



OFFICIAL REPORT
AITHISG OIFIGEIL

Standards, Procedures and Public Appointments Committee

Thursday 6 November 2025

Session 6



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STANDARDS, PROCEDURES AND PUBLIC APPOINTMENTS COMMITTEE

20th Meeting 2025, Session 6

CONVENER

*Martin Whitfield (South Scotland) (Lab)

DEPUTY CONVENER

*Ruth Maguire (Cunninghame South) (SNP)

COMMITTEE MEMBERS

*Emma Roddick (Highlands and Islands) (SNP)

*Sue Webber (Lothian) (Con)

*Annie Wells (Glasgow) (Con)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Katy Clark (West Scotland) (Lab)

Graeme Dey (Minister for Parliamentary Business and Veterans)

Professor Kevin Dunion

Dr Erin Ferguson (University of Aberdeen)

Iain Hockenhill (Scottish Government)

Alex Parsons (mySociety/WhatDoTheyKnow)

Juliet Swann (Transparency International UK)

Lorraine Walkinshaw (Scottish Government)

Dr Ben Worthy (Birkbeck College)

CLERK TO THE COMMITTEE

Catherine Fergusson

LOCATION

The David Livingstone Room (CR6)

Scottish Parliament
Standards, Procedures and
Public Appointments Committee

Thursday 6 November 2025

[The Convener opened the meeting at 08:45]

Decision on Taking Business in
Private

The Convener (Martin Whitfield): Good morning, and welcome to the 20th meeting in 2025 of the Standards, Procedures and Public Appointments Committee. I have received no apologies. Under item 1, does the committee agree to take item 7, which is consideration of the Electoral Commission's draft code of practice for non-party campaigners, in private?

Members indicated agreement.

Document subject to
Parliamentary Control

Statutory Guidance on Imprints for Non-
party Campaigners at Scottish
Parliamentary Elections and Council
Elections in Scotland (SG 2025/215) [Draft]

08:45

The Convener: Our next item is consideration of draft statutory guidance, which is subject to the negative procedure and has been referred to the committee for scrutiny on policy grounds. We considered this document at our last meeting, when Emma Roddick indicated that she intended to lodge a motion that the document not be approved. Before we move to the formal consideration of the motion, this agenda item provides the opportunity for members to make further comments before we move to the formal proceedings.

Emma Roddick (Highlands and Islands) (SNP): Good morning. As you know, I was disappointed and frustrated not to have more of an opportunity to feed into the process without the need to lodge such a motion. The committee would have welcomed the chance to comment further in advance and to work something out in a more collegiate way, because there are problems with the guidance. If we expect people to comply with electoral law, the guidance on how to do that must be sound. In particular, we need to keep in mind that this is guidance for non-party campaigners, and, although candidates and agents are rightly expected to be well across their legal duties, non-party campaigners need to be as clear as possible about how they can best do that.

I am grateful to the Electoral Commission for meeting me earlier this week to discuss some of the finer points, and I am reassured that there are plans to improve the non-statutory guidance, but I still feel that the statutory guidance is, in places, quite difficult to understand. Some of the logic is a bit circular, so it is worth having further conversation about how we approach these issues in the future.

The Convener: I am grateful for that contribution. The minister is not giving evidence on the guidance, but, if he wishes to comment on it, I am content for him to do so. However, first, Emma, you eloquently put on the record the challenges with the guidance, and I wonder whether, irrespective of the outcome in relation to the formal procedure, the committee would be content to write to the Government and the minister to express our concerns and to seek an

opportunity to ensure that this does not occur again. Is the committee content to do that?

Members *indicated agreement.*

The Convener: Minister, I realise that you are not giving evidence in respect of this document, but I am more than happy for you to put comments on the record.

The Minister for Parliamentary Business and Veterans (Graeme Dey): I will simply say that I will meet the Electoral Commission in due course, and I am more than happy to raise directly with it any concerns that the committee provides to me in writing.

In the context of elections, it is important that the guidance that is provided to everyone who participates in the process is clear and easy to understand. I will also reflect with the Electoral Commission on its approach to ensuring that the Parliament is fully engaged, where appropriate, and that that approach is borne in mind even when it is not immediately necessary. I can give you that undertaking if you write to me.

The Convener: I am grateful for that, minister, and for your offer to act as a conduit.

We now move to the formal procedure, which is a debate on motion S6M-19488. As members will be aware, only the minister and members can speak during the debate. I invite Emma Roddick to move the motion.

Motion moved,

That the Standards, Procedures and Public Appointments Committee recommends that the Draft statutory guidance on imprints for non-party campaigners at Scottish Parliamentary elections and council elections in Scotland (SG/2025/215) should not be approved.—[*Emma Roddick*]

The Convener: Does any member wish to contribute to the debate?

Minister, do you wish to add anything?

Graeme Dey: I ask members not to support the motion to annul, given the work that has been going on behind the scenes between the committee and the Electoral Commission and the commitment that I have provided today to act on the committee's concerns.

The Convener: As no one wishes to add anything, the question is, that motion S6M-19488 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

Against

Mackay, Rona (Strathkelvin and Bearsden) (SNP)
Wells, Annie (Glasgow) (Con)
Whitfield, Martin (South Scotland) (Lab)

Abstentions

Roddick, Emma (Highlands and Islands) (SNP)
Webber, Sue (Lothian) (Con)

The Convener: The result of the division is: For 0, Against 3, Abstentions 2.

Motion disagreed to.

The Convener: The clerks will now prepare a short report on our consideration of the document. Are members content to delegate to me the responsibility for finalising the terms of our report for filing?

Members *indicated agreement.*

Subordinate Legislation

Absent Voting at Scottish Parliament and Local Government Elections (Signature Refresh) (Miscellaneous Amendment) (Scotland) Order 2025 [Draft]

Representation of the People (Absent Voting at Local Government Elections) (Scotland) Amendment Regulations 2025 (SSI 2025/263)

08:52

The Convener: We move to consideration of a draft order and a Scottish statutory instrument, both of which relate to arrangements for the signature request requirements for proxy and postal votes for the forthcoming Scottish Parliament elections. The draft order is subject to the affirmative procedure and the statutory instrument is subject to the negative procedure.

The committee has an opportunity to take evidence from the Minister for Parliamentary Business and Veterans before we consider whether to recommend to the Parliament that the instruments be approved or whether we wish to make any recommendations. I welcome the minister, Graeme Dey. He is joined by Scottish Government officials: Iain Hockenhull, the head of the elections team; and Lorraine Walkinshaw, from the legal directorate. Minister, would you like to make a short opening statement before we turn to questions from members?

Graeme Dey: I would, thank you. I am pleased to be here today to present these instruments. Members will be aware of the recent passing of a private member's bill in the United Kingdom Parliament that will allow the Scottish Parliament to legislate on access to the online absent voting application for voters in the Scottish Parliament and local government elections. Although I welcome the change, it is regrettable that the bill's passage through Westminster took longer than planned. I understand that that was largely as a result of the time that was taken up by the assisted dying legislation.

In any event, both the Scottish and Welsh Governments are now working on secondary legislation to allow full access to the system. We are also consulting the Electoral Commission and electoral registration officers on when the system should go live. The very strong recommendation from the electoral community is that it is now too late for the system to be available ahead of the 2026 election. As well as the technical risks involved in a system roll-out, there are significant practical challenges involved in merging the

separate records that voters have for devolved and reserved elections.

Last week, I wrote to the committee to confirm that I had decided to postpone implementation until as soon as possible after the Scottish Parliament election in May. Taking the decision now to defer online absent vote applications removes uncertainty and will allow clear communication to voters of a projected go-live date, and it will also provide more time for the Electoral Commission to prepare guidance for administrators and the public on absent voting.

The instruments that I am presenting today seek to minimise potential confusion and inconvenience for voters ahead of next May's election. Around 75,000 voters would have been asked this winter to refresh their signature sample in order to retain a continuing absent vote for Scottish Parliament and Scottish local government elections. That would have happened at the same time as the reapplication process for between 750,000 and 800,000 United Kingdom Parliament postal voters in Scotland, and there is concern that voters might have incorrectly thought that a reapplication via OAVA for a UK Parliament absent vote was the only activity required to vote by post or proxy in the Scottish Parliament election on 7 May next year.

The two instruments before the committee today seek to avoid that by extending postal and proxy votes that would lapse before the election if no signature sample were provided. That will mean that the 75,000 voters whom I mentioned will not need to take any further action to vote by post in next May's election. It is hoped that the move will remove the scope of voter confusion and the potential for people to have to suddenly seek an absent vote in the spring of 2026.

I hope that those comments are helpful, and I am, of course, happy to answer any questions.

The Convener: I am grateful for that opening statement. Do members have any questions?

Ruth Maguire (Cunninghame South) (SNP): Good morning, minister. We understand that the action that is being taken is intended to remove any scope for confusion, but are there any risks associated with the extension that is being proposed? If so, how have they been assessed?

Graeme Dey: That is a very good question. In looking through this in detail, we have identified one slight potential risk. That is where a voter's signature might have changed substantially since their original application in 2020. If that is the case, there is a risk that the postal vote might be rejected due to signature mismatch.

The risk with regard to signatures is deemed to be highest among older voters and the very

youngest voters, but we have been discussing the issue with the electoral registration officers and the Electoral Commission, and there is no evidence that the UK Government's similar extension of postal votes as a transitional measure in 2023 resulted in any impact on postal vote rejections. The numbers that are available suggest that the postal vote rejection rates for the 2024 UK election were in line with previous elections; they were 2 per cent in 2024 and 1.9 per cent in the 2019 election in Scotland. That was despite many postal vote signatures being refreshed.

Clearly, we want to avoid any negative consequences. We have been in conversation with the EROs and the Electoral Commission on ways of mitigating any potential risk, and we will continue that work. As I have said, the risk is quite low, particularly among younger people—after all, the number of young people who are likely to access voting as absent voters is relatively small—but we are across this, if I can put it that way.

Ruth Maguire: Thank you.

The Convener: I see that there are no other questions from members, but I would like to pick up on your previous point, minister. The situation is that, in effect, the archive of signatures is potentially five years old; you have identified the two demographic groups where there is most likely to be a change; and you have said that a risk has been identified in that respect.

I have two questions. First, can you illuminate us further on any discussions that you have had about how that risk will be reduced, particularly with regard to younger people? As you have said, we will be talking about a small group of voters, but they might be as old as 21 now, if they applied when they were 16. I note that the Government has issued the normal United Nations Convention on the Rights of the Child compatibility statement, but what is your confidence that that statement is correct, given the risk that you have already expressed?

Graeme Dey: I will bring in Iain Hockenhull to talk about the work that is going on, and perhaps Lorraine Walkinshaw can talk about the compatibility issue.

Iain Hockenhull (Scottish Government): A slightly curious point that we identified while we were creating the children's rights impact assessment was that this does not apply to anyone caught within the convention, because they are all aged past that point now. Therefore, it says in the impact assessment that we have written that the concern is in relation to people who were of children's rights compliance age at the time, but are no longer, so it would not apply to

anyone under 18 at the moment. This is not relevant to them, technically speaking.

As for the actions that we are taking, we have been discussing this issue with the electoral registration officers and the Electoral Commission, and one concern is that we might inadvertently create confusion among voters whose signatures are actually fine. For example, if you wrote in certain terms to a household with one young person and there were, say, four other people who were older and whose signatures were static, they might all suddenly think, "Oh, what do we need to do about our signatures?"

09:00

We do not want to create false alarm, but we do not want to avoid looking at the problem, either, so we are discussing with the Electoral Commission and electoral registration officers the best way of targeting the most likely persons so that we can speak to them, or of trying to get information out there that says, "If your signature might have changed, please consider resubmitting a form."

There is a potential read-across to the signature sample for someone's UK Parliament postal vote, because the period for UK Parliament postal votes is now three years. If people compare the two signatures, they might be able to see that the recent sample for UK Parliament elections is not the same as that for Scottish Parliament elections. However, there is a potential data protection issue there, because they will have the information for two different reasons. That is another point that we will explore before progressing with that approach.

The Convener: The solution is, in essence, going to involve a positive outreach, if that is appropriate, to very specific individuals, presumably driven by their age—or their place in the demographics; let me put it that way—to tell them that there might have been substantial change. Are you confident that that will be facilitated in the period of time that we have?

Iain Hockenhull: My understanding is that, when the UK Government did this exercise in 2023, it did not take that approach and statistically there did not appear to be any impact. However, we are still mindful of the issue and want to explore it.

The Convener: Minister, can I request that we get an update on this, given how close we are to the election? I think that it is right to say that we are talking about a relatively small number of people across the whole electorate, but those people could potentially lose their vote. An update would be helpful.

My other question is in relation to—*[Interruption.]* My apologies, Lorraine. Did you want to add anything about the UNCRC?

Lorraine Walkinshaw (Scottish Government): No. I think that Iain Hockenhull covered it.

The Convener: I am grateful.

My other question is on the need for this as we move forward. Obviously, we will be running into the Scottish elections early next year, but, once they are finished, the minds of people in the electoral world will be turning to the council elections. Are you satisfied that everything is going to be in place and that the committee that will follow us in the next parliamentary session will not be in the same position next November with regard to the council elections the year after?

Graeme Dey: Iain Hockenhull is across all of the detail about what is actually happening, but, at this stage, we are looking to move to the new system in June next year—I think that that is the date that we have in mind. There is a lot of work going on to ensure that we move seamlessly out of the Scottish Parliament elections and get the new system in place for the council elections.

Iain Hockenhull: The number of postal votes that are due for refresh next January is already unusually high, because the people in question applied ahead of the 2021 election under Covid conditions. Even if we were doing nothing else, that would add to the large spike in applications and create quite a substantial amount of work next January.

However, there is good news. When the online absent vote application system goes live, the merger process will look at someone's UK Parliament postal vote, if they have one, and, if that has been renewed more recently, it will become the new record. In other words, if someone did it this year for their UK Parliament postal vote, it would run until 2028, I think, meaning that they would not need to reapply next spring for their devolved absent vote, because it will get extended automatically by the system going live. Therefore, we hope that the OAVA going live will not only reduce this as an issue, but remove or reduce that large spike that is already there for next winter.

The Convener: That go-live date is doing a lot of lifting. I would in no way wish this to happen, but if challenges emerge, it seems that, given that you are looking at June, there will still be a period of time in which steps can be taken to obviate any problems.

Iain Hockenhull: Yes.

The Convener: That is excellent. If members have no further questions, I will move to the next item on our agenda, which is a debate on motion

S6M-19176. As members will be aware, only the minister and members can speak during the debate on the motion, which I invite the minister to move.

Motion moved,

That the Standards, Procedures and Public Appointments Committee recommends that the Absent Voting at Scottish Parliament and Local Government Elections (Signature Refresh) (Miscellaneous Amendment) (Scotland) Order 2025 [draft] be approved.—*[Graeme Dey]*

Motion agreed to.

The Convener: Our next agenda item—oh, I am doing this the wrong way, aren't I? *[Interruption.]* My apologies—give me a moment. We have two Scottish statutory instruments to go through.

Ah, right. Are members content to note the Representation of the People (Absent Voting at Local Government Elections) (Scotland) Amendment Regulations 2025 (SSI 2025/263), which is subject to the negative procedure?

Members indicated agreement.

The Convener: That is excellent. We can now move on to the next item, but first I thank the minister and his officials for attending today.

Graeme Dey: Convener, you asked me whether we would provide an update to the committee on the point that you raised. I did not get a chance to say this yet, but we absolutely will.

The Convener: I am grateful for that. I now suspend the meeting to allow a changeover of witnesses.

09:06

Meeting suspended.

09:09

On resuming—

Freedom of Information Reform (Scotland) Bill: Stage 1

The Convener: Our next agenda item is an evidence-taking session on the Freedom of Information Reform (Scotland) Bill at stage 1, for which we are joined by Katy Clark MSP, who introduced the bill. Good morning, Katy.

I welcome to the meeting our first panel of witnesses: Dr Ben Worthy, reader in politics and public policy at Birkbeck College, who joins us online; Dr Erin Ferguson, who is a lecturer in law at the University of Aberdeen; and Professor Kevin Dunion. Good morning to you all.

We will move directly to questions. Members might want to put their questions either to the whole panel or to individuals. Should any of you wish to respond—there is no necessity for you to do so—please indicate that that is the case. Ben, if you raise your hand or use the hand function on your computer, I will bring you in at the appropriate time.

The wonderment of being convener is that I get to ask the first question. My first set of questions is really for all of you; it is partly to set the scene and to enable you to indicate the area in which you will be contributing.

We have conducted a consultation on the matter at hand, and respondents across the sector have indicated that Scotland's freedom of information legislation is both widely used and well regarded. How would you, as individuals, assess the current state of the freedom of information regime here in Scotland? Ben, can I come to you first on that?

Dr Ben Worthy (Birkbeck College): Yes, indeed. Can you hear me okay?

The Convener: We can, thank you.

Dr Worthy: By international standards, the Scottish freedom of information law performs quite well. The data that is available shows that there are high levels of requests and that a broad set of different groups use the freedom of information law.

Looking at the other vital signs of a freedom of information act, I would say that things are pointing in the right direction—I am thinking of, say, the number of requests that are accepted and which result in information being given out. One of the really important things to bear in mind is that the law is very widely supported among the public. According to the evidence, almost 90 per cent of people think that it is a very good thing and support it—and, indeed, support its expansion.

Of course, there are issues, but they are the kinds of common issues that face lots of FOI regimes, such as delays, which cause frustration, and the question of how far the law extends. Something that the bill deals with, and which I have been researching recently, is the question of what we do about the different ways in which Governments now make decisions. We might come on to that later.

The Convener: Excellent. Thank you, Ben. Erin, can I come to you?

Dr Erin Ferguson (University of Aberdeen): I largely agree with what Dr Worthy has said. The Freedom of Information (Scotland) Act 2002 is largely working as intended, and it has resulted in a high volume of information disclosures in the relatively short period for which it has been in force.

However, there is still some room for improvement. The most notable issues in that respect, as far as my research is concerned, are the scope of the act and the speed at which additional bodies have been designated as additional public authorities. As well as the slow speed of that process, the overall volume of designation orders is still relatively low, and it is certainly lower than had been intended when the act came into force.

The Convener: Thank you. Kevin, is there anything that you would like to add?

Professor Kevin Dunion: I agree with both witnesses. When the 2002 act came into effect, we saw it as being very positive compared with the legislation in other countries. For example, we do not charge a fee for making an FOI request; in fact, we do not even have to say that it is an FOI request, which is what happens in most countries. Once the request is made, it is the responsibility of the authority to recognise that it is an FOI request and to apply the relevant legislation appropriately.

The challenge that we have seen ever since my time as Scottish Information Commissioner, and which we are still seeing, is that we are not keeping pace with two things. The first of those is the way in which public services are being delivered—that is to say, through outsourcing. We anticipated that; indeed, the minister at the time said that it would be the next thing on the agenda. However, it has been the next thing on the agenda for the past 20 years, and we are not getting to grips with the need to encompass bodies that deliver public services with public money where rights to information are being lost or are not being afforded.

The second issue is, of course, the way in which information is now transmitted. Our law is based in part on the New Zealand law of 1986. Email hardly existed in 1986; people were still sending in letters

for information, which is why there is a 20-day period for responding to requests. We are not keeping pace in that respect, or in relation to the way in which information is retained or circulated, which is a prominent part of the bill, too. We really have not got to grips with that, and the Covid experience of information between ministers and civil servants being exchanged offline has proven that the legislation cannot go where it is not allowed to go.

The Convener: That was very helpful. Thank you for those introductory remarks.

Picking up on what you have just said, Professor Dunion, I point out that a substantial number of the consultation responses criticise the length of time that it has taken to review the FOI landscape. Obviously, that is one of the bill's fundamental intentions.

In the previous session, committees of the Parliament conducted post-legislative scrutiny of the freedom of information legislation and had subsequent consultations. From your point of view—I will come to you first, Kevin, as this is really a follow-up to your previous answer—does the bill encompass all the suggestions that were made at the time?

09:15

Professor Dunion: I am not sure that it encompasses all of them. Katy Clark can speak to this, but the bill has changed over time in response to soundings that have been taken as to what would be possible, rather than what would be perfect. We are trying to address the biggest impediments, instead of simply attaching to the bill some desirable aspects that might not necessarily be fundamental.

As for your point about committee scrutiny, we are in some respects back to where we were at that time. We recognised the difficulties then, but the question was: what do we do about it? We have now—eventually—designated housing associations and public bodies that operate at arm's length from local authorities, but it took a long time to get there. These things should have been anticipated when the changes in question were being made—for example, it should have been recognised that people would lose rights when their council house transferred to a housing association.

I remember speaking to the chief executive of greater Glasgow housing association; we were all geared up for that to become a designated body—it had, in fact, appointed a member of staff and set aside resources for that—and then the plug was pulled. It is not really the fault of the associations; it is the fault of those with the capacity and the power to designate.

The Convener: Are you confident that, even if it does not quite cover all the previous recommendations, the bill will move us substantially forward? Will it allow us to catch up, if not catch up completely?

Professor Dunion: It tackles the most obvious deficiencies that have emerged because of the passage of time. That is the most important part of it.

The Convener: That was helpful.

Ben, I was going to ask you the same question, but you also mentioned the international reputation that Scotland's freedom of information legislation has. It has been suggested that, although it is still well regarded, it is not as good as it should be. As well as responding to my previous question, can you say whether the bill will move us forward with regard to our international reputation of being—I hope—at the forefront of making clear the importance of freedom of information?

Dr Worthy: Yes, I think that it will. As Kevin Dunion has said, one of the really important things that the bill does is bring the law up to date and make it ready for the modern world. When we did our research on the UK Freedom of Information Act 2000 back in 2010, we found that publication schemes were already antiquated and were not really being used.

That leads me on to an important thing that the proposals in the bill aim to do, which is to make the proactive disclosure side of the law much stronger. That will really push our legislation to the forefront of freedom of information laws around the world. One of the difficulties with such laws is that we often think about them as reactive entities that are all about people making requests, but, as some of the data from the survey showed, most people expect and want information to be published online. They do not want to have to make a request for it.

Therefore, one of the big steps forward in the bill is the emphasis that is put—not only through the purpose provisions, but through the greater control arising from the proposed code of practice on publication—on the proactive side of things that is often lost and neglected.

The Convener: We will explore that later.

Erin Ferguson, I want to put both questions to you. What will the bill do for our international reputation? Will it move us forward?

Dr Ferguson: Yes, the bill is certainly a step towards modernisation. Even within the past 20 years, technology has moved on quite rapidly, so having additional requirements for proactive publication and moving away from the original publication schemes are definitely welcome steps.

I do not think that the bill will necessarily address all issues, because, of course, we can never anticipate all the information that somebody will want to request. We must be careful that we do not overestimate what will be done, but I definitely think that reform is necessary in that area.

I also think that the bill will strengthen our international reputation. When we compare our legislation with that of our closest neighbour—that is, the 2000 act—we can already see some evidence of differences between the two acts that have perhaps put Scotland a little bit further forward. I am thinking, for example, of the requirement in relation to commercial exemptions to show that disclosing information would result in substantial harm rather than just harm or prejudice. There are already some differences in that respect, and I think that the bill would perhaps make the position even stronger.

The Convener: Given the current environment, what are the major barriers that prevent people from accessing their information? We have talked about up-front publication—we will come to questions on that specifically—but, on a slightly wider level, what blocks people from accessing information?

Dr Worthy: A frequent cause of frustration relates to timeliness and delays, which is an issue that the bill deals with. Requesters want their information to be provided within the timescale that is set by the law. The bill makes an important change on proactive disclosure, which is the idea that people should be able to find the information on an organisation's website without making a request, but, if they have to make a request, it will be answered in a timely fashion.

Getting information to people in good time was one of the positive requirements of the act, but it is one of the most common forms of delay, and that is not only the case for individual requests. Lots of freedom of information laws slow down over time. Kevin Dunion can probably speak about this much better than I can, but, once delays start infecting the system, they start happening all over the place. The system starts to slow down and get delegitimised, so people get frustrated and are less willing to use it.

Dr Ferguson: I agree with that. In some of the empirical research that I conducted, which involved speaking to journalists about their use of freedom of information, I found that timeliness was one of the significant barriers, especially given the nature of their work and their need to access information more quickly.

More anecdotally, having spoken to people who perhaps do not use freedom of information in a professional capacity but do so for things such as

local campaigns, there is still a bit of a perception that it is a very legalistic tool. People do not necessarily want to make a freedom of information request, because they perhaps feel as though they are imposing a burden on public authorities and do not necessarily see the information as theirs to request.

That is another reason why the bill is important. It will have a symbolic effect, because it reinforces the idea that it is our information and that public authorities are custodians of it on the public's behalf. In doing so, it might go some way towards changing the perception of FOI.

The Convener: That is helpful.

Professor Dunion: The assumption was that FOI would help to usher in a cultural change—a move towards a culture of openness. We have a culture of compliance, which is positive and does not happen everywhere in the world. I do a lot of consultancy work, so I know that many places around the world have much better laws than we have in Scotland, but the compliance is often not nearly as good and does not match the quality of the law itself.

Our difficulty is that our approach to FOI and the commissioner's decisions are highly legalistic. I understand that, because appeals can go to the Court of Session, but, in many countries, the commissioners' decisions are much briefer and very much a case of them saying, "I've looked at this and, yes, you should release it," or, "No, you shouldn't." The decision is not challenged. In Scotland, we have to justify the disclosure of every single page of information.

Our law works, but it could work better, and the bill is trying to encourage a culture of compliance. Let us look at Scandinavia. Sweden does not have the best FOI law in the world, but it has the best culture in the world, along with Finland. Civil servants and officials do not balk at being asked at the front desk, "Can I get this information?" They will go away and get the information there and then; they do not necessarily say, "We will get it to you in 20 days, but please put your request in writing." We are not anywhere near that point. I would like to see us move towards a more nimble approach.

The proposed changes to publication schemes are long overdue. The requirement for schemes delayed the FOI act coming into effect by 18 months, because it involved going round telling everybody, including pharmacists and practice managers in doctors' surgeries, "You're liable under the act, and you're required to have a publication scheme," which did not go down at all well. The schemes were not maintained thereafter, which has been a great difficulty.

If we can begin to take a more relaxed view of information, as the bill proposes, information will naturally enter the public domain. We should prepare for that rather than hold back and wait to see what exemptions might apply.

The Convener: Therefore, what is required is the next supportive step to move from compliance—"I will comply because I have to, and I will comply absolutely"—towards an environment in which people better understand both the importance and, in a sense, the ownership of the information.

Professor Dunion: Yes, that is right, and that means writing and preparing documents in the expectation that they will go into the public domain. One of the difficulties with emails is that the communication can sometimes become unprofessional during the exchanges; we have seen that with WhatsApp messages, too. Professional discipline needs to be instilled, and having an FOI officer and a good records manager will be hugely important in helping to bring that about. It will help to instil professionalism in the exchanges that take place.

Sue Webber (Lothian) (Con): Some of the respondents to the committee's call for views suggested that the proposal will not change the legal position of information that is disclosed under the Freedom of Information (Scotland) Act 2002, while others warned that it could downgrade the existing position. Do you consider that some of the amendments are necessary, or could they be perceived as merely symbolic?

The Convener: Do you want to direct that to Ben Worthy first?

Sue Webber: I was looking straight at Professor Dunion. *[Laughter.]*

The Convener: Oh, I am sorry.

Professor Dunion: Some of the amendments highlight or emphasise what can perhaps be read into the legislation. On the first question that we were asked about the presumption of disclosure, as I said in my submission, that is not just implicit in the 2002 act; it forms part of the very first sentence of the act. However, it has not been read in that way. Some other laws have a purpose clause, and the proposed provision will, in effect, become a purpose clause that says, "This information will be put into the public domain unless—". That means that people will have to anticipate and act on that basis, as I said earlier.

Dr Worthy: Broadly, all these provisions point in the direction of openness. How open is a question about implementation, of course, but they all point in the direction of openness and pushing at the edges of what Kevin Dunion called the "culture of

compliance" towards a better culture of general openness.

There are a few things that the committee might want to look into. There has been a question about expansion and whether the expansion of bodies under the bill could also affect the Lobbying (Scotland) Act 2016. I am not an expert on the 2016 act designation. The committee will be speaking to Juliet Swann after us, and I recommend that you ask her about that and perhaps flag that as an issue and a potential loophole that needs to be sorted out.

However, generally, my sense of the provisions is that they push towards openness. As Kevin said, there was a very long debate in the UK about how important a purpose clause is. I think that they are important. As Erin Ferguson said, some of the provisions are important in practice and some of them will prove to be important symbolically in sending signals to organisations about how they should behave.

Dr Ferguson: I read some of the responses that you were referring to, and I think that some of the confusion was due to the fact that people were a bit unclear about the purpose of the presumption of disclosure and whether that would simply reinforce what is already in the 2002 act or whether it would impose a new obligation on public authorities. I read it more as reinforcing what is already there. As has been said, although the presumption of disclosure is in the 2002 act, it has not necessarily been read that way, so it is more a case of reinforcing that, rather than imposing any new obligations under that particular provision in the bill. I think that that is where the uncertainty came from in those responses.

Sue Webber: How does the proposed presumption in favour of disclosure compare with the situation in other jurisdictions and their FOI legislation?

Dr Ferguson: As far as I am aware, New Zealand has that presumption in its Official Information Act 1982.

Professor Dunion: Yes, several countries have that presumption. I worked extensively in Brazil, where there is an up-front statement, which is pretty much, "It's going to be disclosed, and here are the reasons why it won't be." There are far fewer reasons for non-disclosure in its legislation. However, I would not necessarily say that you want to follow Brazil's path, whereby you just change the Government and it then takes a different view on whether any information should be disclosed.

Internationally, most freedom of information laws have, in essence, a purpose clause or a statement at the outset. Our act is very prosaic. The first sentence of the act is great, but it stops at

that point and goes into lots and lots of reasons why a public authority would not provide the information. We need to emphasise the openness element.

You will remember that the consultation on the bill was called “An Open Scotland”—it did not say that it was a consultation on FOI—so, back in 1999, up front, it was about encouraging a culture of openness.

09:30

Sue Webber: Do you think that the proposal might have an impact with regard to the interpretation of the qualified exemptions under FOISA?

Professor Dunion: Yes, I think that it will. It is really about a gateway. We have emphasised again and again that the wording can make a difference. For example, the wording in the Scottish legislation about applying the public interest test is to the effect that you have to overturn the public interest in disclosure—the starting point is that the public interest is in disclosure and you have to say why the public interest would be contrary to that presumption. The wording is there, but people are not reading it in the way that an advocate would; they are reading what is on the face of it, so a plainer statement would be helpful.

Dr Worthy: I do not have much to add. In the UK, there was supposed to be a purpose clause, but it was taken out, and there was a great deal of controversy about that. From memory, the Government at the time argued that the title was the purpose and so there did not need to be a purpose clause. In that regard, the UK is the only comparator. However, it is one of those things: it makes a symbolic difference and it helps with the cultural push.

Emma Roddick: On section 5 powers on designation, a few respondents highlighted that the bill’s provisions might not meaningfully incentivise ministers to make use of those powers. What is your assessment of the root causes of the delay in making use of those powers, and do the bill’s provisions address those causes?

Dr Worthy: I will hand over to Kevin Dunion, who knows much more about that. The only thing that I would emphasise is that I welcome the Scottish Parliament’s involvement in the matter and the fact that there will be a greater force for scrutiny and debate whenever the bill is considered. As Kevin said, the extension of freedom of information laws is often far more promised than delivered, and it is a complex process. My sense of the proposed changes is that they would help to create a continual pressure

and momentum towards at least thinking regularly about that extension.

Dr Ferguson: In principle, I am broadly in alignment with the bill’s provisions. However, there is a question about incentivising ministers to use section 5 powers, and it was quite difficult for me to determine whether the bill would actually lead to that. We need to think about the root cause of designation having been so complicated not just in Scotland but in the rest of the UK. A lot of it stems from an inability to determine what constitutes a function of a public nature. We see that in different contexts: we see it in the context of judicial review and I have recently written about it in the context of the Human Rights Act 1998. The office of the Scottish Information Commissioner is doing a lot of work—as it has done for years—in trying to identify different factors that could be used in making an assessment of that. There is still a fair bit of debate around that, which is perhaps slowing down the early stages of the process. The involvement of the Parliament, too, could help to facilitate the discussion.

Professor Dunion: Having annual parliamentary scrutiny is not a bad thing—it is a good thing—but, to be frank, from my experience, I am not sure that that is going to incentivise ministers to use those powers unless they are really inclined to and unless they feel more pressure than that of there being a debate once a year.

On why it has not been done in the past, in large part, it was the assumption that it would be an enormous burden, which I just do not think has been the case. It has now been demonstrated that FOI is not nearly the burden that people think it to be. Indeed, if we get rid of the publication scheme, it will be much less of a burden.

Secondly, there is the assumption among bodies that they will be overwhelmed with requests, that they will have to employ staff and that they will not be able to answer the requests. I spoke at the Scottish public information forum meeting recently, and I looked back at all the designations that I was involved in trying to bring forward—namely prisons; arm’s-length provision of council services, such as leisure and culture services; and housing associations. The constant refrain was that they were going to be overwhelmed and that they would not cope.

Last year, Addiewell prison received four FOI requests; Kilmarnock prison received one request; West Lothian leisure and culture services received 10 requests; Dundee leisure and culture services received 24 requests—24 in the whole of last year; Hanover Housing Association, which has 5,000 houses and 600 staff, received 11 requests; Wheatley Homes, which has 100,000 homes, received 61 requests; and ScotRail, despite all the

controversy around it, received less than one FOI request per day on average. It is not an overwhelming burden, and, in any case, are you telling me that, if you were a housing association tenant and you wrote to it, it would ignore your letter or your request for information? No, it would not. We need to get these things into perspective and into proportion and not have the process held up as an impediment.

We have introduced other legislation in Scotland, including on data protection and record holding—we will come to that in relation to FOI officers. There are things that should be required of public bodies in Scotland and bodies that receive public funds, and being held accountable must be one of those. To my mind, accountability is not burdensome.

Emma Roddick: There were a few mentions of the Parliament being able to make designations and the fact that it was hoped that that would act as a bit of a pressure point. Is the Parliament well placed to make such designations?

The Convener: Ben Worthy, shall we start with you?

I am allowing others some thinking time.

Sue Webber: I think that Ben is thinking, too.

Dr Worthy: I was going to hand over to Kevin Dunion. [*Laughter.*]

Professor Dunion: Until now, it has been a matter for the minister to take a decision on. With regard to housing associations, we were very close to designation at the time when Bruce Crawford was the minister, and it was a political decision not to take that forward. There has to be some degree of parliamentary accountability for not bringing forward designations that have been consulted on and on which there is clearly broad agreement, including, in that particular case, from the body to be designated.

Emma Roddick: Is there anything else that could help FOI rights keep pace with changes in public service delivery generally?

Professor Dunion: India and some other countries have a kind of gateway clause. In other words, if you carry out certain functions with public money, you automatically come within the scope of FOI law for the period for which you have that contract. I am not talking about short-term contracts; I am talking about things such as 20-year private finance initiative-type contracts. The current commissioner and my successor are opposed to gateway clauses, and I understand why, but if we are not going to use a gateway clause, we have to say that, when such a contract is being let, consideration must be given to designation under FOI legislation, so we would at least go through the designation process.

However, it should not be the last thing that people think about; it has to be done at the same time as the contract is given. Otherwise, as we have seen, if a contractor is asked for information about, for example, a hospital, they can claim commercial confidentiality in relation to information about which that could not be claimed if the hospital was wholly in the public sector. Therefore, we lose rights if that is beyond reach.

Dr Ferguson: Some respondents to the call for views suggested an approach that is similar to the Environmental Information Regulations 2004 or the Environmental Information (Scotland) Regulations 2004. That is more of a functional approach in the case of bodies that perform a function of a public nature. If a body is involved in public administration, it ought to be subject to disclosure. It is definitely worth exploring that approach further, but, in my research into how the EIRs work in England and Wales, I have noticed that the functional approach is a bit narrower than it might appear at first and that it can create some uncertainty, not only for information holders but for those requesting information. We saw that most prominently back in 2015, and before that, in relation to the question of whether private water companies were subject to the EIRs. After going to the Court of Justice of the European Union and back to the Upper Tribunal, it was eventually resolved that they were subject to the EIR.

However, I have been doing research on how the EIR has operated since then and I have discovered that the tests that were established in the Fish Legal case have created a high threshold that very few other public authorities have met. For example, Poplar Housing and Regeneration Community Association is, quite famously, not subject to the environmental information regulations.

Therefore, the functional approach has some benefits in terms of flexibility, which people find to be welcome when they consider the slow pace of the section 5 designations, but some uncertainty has also been created, and leaving it as a matter of judicial interpretation has resulted in a high threshold for bringing other bodies into the scope of the EIRs.

Dr Worthy: This area—and how best it functions—is complex for lots of freedom of information regimes. I also point out that, in relation to the laws in the UK and Scotland, this is often a very complex and lengthy process that can sometimes appear to be going in circles. Any mechanisms that can help to apply pressure or speed up the process are a good thing.

The Convener: Kevin Dunion, I want to come back to your response about the role of the Parliament. The bill proposes a role for the Parliament in actively participating, and I think that

your answer suggested that, although possible, it might be more desirable for the Parliament to more actively oversee decisions that are made by ministers. Is that right?

Professor Dunion: To be frank, I think that my frustration was that even though political expectations had been created that designation was going to take place and significant amounts of work had been done to bring that designation about, there was no satisfactory explanation as to why the decision to designate was not made. We are not talking about changing the law; we are applying the law. Of course, subsequently, that designation went ahead, so what changed in the interim is perhaps simply down to the personal preference of senior members of the Cabinet—I am not entirely sure about that—or special pleading that never came into the public domain. Therefore, it would not be a bad thing if the Parliament could, in some way, have a debate about whether the designation should take place. It would at least allow the reasons for not designating to be properly aired. We were never given any explanation at all for that designation not going ahead at the time.

Parliamentary oversight generally is no bad thing in relation to FOI and, in terms of what are talking about, keeping pace. The view of what is a public function changes. The problem with the gateway, as Erin Ferguson is describing, is that it makes the process legalistic. However, the considerations that any Government would make are whether the body is carrying out a public function, whether it is spending significant sums of money, and whether it is a key resource for the public to access. Those are the boxes to tick with regard to saying that, in this case, yes, we will designate a body, in comparison with a different body that carries out some functions but none of particular prominence or at particular cost.

09:45

The Convener: In essence, then, what we need to underpin freedom of information is transparency in that decision-making process, to ensure that there can be understanding. It does not matter what the appropriate body is as long as that process takes place and can be interrogated.

Professor Dunion: Yes, but it has to happen at speed. None of these bodies was designated in my whole time—my nine-year term—as commissioner, and yet we were promised that it was the next thing on the agenda.

The Convener: That was helpful.

Sue Webber: You talked earlier about one of the frustrations for those making FOI requests being timeliness, but the committee has also had some evidence that requesters might view

clarification requests with suspicion. The whole world is in that sort of place right now. Could the pause mechanism proposed in the bill reduce that perception or perhaps make it worse? Are there any other legal or procedural changes that would better support improvements to trust and transparency?

Ben Worthy, I was told to come to you first on that.

Dr Worthy: Thank you. As I have said, delay is a cause of frustration, so anything that can help with that would be really useful.

I would also come back Kevin Dunion's earlier point. The other thing to think about is that, when it comes to requesters, what is really important is how the issues are explained and the language that is used about what is going on and why. However, the proposals will at least help to mitigate what is a pretty considerable cause of frustration.

Sue Webber: You do not think that they would be viewed as delaying tactics or with suspicion by the requester.

Dr Worthy: I do not know—probably less so than in the current system.

Sue Webber: Okay. Does anyone else want to comment?

Professor Dunion: Having the ability to reset the clock is clearly open to abuse. One of my concerns is that the legislation is quite clear about this: you are expected to reply promptly and, in any case, not later than 20 working days. To be frank, though, I think that a lot of officials believe that 20 days is a tariff that they have to respond to and that a response within those 20 days is a timely one. However, that is not what the legislation says. If you get to the 18th day, open up the docket and see that, actually, the request is not as straightforward as you had thought, seeking more information at that stage will allow you to reset the clock and start all over again.

As I have said in my submission, the pause that has been proposed is just that—a pause—so you are allowed to make the request for clarification. The clock is no longer ticking, but it restarts once you get the information back. In other words, you are no worse off than if you had opened up the information request there and then and it was perfectly clear to you what had been requested. If you leave it to the second last day to do your homework, so be it—that is your challenge. Some people have suggested the pause itself could be abused, but I think that it is less likely to be abused than the clarification provision just now.

The fact is that 40 working days is a hell of a long time. As I pointed out in my submission, the

US is one jurisdiction that pauses in the way that has been suggested in the bill.

Sue Webber: I think that the Scottish Information Commissioner suggested that it might be used tactically to delay responses.

Professor Dunion: Well, the current system is used tactically to delay responses, too. Nevertheless, they would get no more time if they did that; they still would only have the 20 days in total in which to respond. They might well, in the interim, be busily beavering away to get the information required, which would be no bad thing, to be honest.

Sue Webber: So, do you think that the pause-the-clock mechanism will have a positive or negative effect on the workload of FOI officers?

Professor Dunion: I think that it will be an encouragement to get on with it. Speaking of simple requests for clarification, I once issued a decision in which I said that the authority was being institutionally stupid, because the questions that it was asking were so obvious. It was asking, "What do you mean by the following?", and it was absolutely plain from its what-do-you-mean questions what had been meant. It was just a means of delaying things for another 20 days.

That really aggrieves people who might already be in an adversarial relationship with the authority, and this kind of game playing does not do us any service.

Sue Webber: If no one else wants to comment, I will hand back to the convener.

The Convener: Emma Roddick, I hand back to you.

Emma Roddick: Kevin Dunion, I have some questions for you in relation to the Scottish Information Commissioner. Based on your experience, do you support the changes to some of the commissioner's enforcement powers? Are there any that you would strengthen or reconsider?

Professor Dunion: David Hamilton's submission is sound, and it is much more based on the subsequent experience. I was the first commissioner, and our focus was on taking decisions that demonstrated that the legislation had effect. We were releasing information into the public domain that had not been released before. The commissioners—certainly David and his predecessor—have been very much focused on improving performance across the public authority, not just in respect of individual requests but in how to get requests responded to more quickly. I would make practice recommendations, but those commissioners have been making systemic interventions across the whole of the public body to improve performance. I am not sure that that

needs a change of law, although it certainly needs a change of resources, as David Hamilton makes clear in his submission.

As to the legal enforcement of decisions, appeals are made to the Court of Session, so, thankfully, there are not that many such instances compared with the number of appeals that go to the tribunals in England. I would not change anything in that respect.

On the matter of the commissioner taking action on information that has been withheld or destroyed after a request has been made, there is a suggestion that that provision should also exist in anticipation of a request being made—and we may come to that. I certainly found that a very difficult matter to pursue. When I did pursue it, we had to get a change of the law altogether, because we could not do it in the time that was allowed. We had to get a change in the law with respect to the Procurator Fiscal Service. That provision does not inhibit people if they seriously want to get rid of information. Particularly as it is so readily possible to destroy information, we need to consider seriously how we will tackle that and what powers may lie with the commissioner to investigate further.

There are powers to go in and seize equipment and have it inspected. I never used those powers, and I do not know whether any of my successors have used them, but it may come to that someday if that is how we have to prove whether or not information has been destroyed in anticipation of a request or after a request has been made.

Emma Roddick: Did you not use those powers because it was going to be difficult, or did you just not find it necessary?

Professor Dunion: Without using the powers to seize anything, I was able to get access to back-up information that demonstrated that information had been destroyed subsequent to a request having been made. That was the case that led to the legislation being changed, north and south of the border, to allow a greater timescale for prosecutions to take place in.

As for whether I would be comfortable going in and saying, "I suspect this has happened. Give me everything you've got," that would be a big step to take. There is no doubt that methods have been used to withhold or obscure information. Famously, Michael Gove had his "Mrs Blur" Hotmail account through which to discuss how academies were going to be set up in England, which kept that out of the public domain and beyond the scope of FOI, as he saw it, until, unfortunately, he sent the material to a journalist. Clumsiness cannot be relied upon, however.

The Covid experience and the uses of WhatsApp present a real difficulty. I am not sure

what commissioners could have done in those circumstances. Perhaps we could have been more forceful in demanding to see what was being exchanged on WhatsApp, particularly given that anything on WhatsApp was meant to be transcribed into the official record, certainly in Scotland. Commissioners could have inspected that more forcefully.

Emma Roddick: Would the powers that are being proposed have helped in that situation?

Professor Dunion: I think that those actions would have helped—although, politically, those would be very challenging actions to take. I only once used my powers under the legislation, when I was the commissioner, to ask the authority to say what it knew, not just what it held. I did seek to use that power. The Government took the matter to the Court of Session and conceded only literally at the last second, and the interrogations that I had with ministers and civil servants were not productive thereafter.

Emma Roddick: In your first answer on this theme, you mentioned the move towards considering systemic issues as well as individual cases that come up. Do you think that the resourcing and capacity are there to do that effectively, or do you still rely on something going obviously wrong?

Professor Dunion: We are moving away from the cases of things going obviously wrong. Yes, we can take such decisions, but the obviously wrong tends not to be malign; it tends to involve either a lack of capacity on the part of the authority, because it has not been afforded the means to do the task, or a lack of expertise. As David Hamilton sets out in his evidence, the interventions made by the commissioner have been hugely successful. The improvement in the performance of the Scottish Government through intervention provides one example.

There is not necessarily a lack of willingness, but there is a lack of focus. If the commissioner goes in, sets out targets and does not lift the intervention until those targets are met, that is really powerful, and it is proving to be effective, but that is not the core of the commissioner's activity, particularly given the increasing number of appeals coming to him. So, yes, there is a capacity issue.

Emma Roddick: Do you foresee any operational challenges arising from the commissioner's extended powers to enforce compliance with the proposed and existing codes of practice?

Professor Dunion: There will certainly be some up-front challenges. I think that the benefits will be hugely important, including in not wasting the authority's time. The waste of time is actually with

the authority, not with the commissioner. The authority has to go through what is almost a tick-box process now, and nobody is enthusiastic about it, including the commissioner. If we were to switch the responsibility to the code of practice, which can be nimble and applicable to the circumstances of the authority, that would be an investment well worth making.

Annie Wells (Glasgow) (Con): Good morning. This question is also about the Information Commissioner and enforcement. Section 11 of the bill proposes to repeal section 48(a) of the Freedom of Information (Scotland) Act 2002, which prevents the Scottish Information Commissioner from investigating the handling of information requests by its own office. What do you think the impact of that might be on transparency and accountability for the Scottish Information Commissioner's office?

Professor Dunion: When it comes to authorities investigating themselves, I understand that there is a lacuna—and Ben Worthy can probably speak to this better. The UK Information Commissioner has to investigate himself or herself in terms of any deficiency in the handling of information requests. That never came up as an issue during the time when I was in post, but perhaps Ben has a better handle on what has happened at the UK level.

Dr Worthy: What Kevin Dunion has said is right. However, I do not have an immediate handle on how things have been going in that respect. That just seemed a sensible thing to do.

Annie Wells: Following on from that, what are your views on the proposal to introduce an exemption for information that is provided to the commissioner during the investigation of appeals? Do you think that that information should be available, or should it be exempt?

Professor Dunion: I am strongly in favour of it. The commissioner issues formal decisions, but we should consider the commissioner's workload. When I left, about a third of the decisions were actually settled. In other words, the commissioner had come to an agreement between the authority and the applicant as to what information could be provided and what could reasonably be withheld.

Often, the decision was based entirely on the authority providing the commissioner with the very information that was being withheld and explaining confidentially why the information could not be disclosed. Without going into detail, I will give you an example. Sometimes, the requested information relates to a police investigation but the authority is aware that the information would disclose scrutiny and police surveillance that is taking place. Clearly, it is almost impossible for it to explain that in a response to the applicant.

10:00

It is about the authority having the confidence to explain which information it can and cannot disclose—it might be able to provide information that is separate from what the request is specifically about—and to sometimes get the applicant to say what they really want in order to help them to get the information. Settlement is now a really significant part of a mature commissioner's function.

Annie Wells: I have one final question. The bill proposes repealing the First Minister's veto power under section 52 of the Freedom of Information (Scotland) Act 2002. What are your views on that proposal?

Dr Worthy: It makes complete sense. As has been said in all the submitted evidence, the veto has not been used. The exemptions are sufficient, so the power should just be taken away. With UK FOI law, there was a lot of talk about the veto being used very habitually, which people were worried about because that has happened with other regimes, but that has just not taken place.

Professor Dunion: I agree that it should be removed. In Scotland, the veto power is only for the First Minister; in England and the UK, a Cabinet minister can use it. The process was used several times in the early days, which included involving the speaker—I think that it has been used six or seven times under the UK legislation.

As I pointed out in my submission, the veto is not absolute. As a commissioner, I was able to challenge the First Minister's use of the veto and still end up in the Court of Session. I would rather that the First Minister challenge the commissioner in the Court of Session than that the commissioner be asked to challenge the First Minister in the Court of Session.

Annie Wells: Thank you for that.

Dr Ferguson: I broadly agree with what has been said. Additionally, removing the possibility of executive interference with a decision of a court or tribunal would send a message about the commitment to the rule of law, although, as everyone has said, the veto has not been used to date. The environmental information regulations do not provide a similar veto power, so the bill would bring FOI in line with that approach.

Ruth Maguire: Good morning. Thank you for your evidence so far. It has been very interesting.

I have some questions about replacing the publication scheme with a duty to publish. As has been spoken about this morning, many who responded to the committee's calls for evidence advocated for a cultural shift in the way that public authorities approach proactive publication and the resourcing of FOI functions. I am interested in

hearing panel members' assessment of the readiness of the public sector in Scotland to implement that proactive duty to publish. What technical, financial or cultural support might be needed to make that shift effective?

Dr Worthy: As I said, when we looked at the publication schemes more than a decade ago, people were not using them. Public authorities then neglected them and they all fell into disuse, so everybody agrees that they are a relic. I suspect that lots of organisations already publish lots and lots of data anyway. The bill just requires an additional set of data to be published. Even thinking about costs, a lot of the processes are already embedded.

On a slightly wider point that goes back to the discussion about what helps to push these cultures, when we talk about freedom of information, we think in legalistic terms, as Kevin Dunion and Erin Ferguson have both said. Something that is often neglected is that for an FOI regime to really work—or not work—it needs elite support and political support. In the UK, we have had a succession of very senior leaders who do not really back transparency or openness, and that has had an effect on the whole system. From that point of view, what can really help to push a culture forward is politicians and elites really supporting freedom of information. I know of only one Prime Minister who made a positive comment about freedom of information while they were in office, and that was Gordon Brown in a speech in 2007. Those sorts of things really matter when it comes to pushing forward the culture from, as Kevin has said, compliance towards openness.

Ruth Maguire: Thank you.

Kevin Dunion, you mentioned some Scandinavian countries where the culture is different. Why does that difference exist? Is it simply about leadership?

Professor Dunion: It is partly leadership, partly public expectation and partly the law. For example, in Sweden, once a decision is taken and the document is finalised, it is not necessarily published—the legislation is very old—but it is expected that that document will be put into the public domain. I am not saying that everything that is ever written down is put into the public domain—the drafts are excluded—but the substantive document at the end of the process is. That substantive document might still be controversial or sensitive, but, nevertheless, the expectation is that the public have a right to know, and we are a long way away from that in Scotland.

I have actually tested this in Sweden. I have gone to the front desk and asked the administrator for something. One time, they said to me, "Oh, I'm really sorry but we can't give this to you right now."

I thought, “The system doesn’t work at all,” but then the man said, “Our systems are down, but they’ll be back up in 15 minutes and I’ll get it to you then.” In Brazil, the ministries have a front desk where you can make your request, and they will go and get you the information. We do not really have that system or that expectation in Scotland—we still have the 20-working-day requirement.

However, the point about the change away from the publication scheme is that it was outdated before we even started. It was based on a 1980s mentality whereby you would actually put up a list of everything that you had under certain headings. People now expect to use search engines or artificial intelligence to get information together, and the authorities should not be trying to cohort that into a single place. That is almost impossible.

Ruth Maguire: The majority—perhaps the overwhelming majority—of respondents were supportive of this, but some raised issues such as the additional resources required, the manner in which data is held by public authorities and some fragmentation in that respect. As well as the cultural considerations, there will be practical implications—financial or whatever—for authorities, too.

Professor Dunion: There always will be. My concern is that, in my experience, the authorities do not even know what they hold. Individual members of staff do not know what the authority holds, and they are looking for it either for themselves or in response to information requests. That is actually a records management issue as much as anything else, because it shows that records management policies and requirements are perhaps not being adhered to or are not sufficiently up to speed.

That said, we need to accept that the old idea of having even a disclosure log—in fact, the idea of cohorting everything in one place—is far too old-fashioned. I am sure that people in, say, a large authority are scraping together information from across it to put together a composite, and I think that the public should be able to do the same.

Ruth Maguire: Thank you. That was helpful.

Erin Ferguson, I am interested in hearing your reflections on those questions.

Dr Ferguson: I am largely in agreement. I would not necessarily want to put words in an authority’s mouth, because it probably knows what information it holds and what sort of impact it might have. Perhaps we need to reassure authorities that this is not necessarily going to be a burden. Earlier, Kevin Dunion pointed to empirical evidence showing the impact that this could have. It is all about doing things in a more modern way.

As Ben Worthy has said, authorities have this information in a lot of cases, and they already publish it in many different channels, have a web presence and so on. Therefore, an entirely new infrastructure might not necessarily be needed. It might just be a matter of working with the office of the Scottish Information Commissioner, in the first instance, to understand the implications and how they can make that information more accessible—and not just to the public. It might lead to improvements in authorities’ internal records management processes, too.

Ruth Maguire: Thank you. On the consultation requirements for the new publication code, the bill says that the Scottish Information Commissioner must consult

“the Keeper of the Records of Scotland ... any Scottish public authority listed in schedule 1 or such persons as appear to the Commissioner to represent those authorities ... any person designated by means of an order under section 5 ... the Scottish Ministers, and ... such other persons as appear to the Commissioner to be relevant”.

Should any additional institutions or perspectives be included in the development process? I am mindful of what you have said about the time that it takes to do these things.

Professor Dunion: It is about ensuring that we do not duplicate things and that no gaps or challenges are left. In any case, consulting with the keeper will be particularly essential under the code because of their responsibility, for example, for approving the designation of record management officers in every public authority. There is a significant crossover role there.

I do not want the work to be done and the consultation to take place on the publication code only for it not to be approved. The code will not work unless we do it properly and quickly replace what we currently have. Otherwise, we will have to go ahead with the publication schemes, which are utterly discredited. I had to spend a lot of time producing model publication schemes for general practitioners and others, because it was not possible for a single practice to produce a publication scheme just for itself. However, although we created those model schemes, which bodies could then say they were adopting, I am not certain that anybody ever looked at them again, to be perfectly frank.

Ruth Maguire: The public interest benefit of proactive publication is probably widely accepted, but the committee will want to hear reflections on financial implications. Do the panel members have any assessment to share with us of the resources needed to implement the duty set out in the bill’s financial memorandum?

Dr Worthy: I was involved in producing one of the documents on the constitution that has been

quoted in some of the financial background. The financial memorandum estimates an average cost of “£200 per FOI application”, but that is actually very high—most freedom of information requests cost far less than that. As Kevin Dunion has pointed out, the burden, even using those calculations, is likely to be very small.

It is important to make a couple of points about calculating the cost and the resource implications. One of my worries is that, when we start talking about the cost of freedom of information, we hide its benefits. We also help to feed the narrative that freedom of information is somehow a burden rather than a democratic right. The cost can be extraordinarily variable, and you must consider all sorts of questions when it comes to how you calculate them and what you include.

The other thing that we found when we monitored local government in the UK over the first five years of the freedom of information legislation is that organisations become better and more efficient at dealing with FOI requests over time. Therefore, I would caution against using any particular cost. It is likely to be very low, and it is helped by lots of other systems that, as we have said, are already embedded.

Ruth Maguire: Thank you. Erin Ferguson, do you wish to share anything on that, or on the previous question?

Dr Ferguson: No. That was pretty comprehensive.

Professor Dunion: I have read through the consultations, and very few people have been able to come up with an answer on costs that can be sustained under scrutiny. I recall the same question being asked when the FOI legislation came into effect and the process to appoint a commissioner was started. I would love for you to go back and look at the number of requests that were expected to be made to the commissioner back when the bill was passed in 2002.

There are two things to say about that. First, as I have pointed out, the number of requests coming in is far lower than might have been expected—although I do not know how you can calculate that unless you have a view as to what result you will get. Secondly, the 2002 act allows you to say to a person, “If you don’t like it, go to the commissioner.” You do not have to keep engaging with them, and you can come to that view if they are being vexatious, too. Therefore, there are some provisions that allow you to cut costs when you have a particularly persistent requester who is abusing the system.

10:15

At the end of the day, the fact is that, if we are going to move towards openness, we need to make some investment. What I see—and what I like—in the bill is that we are now investing in FOI 2.2. We need to move on from the point that we have reached, which is a culture of compliance with the law, towards a system of openness and empowering people. That fits with other legislative provisions on, for example, access to data. We want to encourage authorities to put data into the public domain and allow third parties to make use of it in order to create new information. That is already happening.

It is impossible to say what the figure should be. I would give you a low one, whereas somebody who does not like the bill would give you a high one. Your challenge, I think, will be to decide where the middle is.

Ruth Maguire: That is always a challenge.

The Convener: The information officer is one of the new figures introduced by the bill, and a lot of evidence in that respect has been drawn from the experience of general data protection regulation and the role of records management officers. Is that a fair comparison, or should we be looking for something else from the role of information officer with regard to obligations and expectations? What should we understand by the role? After all, it will be important to clarify that as we progress with the bill.

Ben, I will come to you first again, as you are online.

Dr Worthy: The comparison in the evidence makes sense to me. Across local government and smaller bodies, the person dealing with data protection and the person dealing with FOI are often the same.

Dr Ferguson: I agree. It is not unusual for an organisation to have an information governance officer who has a wide remit covering data protection and freedom of information. Indeed, the Information Commissioner’s Office in England is responsible for data protection and freedom of information. Therefore, although those roles are separate and have separate aims, they are, in a way, two sides of the same coin, so they could be combined.

The Convener: A lot of the evidence refers to the need for adequate information management systems, so might there be a benefit in the same person dealing with both aspects, even though the roles are slightly separate and distinct from each other? Do you see that as a way of making the cultural shift that is needed?

Dr Ferguson: Potentially, yes. Combining the roles would show that this was not just about data

protection but about proactively providing public access to information. It could reinforce and strengthen the role of information management in an organisation, especially given that things are moving on, technologically. It is important to have those roles and to retain them, so such an approach could strengthen things in that regard.

Professor Dunion: This is one of the elements that I am strongly encouraging; in fact, the question that we should be asking is why information officers do not already exist. We have mentioned that data protection legislation requires you to have a designated data protection officer. When the Public Records (Scotland) Act 2011 came in, I had to designate somebody, and the keeper looks at that. For example, the Information Commissioner is the person with corporate responsibility for compliance, and the head of office services is the person responsible for the practical implementation of what is required from a records manager. That is for an office of 28 staff.

I used to be convener of the Standards Commission for Scotland. In that regard, the Ethical Standards in Public Life etc (Scotland) Act 2000 requires a proper officer—the monitoring officer—to be designated in every local authority and a person to be designated in every devolved public authority in Scotland, no matter the size. The Standards Commission actually approves that person; the body will submit the name of the person and their qualifications, and we would sometimes say that we did not think that the person was senior enough.

The point of that approach was twofold: first, to help with progress chasing and providing expertise to those who are handling FOI requests; and, secondly—and I am being perfectly frank—to stand up to those in more senior positions who would countermand the professionalism of a junior member of staff. The point is to give some kind of status to the individual and their functions in the organisation.

Those roles already exist. For the past 10 years or more, we have had an annual meeting in the University of Dundee, where I have my honorary professorship, for the people who carry out those functions. They are self-selecting, but, each time, 150 people with those roles turn up, and it is important that they are professionally recognised.

The Convener: That is excellent. Thank you.

Katy Clark (West Scotland) (Lab): With regard to the new designations and the costs and benefits, there is, as Ben Worthy has said, a wide range of views on the cost of FOI, but there are also significant benefits to the public purse of FOI as a result of driving transparency, particularly for big organisations. As Kevin Dunion has said, the bill has changed significantly during the

consultation process. Lots of people would have liked the bill to immediately designate everybody who delivers public services in Scotland, but, in reality, that is not what the bill will do. What it aims to do is drive new designations, particularly through the creation of a role for the Parliament.

Can you say something to make it real to people what the bill might mean for those sectors or bodies that you believe should be prioritised for designation? What is your advice to the Parliament on what the priority should be?

Dr Worthy: I will hand over to Kevin Dunion and Erin Ferguson, because I am afraid that I do not really have a view on that.

Katy Clark: Thank you. I appreciate that you are down south.

Professor Dunion: Post-Covid, people have been concerned about what happens in the health and social care sector. I do understand that the sector feels that it is already under pressure, and there are challenges in relation to costs that have nothing to do with FOI. However, the fact is that, if your elderly relative is in a council care home, you can make an FOI request to that home about the quality of the care provided but you cannot necessarily expect a response if you make the same request to a private care home, even though it is using public money to provide the same service. Therefore, it is quite obvious that people will feel disadvantaged if their relative is in a private home.

I have two things to say on that. First, I am sure that care homes do not actually ignore information requests, and, secondly, I think that, as I have already demonstrated from the figures, care homes will not receive a tsunami of requests. However, given the sense of entitlement and the fact that subject access requests about individuals will be dealt with in any case, the issue is the regime in the care home, not necessarily the individual patient. Therefore, that sector is the essential one to designate. It will be challenging for the care sector to hear that, but it is necessary that it does.

We still need to get some big infrastructure projects brought within the scope of the legislation. Vast sums of public money are being spent in an opaque fashion and on services that are sometimes substandard. The idea that rail services can dip in and out of scope—the private provider fails, the service comes back into the public sector and then, hey presto, the unions and customers can make requests again—is nonsensical.

However, as Erin Ferguson knows, there was a case in England in which a judge decided that running a rail service was not the role of the public sector. Well, the reality is that it is; we are

regularly running rail services, as the operator of last resort. Where you have a public function and are spending significant sums of money, designation should be carried out on a case-by-case basis.

So, I am not suggesting a gateway any more. I am just suggesting that those are the factors that you would use when applying the designation process.

Katy Clark: The rail sector is heavily unionised, and there has been litigation to try to extend FOI into it. As you have said, ScotRail is now in public ownership and therefore has to comply with FOI. However, there are many sectors that perhaps do not get as much attention and where we have massive public contracts, with many millions of pounds going to multinationals to provide public services. From your experience, what benefits might there be in extending the regime to cover some of those large contracts with multinationals?

Professor Dunion: You can sometimes get that information at second hand from the contracting authority, although it will sometimes have to seek that information. With prison escort services, which involve a substantial sum of money, there are financial penalties for everything from turning up late at court to a prisoner dying in escort services. When I was commissioner, information on that was often withheld as being commercially confidential and I had to overturn those decisions. If that information were held by the Scottish Prison Service, it would be put in the public domain.

As for major PFI projects, the cost of Edinburgh royal infirmary was almost impossible to get. Thankfully, a shop steward—it was not even the union—asked for the information and, eventually, I simply said, “Publish it,” because the authority could not give me the final contract. If it did not know what the final contract was, how could it scrutinise it? Subsequently, there have been difficulties with that contract. It is unrealistic to say that a 20-year contract involving several million pounds a year does not involve providing a public service with public money. That is why case-by-case designations should still take place.

Katy Clark: I am grateful for that.

I appreciate that we have a time problem, convener.

The Convener: Yes, but Ben Worthy wants to make a short contribution.

Dr Ferguson: I—

The Convener: Oh, I am sorry. I will go to Erin Ferguson first and then to Ben.

Dr Ferguson: I am broadly in agreement with the previous comments. In addition to the matter of public funding, we need to think about the

fundamental rights that are at stake. That is why many people, including me, have been proposing and supporting the inclusion of the care sector. Similarly, the private contractors who are responsible for delivering asylum and immigration housing are ripe for being brought within the scope of FOISA.

When we think about the care sector, we think about the people working on the front line and, of course, we do not necessarily want them to be inundated with information requests. However, as Katy Clark has pointed out, it is often large multinational companies that have the contracts. We should reframe the discussion in that way and think about the amount of power that those organisations are wielding and why they should be transparent.

Dr Worthy: I would just note that the UK freedom of information law is expanding, because parts of the rail service are coming back into public ownership and so will automatically become subject to freedom of information. Similarly, if local authorities choose to take over local bus services, those will be subject to FOI, too. Transport will be a really important area.

I have two more quick thoughts, the first of which is that publicity of rights to information can help. If those rights are extended, people should know about that.

Secondly, to pick up on what Katy Clark said, I think that there is always a hidden benefit to the introduction and pushing of freedom of information. Freedom of information, of course, saves money by catching poor behaviour or exposing accountability when money is being misspent. However, it has another, more subtle effect, which is that the possibility of someone asking a question, rather than someone actually asking it, can itself discipline and stop poor behaviour. The extension to new areas could have all sorts of hidden behavioural benefits.

The Convener: That is excellent. Thank you.

I thank the witnesses for their fascinating evidence. If any thoughts come to you afterwards, please feel free to contact the clerks with them. I hope that you will appreciate that, by way of reciprocity, if we have any additional questions, we might also come out to you. Thank you for your attendance.

I suspend the meeting while we change witnesses.

10:29

Meeting suspended.

10:34

On resuming—

The Convener: We return with our second panel of witnesses. I welcome Alex Parsons, who is joining us online. He is a senior researcher at mySociety and WhatDoTheyKnow. We are joined in the room by Juliet Swann, who is the nations and regions programme manager for Transparency International UK.

We will move straight to questions if that is all right. Using the privilege of being convener, I will kick off with a question that I started with during the first panel. We consider the freedom of information provisions in Scotland to be well used and well regarded, but is that correct? Are we as good as we think we are?

Juliet Swann (Transparency International UK): You can always improve on good practice. As the witnesses on the previous panel alluded, there have been improvements in recent years after a period of underperformance. As the previous panel said, the freedom of information law is decades old and we need to move into a 21st-century, digital-first recognition of what freedom of information can do.

Public expectations are different. In the context of declining trust in democracy, we need to think about the transparency tools that we have at our disposal and about how to use them effectively and efficiently to ensure that the public see governance and decision making as trustworthy.

Alex Parsons (mySociety/WhatDoTheyKnow): Basically, it is good to balance where Scotland sits internationally, in terms of having access through the law and an effective working system that is well regarded by the public, with the changing nature of government not only in Scotland but around the world, and to recognise the need for transparency laws to keep in step. Things stand well in comparison, but, at the same time, there is always room for—and a need for—improvement, otherwise things will be left behind and will quickly become outdated.

The Convener: In the previous session of Parliament, consideration was given to the need for improvements in freedom of information law. Indeed, that itself speaks to the length of time over which we have perhaps not examined it. Has anything been missed in the bill that potentially represents an opportunity to bring freedom of information up to date? It is no criticism of the member in charge of the bill, who is joining us today, but have any opportunities been missed in the bill?

Juliet Swann: I suppose that the committee will have heard me say this before, but FOISA is only

one of a suite of transparency tools that we should consider as complementary and interlocking. Other post-legislative scrutiny has happened around the Lobbying (Scotland) Act 2016, for instance, but there has not been any progress there. I would not necessarily say that there is anything missing in the bill, but we should be considering the use of a broader suite of tools.

This might be an opportunity to stress that TIUK is supportive of the proposals in the Freedom of Information Reform (Scotland) Bill. One of our main concerns is that bodies that are designated as Scottish public authorities are exempt from the Lobbying (Scotland) Act 2016. We would be interested in ensuring that the designation process does not remove the commercial and private activities of firms that are also delivering public services from the requirements to register lobbying activity.

Alex Parsons: In viewing FOI as part of a wider suite, it is important to keep the environmental information regulations as part of the discussion, especially regarding any differences between the cost limits of the two. In a sense, the environmental information regulations inherit an older framework, whereas, when freedom of information came in, there was an understanding that most reasonable requests should not cost anything. That is a bit different from the environmental information regulations, and it is important to keep that as part of the picture. While the goal of the environmental information regulations is to make it easier to access environmental information—as is implied by the name of the regulations—it is important to ensure that environmental information is more accessible, not less accessible, than other kinds of information, as that was the point of having a separate framework.

The Convener: What are the current challenges and barriers to freedom of information for those who are trying to use it?

Juliet Swann: I suspect that it has already been mentioned that, broadly, freedom of information is culturally seen as burdensome and vexatious rather than as a transparency tool of last resort. As a matter of course, organisations should already provide that information to the public and put it in the public domain, which is why the focus in the bill on proactive publication is so important.

It goes back to how the ways in which we communicate have changed. It is no longer the case that somebody types up a handwritten note to be published on a website. We all communicate electronically, so it is not that hard to put such information into the public domain. That is my main comment.

Alex Parsons: As was mentioned by the previous panel, one of the good things is that you do not have to say, “I’m submitting a freedom of information request.” If you ask for information, the authority should say, “Yes, and this is how we process that.” I think that the surveys run by the commissioner show that a number of people understand themselves to have made an information request, partly because the process kicks into life when they ask for information.

At the same time, it is not unfair to say that there are barriers when it comes to understanding how to use the legislation and what it does. When you start to engage with the process, it becomes more formal and legalistic, and you have to understand the responses that come back and how exemptions were applied. If you just want information from a public authority that is physically close to you and that makes decisions about your life or other local matters, the barrier fairly often is that most people who make requests make only one request to one authority and do not have the institutional knowledge that, for example, researchers like myself or journalists have. The barrier is that you always have to go from zero to 60 when considering, “How do I use this right to information?”

Sue Webber: If the proposed amendment to the general entitlement does not alter the position of disclosure under the Freedom of Information (Scotland) Act 2002, how might it still help to shift organisational culture or public perception around transparency?

Juliet Swann: Is that the presumption that you should disclose?

Sue Webber: Yes.

Juliet Swann: Having reviewed the consultation responses, my broad understanding is that there is already a presumption to disclose if you are sent a freedom of information request. The move to focus more on proactive publication also suggests that, if you have not already put the information in the public domain, you should justify why you have not done so. That should be your first reaction.

Will the proposed amendment actually change behaviour? That is a whole different kettle of fish, is it not? The previous panel touched on the fact that whoever delivers responses to freedom of information requests needs to have the support and seniority to do so without feeling that they will be challenged or blocked in what they are trying to do. A cultural shift is probably required, but you cannot legislate for that, can you?

Alex Parsons: The way that I think about it is that public authorities are not monolithic. In any conversation about releasing information, there will be people who are in favour of it and people

who are against it. You want to put more tools in the hands of the people who are in favour of it.

When you go to conferences with freedom of information officers, it is clear that they believe in transparency and making the legislation work. You want to put more tools in the hands of people who want to make that transparent culture work, and one aspect of the bill is that it would give them tools, because they would be able to say, “Well, this is what the bill says. There is a presumption here.” When things are borderline, it would help people to make the argument that they should go with the presumption of transparency.

Sue Webber: You said that most of the public authorities and bodies say that they operate in a world of transparency, so why do users often have quite a different view and feel that exemptions are used as a default in order to withhold information? They look at it a bit sceptically.

Alex Parsons: Can you ask the question again?

Sue Webber: I am struggling to hear you, Alex. You are going in and out. I will ask Juliet Swann that question, which I hope you can pick up.

Public authorities say that they already operate with that presumption of disclosure and are open and transparent. Why, then, do users of FOISA often feel that exemptions are used as a default in order to withhold information?

10:45

Juliet Swann: You have answered your own question. As Alex says, that is one of the reasons why more tools need to be in the hands of the people who are seeking to pursue transparency, whether that is people who submit freedom of information requests or those who seek to meet them inside public bodies.

It is frustrating. Which exemption will be used when you are putting in an FOI request can sometimes be predicted. You think, “You’re going to tell me that it’s commercially confidential.” That is frustrating. Again, without wanting to repeat myself, that is why it comes down to a cultural shift whereby it is, “Why shouldn’t you share this?”—no; “You should share this. You have to demonstrate why—”. I am not really explaining myself terribly well.

Sue Webber: I get what you are saying. It is the double negative.

Juliet Swann: It is about reverse engineering.

Sue Webber: Alex, can you help us with that?

Alex Parsons: [*Inaudible.*—in FOI statistics is the unreasonable effectiveness of internal review in the sense that more information is released

after internal review than should really happen if the first decision is correct. That could be the result of a range of things, such as the inexperience of the first responder, for example, but it is also sometimes a strategic play to see what happens—to see whether the person making the request goes away or whether they go to the next stage, when they can appeal to the commissioner. In that sense, the previous question falls outside the scope of the bill. Looking at the review system and making it easier for the commissioner to understand what is happening in internal review would be part of encouraging incentives all the way through, to give the best answer the first time around.

Sue Webber: “Give the best answer the first time around”—we will take that out of that response.

Emma Roddick: There were some conversations with the previous panel about section 5 powers and the feeling that it has taken an awful long time to make use of them. Do you have any thoughts about the root causes of that delay and what more can be done to make sure that those powers keep pace with the changes in public service delivery?

Juliet Swann: I imagine that private bodies that deliver public services do not particularly want FOISA to be extended, so an argument will be being made from that side. It brings us back to the lobbying question. However, it is complex. How do we decide which parts of an organisation’s work are public services, following public money, and which parts are still doing private and commercial work? Arguably, some bits of public bodies deliver commercial work, so should that also be separated out?

Perhaps there is a reluctance because it feels complicated, and it is not actually as complicated as we think it is. I like the idea of the Parliament having a role and having a consultation process around the designation, especially because that could help to bottom out some of those suggested complexities.

It is important to know why we are extending the designation. The principle of following public money is a good one—TIUK strongly supports that—but it is also important to understand what the public thinks it can get from freedom of information requests and whether there are other ways for that information to be made public, either through better proactive disclosure or through a requirement that X, Y and Z be done as part of delivering a contract.

Multiple things could be done, which I suppose is maybe why it has taken longer than we would have liked to bring other bodies on board. Alex Parsons might want to say something about the

fact that we do not really have a list of public authorities except in the Freedom of Information (Scotland) Act 2002. If we had had a better list, we might have been able to improve the designation process instead of having a cart-before-the-horse situation whereby the list is in FOISA rather than being a list of people who deliver public services.

Emma Roddick: In the earlier evidence session, there was a suggestion that there could be triggers for starting the designation process and that, once those were met, it would be almost automatic that designation would be considered. Alex Parsons, you might want to address that in your response.

Alex Parsons: One of the interesting things about bringing the Parliament into the picture is that it encourages the alignment of incentives all the way through the process and that, rather than just a debate, there is a potential backstop for the designation of bodies in a way that encourages that sort of discussion earlier in the process. It is almost a case of thinking, “Well, okay—we’ve done all this consultation, the Information Commissioner is in favour and all this work has happened, so there’s no clear reason not to do it,” or it will incentivise the Government to give a really clear reason why, despite all that work, designation is still a bad idea. Therefore, the involvement of the Parliament in the process encourages providing reasons and being clear about what is going on during the process.

Emma Roddick: Juliet Swann, I found it interesting that you mentioned lobbying and the fact that that might cause delays to designation—that is how I picked up what you said. Would it be harder to lobby if the whole Parliament was involved?

Juliet Swann: That is a really good question. It is probably harder to lobby across the whole parliamentary decision-making process than it is to lobby specific Government decision makers, because there are fewer of them. The way that lobbying works is that, the more contact that you have with somebody, the more you become almost captured by whatever they are telling you. If you are regularly spoken to by X industry, which says, “Well, of course you don’t want to extend FOISA to us—we’re lovely,” you are going to adapt to that thought process.

I like the idea of triggers leading to designation. I wonder whether you could have a system in which one of the conditions for applying for public money for a contract was that you would be subject to FOISA in the delivery of the contract. It would then be up to the body that was applying for the contract to decide whether it wanted to go through the process, which I suppose would tell you something about who wanted to apply to spend public money.

Emma Roddick: In general, would the parliamentary route to designation be faster?

Juliet Swann: I suppose what I am suggesting is that, if the Parliament decided that there was a designation process and it was agreed that you could apply that process per outgoing of public money, that would be even faster. Obviously, with the Parliament, the risk is that there is only so much time in the day and there is the issue of how you keep doing all the things that you need to be doing, including deciding on further designations.

Sue Webber: Some of the evidence that was submitted to the committee suggested that the clock approach can feel adversarial to requesters. Would a pause mechanism lead to a better relationship between public authorities and the public?

Juliet Swann: That probably goes back to Alex Parsons's point about doing it right in the first place. Sometimes, I have been asked to limit the timeframe because we have so much correspondence. Identifying a way to get a first tranche of information, to see whether you are going to get anything useful from it, and having that sort of back-and-forth process—if both parties are doing it in good faith—can be helpful. A pause to the timeframe would be a useful way of allowing that to happen, and, as I think was said earlier, the clock would start again once the information came back from the applicant. Therefore, I could see that being beneficial, but, as with many of the bill's provisions, it will come down to the good faith that I have spoken about. You could still try to use that mechanism maliciously if you wanted to, but I would hope that it would be an improvement.

Alex Parsons: It is a question of wanting the system to work on the basis of good faith but also ensuring that there are not mechanisms that could be abused. Switching from a reset to a pause would help to shift that along a bit—there would still be potential to throw some obstacles in the way, but to a much lesser extent, which would be an improvement.

Sue Webber: Is there a risk to public trust if public authorities are not sufficiently resourced to meet the 20-working-day deadline?

Alex Parsons: Only in the general sense that, in relation to freedom of information, if public trust is dependent on timely access to information and public bodies are not resourced appropriately to provide that, the general principle of the 2002 act is undermined. The resourcing and the support that are given to freedom of information in authorities is, practically, one of the—[*Inaudible.*]

Sue Webber: Juliet Swann, would the proposed pause improve the experience of users of the 2002 act and strengthen trust in the system?

Juliet Swann: Yes, I think that it could help people on both sides—those who are making freedom of information requests and those who are trying to respond to those requests within 20 working days. As we have both said, they would know that they could pause the clock if they needed to have a conversation about exactly what someone was trying to get out of their request, because some requests are cast better than others.

One of the points of freedom of information is that it is a backstop that allows transparency in, decision making and public spending, and it is important to have that transparency quite quickly. If you find out the information only after months of delay, it is sometimes far too late to have a proper impact either on how the money is spent or on any of the outcomes of how the money is spent. Therefore, there has to be a time limit on the process. Yes, it is sensible to have back-and-forth communication, but if the time limit is not met, further processes can begin and appeals can be made to the Information Commissioner and so on.

Sue Webber: What are your thoughts on some of the alternative proposals such as having a shorter time limit—five working days for seeking clarification—after which only a pause would apply? Would that balance the needs of requesters with the operational realities of public authorities?

Juliet Swann: I think that the committee would need to talk to people who respond to freedom of information requests to get a better idea of exactly how that would work. As Alex Parsons and Professor Dunion said, most of these people have bought into the idea of transparency and think that freedom of information is a good thing, so we need to find ways to talk to them about how such a mechanism would improve their ability to function.

Sue Webber: Thanks, Alex, do you have any thoughts on that question?

Alex Parsons: Only that there is a risk. Flexibility is useful in terms of being able to use resources in different places, and a quite short deadline for the first step could cause problems for requesters. For example, if things legitimately are not seen until the sixth day, you will be back in the situation that you were in before, in the sense that the request is so broad that you immediately get a cost limit exclusion or in the sense that the request is not easily understood, so you are starting the clock again. The pause would helpfully balance things when requests were, legitimately, judged to be unclear or too big to answer and a discussion was the right approach.

Annie Wells: I am sorry that I was not here at the start of the evidence session. I would like to speak about the Scottish Information

Commissioner and enforcement. I asked these questions of the earlier witnesses, too. Do you support the proposal to allow the Scottish Information Commissioner to investigate how its office handles FOI requests? What impact might that have on transparency and accountability?

Juliet Swann: I think that I heard in the earlier evidence session that that has never had to happen. The principle that TIUK would probably sit with is that it is never particularly good to have people judging their own work. How you square that circle is a whole other issue, but the basic principle is that people should not be marking their own homework.

Annie Wells: Alex Parsons, do you want to add to that?

Alex Parsons: To bring in more information from the earlier evidence session, the reason that the UK ICO tends to mark its own homework a bit more is that, in effect, it is a joint privacy and information regulator. In appeals, we often see different teams in the ICO looking at different things. For example, if a request is made to the ICO for information on the nature of its privacy commissioner role, the FOI team will review that aspect. It is important to understand that the ICO is a bigger institution than the Scottish Information Commissioner, which partly explains why we see different behaviour there.

11:00

I do not know what the correct approach would be to ensure that the Scottish Information Commissioner does not judge its own homework. The two regimes are not massively different. I imagine that a supervised approach between the commissioners might be a back-up in some circumstances, but that has not happened often in practice. The concern is legitimate and the situation needs to be monitored, but I am not sure that we would want to overthink it and overengineer a solution.

Annie Wells: Perfect—thank you for that. What are your views on the proposal to introduce an exemption for information that is provided to the commissioner during the investigation of appeals? Should there be such an exemption?

Alex Parsons: I can see the reason for that, especially if, as part of the investigation, the commissioner gathers more information in one place. The exemption would enable them to be clear that the information was part of the investigation and it should release information only if that is legitimate. Our only concern is that the exemption should be tightly focused on any extra information that comes from extra powers. We do not want a situation where the fact that the commissioner is having an investigation changes

the status of some of the information. We should hope that the investigation will lead to the right outcome.

Annie Wells: Juliet Swann, do you have anything to add on that?

Juliet Swann: No.

Annie Wells: I will move on to my final question. The bill proposes repeal of the First Minister's veto power under section 52 of the Freedom of Information (Scotland) Act 2002. What are your views on that proposal?

Juliet Swann: We are glad that that power has not been used. Let us get rid of it.

Alex Parsons: The veto is best understood as a compromise that was made during the consideration of the bill that became the 2002 act, when there was a lot of official reluctance to bringing in the legislation at all. It was a safety net that could be used in extreme circumstances. It has proved not to be needed and it has not been used. We hope that it will never be used if it remains, but why not remove it while you have the opportunity?

Annie Wells: Thank you for your answers.

Ruth Maguire: Good morning. We have had a conversation about how far the proposals will go in creating a cultural shift. If you have anything else to add about that, please do so, but I also have some specific questions for you, the first of which is about the duty to publish, which would replace the publication scheme duty that we have at the moment.

Juliet Swann, what are your reflections on how well the duty to publish would keep pace and be future proof? You said that a lot of our communications are now digital. We have already seen the use of questions that have been generated by artificial intelligence for freedom of information requests, and the public sector is involved in digital transformation at varying pace. Is the proposed duty future proof in your organisation's eyes?

Juliet Swann: I am also co-chair of Scotland's open government partnership steering group. Open government is about ways of working and developing government activity that deliver on transparency, accountability, integrity and participation, and two commitments that we have worked on since the partnership started are open data and fiscal transparency. Working closely with civil society and government, we have been able to push information out much more proactively in both of those areas, so there are relevant models in open government.

Because open government is an international innovation, we can learn from other countries in

pursuing more proactive publication and understanding how to harness the digital tools that are available to us, which were not available when we first considered what freedom of information would look like. I am not completely across it, but the Netherlands is doing really good work on proactive publication, which we can learn from as we develop the proposals in the bill.

I am interested in monitoring the process and in post-legislative scrutiny of the provisions if the bill is enacted. Pulling that into open government would allow us to monitor that cultural change and identify opportunities where it might be useful to have more participation in deciding things, whether that is in relation to designation or how things are working, and to get reflections on how people feel the new regime is working on a practical, request-by-request basis.

Ruth Maguire: When we think about freedom of information, we often think about journalists using it—although here we think about politicians. Will the work that you spoke about, and the bill, do enough to help the public to find the information that they need and, importantly, help them to use that information to realise their rights?

Juliet Swann: A fundamental aspect of open government and its approach is doing those things in a useful and effective way and bearing in mind the end user all the time. By embracing those ways of working, you can start to at least have those things in mind at the outset.

It is difficult to make those things perfect and to apply them across the swathe of different experiences, knowledge and ability to process information. We had an interesting presentation from one of my open government colleagues in the Nordics, who said that they always like to imagine their great-aunt Beth and ask themselves whether she would understand the information that they have just thrown at her. As was said earlier, there are interesting platforms that are based on a search engine-type thing, which ask afterwards, “Did this information help you?” If you answer that the first piece of information did not help you, the platform suggests where you might go to find the information that you did not get.

It is about pulling things together a lot more and seeing it all as one big ecosystem rather than having all those separate databases in different places.

Ruth Maguire: That is helpful. Alex, in your evidence, you noted concerns about data fragmentation in the public sector. Can you expand on how that might affect the implementation of the duty to publish? Do you have evidence of the scale of the issue that you have flagged? How might we address it to ensure that that duty works well?

Alex Parsons: I will recap a few aspects of the matter. When we talk about public data fragmentation, we are effectively talking about where different public authorities, typically local authorities, collect data. However, the value of that data is often in the aggregate data set across Scotland or the UK.

At the moment, to reassemble that data often requires either all authorities to be mandated to publish it, for them to do it themselves, or for someone to make a freedom of information request to every authority, then reconcile it and then keep it up to date, which is quite a large amount of work for the ultimate value of the data set.

What is exciting to me about the proactive publication part of the bill is that moving things to a code of practice would make it easier to be kept updated over time and to provide frameworks for thinking about how to join things up.

The bill does not necessarily mandate right at the start that people must publish in a certain way; rather it gives a forum for co-ordination. At the moment, we are all trying to publish the same data set and, if we publish on our own, we put in all the work but the value does not come out of it. However, if we do a little bit of work to co-ordinate with information commissioners and a framework is provided for how we talk to one another, that will enable us to get the most value out of that public data, to ensure that it is not only feeding into the immediate requester, but into subsequent analysis, research that informs policy and commercial products that can be useful for the general public.

One of the problems about just publishing things for freedom of information purposes is that data ends up fragmented, so having more standards in place would help to join up the conversation, get the most out of the data and enable people to do proactive publication well.

On the point about scale, I do not have any numbers at the top of my head, but I know that we looked at the requirements to publish, which were produced in 2015. I wonder what the best example is that I can use.

I have forgotten the institution involved, but there was a project involving Scottish local authorities taking actions around climate change that essentially started as an outside project, with lots of questions being asked of local authorities, but it came to be embraced as an official Government project, and the data standard was adopted by legislation to create a framework.

There is an escalating ladder between finding out what is already there and formalising something informally and finding out that it is really

useful and making it a useful element of Government statistics, if not official statistics.

Ruth Maguire: That is helpful. Thank you.

The Convener: Before I bring in Katy Clark, I want to ask about the proposal to extend the offence of altering or destroying records. Such things frequently come to light because someone has made a freedom of information request. Do you see any challenges there? Do you see value in extending that in cases where no freedom of information request has been made and the destruction of the records has come into public knowledge in a completely different way? Is there anything that we need to be cautious about in introducing a blanket extension of the provisions?

Alex Parsons: I do not have a strong opinion on that point, as I do not feel that we have a good set of expertise in this area. I understand what you are getting at, but I do not think that I can give you useful information.

The Convener: That is fine.

Juliet Swann: The Martins review of WhatsApp deletion during the Covid pandemic is a good, expansive review in that area, with a very good set of recommendations. I would be interested to know how those recommendations are being implemented, and the committee may wish to ask for an update from Government on how the Martins review is going. That piece of work should inform this policy area.

The Convener: Are you saying that the strength of that review is the idea that the purposeful destruction of records in any situation should, at the very least, merit questions as to why it occurred?

Juliet Swann: Exactly. That example revealed to us that record keeping is important, as is knowing how record keeping happens and having a culture around record keeping. Emma Martins has provided a good, useful, comprehensive analysis, which I think could be applied beyond the specifics of the use of WhatsApp during Covid.

Katy Clark: I will ask one question if that is okay.

The Convener: Please do.

Katy Clark: There have been campaigns over a number of Scottish Parliament sessions to update and extend freedom of information provisions in Scotland. As has been mentioned, the committee undertook an inquiry, took evidence and produced a report with recommendations in the previous session. The bill is partly a response to that: it includes some of those recommendations, or it is an attempt to deliver on some of them—and, indeed, on recommendations that have been

made by successive Information Commissioners, who all support the bill.

A lot of the submissions discuss public trust and the popularity of robust freedom of information laws. What is your opinion of the likely views of campaigners, in particular, but also of the views of the wider public should there be a failure to take action to address some of the issues that have been raised time and again over a number of sessions?

Juliet Swann: I see what you are getting at. Given the amount of attention that has been paid to bringing the law up to date and into the 21st century, a continued failure to do that will lead to questions about why we do not want to improve a system that we know could be improved and what it is that we want to hide. As I referred to at the beginning of my contribution, given the on-going decline in trust in democracy, following-the-money reforms to FOISA, moving to proactive publication and improved transparency of decision making are not just nice-to-haves; they are essential protections against the roll-back of democratic norms that we are seeing globally. It is vital to ensure that, in Scotland, we are still abiding by the highest international freedom of information standards, not falling behind.

Alex Parsons: We do not like freedom of information for its own sake; we like it because of the benefits that it brings and because of its wider impacts, such as encouraging good, effective Government projects, transparency and the reduction of waste and corruption. That is where a failure to keep freedom of information law up to date in a timely way kicks in. It is not that a particular story in the newspapers or a scandal may have resulted from a lack of freedom of information, but that is kind of behind it in that a lack of transparency and accountability leads to more bad things happening, and that is bad in general, bad for public trust and bad for people.

That is the consequence of not keeping freedom of information law up to date and reflecting changes in how government is run. Bad things happen in how government is run, and people notice that. They might not understand it as a something that could have been prevented five years previously with new freedom of information legislation, but that is part of the picture.

The Convener: Juliet and Alex, thank you for your evidence today. If there is anything that comes to mind afterwards, you know how to get in touch with us. As always, we know how to get in touch with you if we have further questions.

11:15

Meeting continued in private until 11:16.

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