that are used in the financial memorandum have had to be adjusted so that we can harmonise the different schemes. The threshold that is set out in paragraphs 158 and 159 of the financial memorandum is a disposable income of £68 a week—that is the level at which someone would start to pay a contribution. Unless

there are particular circumstances, if someone’s weekly disposable income is over £222 they will be ineligible for legal aid. Those figures sound quite stark, and I know that it has created some anxiety among members of the legal profession that people who are pretty poor will be making a contribution. However, it is important to bear in mind that those are net figures for disposable income after various outlays have been taken into account, including childcare costs and mortgage or rental costs. Everybody’s outgoings are different, so it is difficult to give you an average gross figure for the money that people need to have coming in for them to be eligible to make a contribution. In most cases, it is likely to be substantially more than £68 a week, which will be the amount of money that they are genuinely able to dispose of and which could be used to contribute towards their costs.

The Convener: Yes, I saw those figures under paragraphs 158 and 159; I was just looking for a wee bit more information. You have mentioned mortgage costs and childcare costs, but I imagine that people will want to know whether they qualify for legal aid, which I suppose they will if the proposal goes through. However, could you put more meat on those bones with regard to what is included and what is not included in terms of disposable income?

Colin McKay: I doubt that I can give you much more information at this point, beyond what is in the financial memorandum. I should apologise for the fact that my colleague, Karen MacIvor, who was due to give evidence on the legal aid aspects of the bill is not here today, but she is unwell. We would be happy to give you details of what the board currently treats as outgoings that are taken off the calculations. That should give you a clearer picture of what that would mean.

Michael McMahon: Obviously, everyone would sign up to the goal of improving the civil justice system. Fortunately, I have never had direct experience of the courts but, speaking to family members or friends who have been witnesses or jurors or earn their living in the court system, I am aware that there is a concern that there is a lack of efficiency and that we need to get more value for money from our judicial system. I am also aware that, sometimes, we must spend to save—that there are some additional costs that must be met in order to arrive at something that, in the fullness of time, will achieve some savings. The financial memorandum suggests that there would be increases for the first two or three years but that there would be decreases thereafter as a result of efficiency savings. However, it is also concerning that the financial memorandum says:

“It is not possible to estimate the costs the new Council will incur in taking forward the rules changes for civil courts

reform before legislation in that regard is passed by the Scottish Parliament.”

How can you convince us that we are not buying a pig in a poke?

Colin McKay: When it says, “It is not possible”, you must remember that we have done the best we can to give fairly detailed estimates of how many staff will be needed to take forward the reforms as we understand them. The point that we are making is that the Parliament might choose to legislate in a different way from what we currently envisage. The Government has set out a response to the Gill review and we have set out how we intend to take those things forward but, clearly, we do not know what will end up as legislation, so we cannot be entirely clear about what the outcome of that will be.

That said, much of what happens depends not just on what is in the legislation but on how quickly it is implemented and how it is phased in. There is scope for the Scottish Court Service to manage and husband its resources in a way that will allow it to phase in the reforms over a period of time, should that be necessary.

Our expectation is that the cost will not substantially exceed to any appreciable degree the ranges that are given in the financial memorandum. We think that that is adequate to implement the reforms.

The pig-in-a-poke aspect concerns the fact that it is not us who will deal with the bill but Parliament—ultimately, it is Parliament that will approve the financial memorandum for the courts reform bill, which will include whatever costs are to be borne as a consequence of the legislation, and that will include any implications for the civil justice council.

I should say, also, that we intend to introduce the bill as a draft bill for consultation before it is introduced to Parliament, so there should be an extensive opportunity for all the stakeholders to consider the implications of the changes.

Michael McMahon: As I said, I understand that, sometimes, there have to be some initial costs—there is no question about that. However, we have to test whether those initial costs will be around the area that the financial memorandum suggests that they will be and that the on-going costs are not going to miss the target. The convener referred to Consumer Focus Scotland’s evidence. It has some major concerns because, if the council is to be properly funded to make the changes that will come about, the initial set-up costs may be greater than the financial memorandum suggests.

12:15

If the figure in the financial memorandum can be argued for, legitimised and sustained, that will make the memorandum more robust and will mean that we will have more confidence in it. However, Consumer Focus Scotland believes that, with the level of funding that has been set, the council will be nothing more than a rule-setting body, which means that it will not achieve the savings that have been set for it in the longer term.

Do you understand the concern that, if we do not get the costs right at the outset, the council will not achieve its aims regardless of how well the bill is drafted and we will not get the reformed and more efficient judicial system that we all want?

Colin McKay: Yes, I appreciate that. However, I am not aware that Consumer Focus Scotland identified any particular comparisons or any basis for its concerns other than the general sense that the figure was not as much as it might have hoped for the council to do the business. We examined the costs of the two current rules councils, which will be merged into the single body, considered the costs of the Civil Justice Council in England and Wales as the best comparator and came up with a set-up that is relatively lean but which will have additional capacity to implement changes in the rules.

On the point that you rightly make about investing to save, the larger part of the investment for courts reform will not be in the proposed Scottish civil justice council; it will be in, for example, information technology systems, judicial training and, potentially, changes to the court estate. Therefore, the set-up costs for the council are a small element of the overall court reform agenda.

To be honest, I think that if the Lord President decided that it would take three years for the civil justice council to do its rules revision but would rather that it carried it out in two years to get things going more quickly and, therefore, decided that we would need to put more money into the body, such variations in the cost of the council would be completely swallowed up by the variations in, for example, the cost of buying a new IT system for the Scottish Court Service.

We have enough flex in the Scottish Court Service’s overall budgetary provision and in the financial memorandum to ensure that the council has sufficient resources to carry out the Gill reforms. You will have seen that the extra cost of making those reforms is substantially more than the steady-state cost of the council, so we are talking about ramping up the funding fairly significantly over the next few years to implement the rules project.

That has been done by reference to the similar exercise that took place down south following the Woolf reforms, which are along broadly similar lines to the Gill reforms. In his evidence to the Justice Committee, Lord Gill pointed out that we cannot always directly compare Scotland and England because the way in which the English rules are constituted is different from the way in which the rules work in Scotland, so there is some degree of uncertainty. However, we are reasonably certain that the range that we have given provides enough money for the council to do a decent job of bringing the rules up to date.

In essence, the council's job is to think about things and we just need to get the right people with the right brain power and the right analytical skills to do that thinking. The council will not require large costs for equipment, buildings or any of the other public sector spending items that can sometimes run away with themselves. It will have enough people to think about things to enable it to come up with the right solutions.

John Mason: The point has been made that, if there are extra costs, they will be added to court fees and will be paid by the users of the courts. There is already concern that, although people at the bottom get legal aid and people at the top have lots of money, many people in the middle cannot access the courts. Therefore, I fear that the number of people who cannot access the courts might increase. Has that been taken into consideration?

Colin McKay: Yes, it has. That is obviously a concern with access to justice. However, I point out that court fees are typically a small part of the cost of any action; lawyers' fees are what cost people money and make court potentially expensive. Therefore, the relatively modest uplift in court fees will not be the deciding factor in whether people have access to the courts.

As you said, people who receive legal aid do not pay court fees. The Government has substantially extended eligibility for legal aid up the income ranges so that people with moderate incomes can still access it, particularly if they have a very expensive case. They may have to pay a contribution, but the idea that they would be subject to huge financial risk is removed. It is obviously difficult to sustain that approach, given the pressures on public finances, but we have done so and have committed to trying to maintain it.

We do not think that the fees increases on which the Scottish Court Service has consulted will impact on access to justice for the poorest or the people in the middle income ranges.

The Convener: I thank colleagues for their questions and the witnesses for their evidence.

Decision on Taking Business in Private

12:21

The Convener: I return to item 1. As members will recall, Elaine Murray raised an issue with going into private. I suggest that the committee agree to take items 6 to 10 in private today but consider its future approach to items in private as part of the discussion on the work programme, which we will have later this afternoon. Does everyone agree with that?

Members indicated agreement.

The Convener: Thank you very much.

Members may have noticed that our clerical staff have been dropping like flies over the past hour. Therefore, I close the public part of the meeting and suspend the meeting until 12.30 so that everyone who needs a natural break can have one.

12:22

Meeting suspended until 12:29 and continued in private thereafter until 12:48.

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