



OFFICIAL REPORT
AITHISG OIFIGEIL

DRAFT

Finance and Public Administration Committee

Tuesday 21 May 2024

Session 6



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FINANCE AND PUBLIC ADMINISTRATION COMMITTEE
18th Meeting 2024, Session 6

CONVENER

*Kenneth Gibson (Cunninghame North) (SNP)

DEPUTY CONVENER

*Michael Marra (North East Scotland) (Lab)

COMMITTEE MEMBERS

*Ross Greer (West Scotland) (Green)

*Jamie Halcro Johnston (Highlands and Islands) (Con)

*John Mason (Glasgow Shettleston) (SNP)

*Liz Smith (Mid Scotland and Fife) (Con)

*Michelle Thomson (Falkirk East) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Dr Ian Elliott (University of Glasgow)

Lesley Fraser (Scottish Government)

Gregor Irwin (Scottish Government)

John-Paul Marks (Scottish Government)

Jackie McAllister (Scottish Government)

Professor Alan Page (University of Dundee)

Lynda Towers (Law Society of Scotland)

CLERK TO THE COMMITTEE

Joanne McNaughton

LOCATION

The Robert Burns Room (CR1)

Scottish Parliament

Finance and Public Administration Committee

Tuesday 21 May 2024

[The Convener opened the meeting at 09:30]

Public Administration in the Scottish Government

The Convener (Kenneth Gibson): Good morning and welcome to the 18th meeting in 2024 of the Finance and Public Administration Committee. The first item on our agenda is an evidence session with John-Paul Marks, permanent secretary to the Scottish Government, on issues relating to public administration in the Government. Mr Marks is joined by Scottish Government officials Lesley Fraser, director general corporate; Gregor Irwin, director general economy; and Jackie McAllister, chief financial officer. I welcome you all to the meeting and invite Mr Marks to make a short opening statement.

John-Paul Marks (Scottish Government): Thank you, convener. I have a few opening comments as per your correspondence.

First, the 2022-23 consolidated accounts have received an unqualified audit opinion. You can expect a balanced position in the 2023-24 provisional outturn in June, with sustainable levels of borrowing and a modest capital carry forward to support the 2024-25 position. I am grateful to Jackie McAllister, my chief financial officer, and to Audit Scotland for its scrutiny and leadership as we continue to strengthen transparency and financial control, balancing the budget each year.

Secondly, my director general corporate, Lesley Fraser, wrote to you with an update on the historical harassment reviews. We strive for best practice in propriety and ethics to build trust, accountability and confidence.

Thirdly and importantly, in response to the committee's inquiry into effective decision making, we are focused on improvement following your recommendations. I thought that I would share a few examples with you this morning.

On transparency, we have shared the accountable officer scheme of delegation. We have published the first performance report alongside the annual report and accounts, and we have improved freedom of information response rates to above 95 per cent from an 82 per cent average in 2022-23.

On approach and structures, we will finalise our Scottish Government governance review in June, maturing our model of corporate leadership. We have developed partnerships in delivery by, for example, working with local government to tackle child poverty, underpinned by the Verity house agreement. We are also collaborating across four nations by, for example, working to revise the fiscal framework with His Majesty's Treasury and delivering programmes such as green freeports, underpinned by good intergovernmental relations as a civil service.

The review of the national outcomes is under way, with the statutory report laid in the Parliament, revised as Scotland's wellbeing framework, and we are developing long-term insight briefings. To inform consistency, we have established new capabilities on strategy, performance and delivery, with targeted programmes to improve risk management, AO assurance and commercial asset management consistent with our published business investment framework. We are strengthening the team with new directors and non-executives and, of course, structuring challenge into delivery—for example, via The Promise oversight board, the national advisory council on women and girls and the Scottish Futures Trust—as we innovate our approach on mutual investment.

Finally, we are developing policy profession standards to support advice to ministers, implementing a new Scottish Government leadership framework this year.

Convener, as you know, we have welcomed a new First Minister, Deputy First Minister and Cabinet, and the Parliament will shortly hear a statement on the First Ministers' programme focused on reducing child poverty, growing the economy, delivering strong public services, and tackling the climate crisis. But we must be open about the scale of the challenge. We face acute risks to longer-term fiscal sustainability. The consolidated effects of double-digit inflation and Covid backlogs have placed considerable demands on fixed budgets. Difficult choices remain necessary. That is true across all four nations, with pressure across systems. The medium-term fiscal strategy will be set out to the Parliament shortly and I believe that you will be written to this morning to confirm the date next month.

Convener, finally, amidst the challenge there are opportunities in key indicators. The growth outlook is improving. Inward investment remains strong and we are seeing significant investment in green industrial transformation. As the First Minister and Deputy First Minister set out on Friday and yesterday, the Scottish Government is firmly focused on accelerating growth. Gregor Irwin, my

director general of economy, joins us, too. We are happy to say a bit more on that if you wish.

I hope that gets us started this morning. We look forward to your questions. Thank you.

The Convener: Thank you very much. You touched on the medium-term financial strategy and the letter about that that members have been given only this morning. I will ask about that first.

I think that there will be disappointment throughout the committee. I have not spoken to all members yet—I found out less than an hour ago that I was receiving the letter. Surely, sending something along the lines that the strategy will not come out until Thursday 20 June is not really acceptable from a scrutiny point of view. That makes it extremely difficult for clerking teams to get papers out to members, let alone for members to absorb them in order to have any meaningful scrutiny at our last committee meeting on the Tuesday before recess.

John-Paul Marks: I can take that message back. As I said in my opening statement, you will recognise that events in the last two weeks are such that we have a new First Minister, a new Deputy First Minister and a new Cabinet, so there is a set of parliamentary events that will occur between now and summer recess, including the First Minister's statement this week in which he will set out his policy programme. That will impact on the long and medium-term fiscal strategy including, for example, on the choices around capital prioritisation in the infrastructure programme. I think that the time is needed to do that well, but I hear the feedback in regard to the letter that you have received from the Cabinet Secretary for Finance and Local Government this morning. We will convey that and see whether there is anything that can be done to make sure that we can be available for scrutiny with you on 20 June.

The Convener: I think that members would be more sympathetic if there had been a change in finance secretary, but there has not, of course. As I said, I am not speaking for all the committee at this point because we have not discussed it, but I am sure that they would be supportive of my view that a three-week delay to almost the very last minute prior to recess is not acceptable. We will be feeding that back and I am pleased that you will also feed that back.

We have a huge range of areas to cover. My colleague Liz Smith, who sends her apologies that she will not be able to come until about 10 o'clock, said that I will probably still be questioning at that point. That certainly is not my intention. However, we have been given quite a range of issues to talk to you about. I will try to touch on a few things and colleagues will, I hope, come in at a similar depth.

I may come in at the end if there are any gaps, although knowing my colleagues I do not believe that there will be.

The committee has looked at how the Scottish Government assesses the quality of engagement across different policy areas in Government to identify areas for improvement. How difficult is that when you have a situation of churn in ministerial appointments and portfolios?

John-Paul Marks: We have focused on that to make sure that we are managing churn. That has been raised by this committee and by others in the past. Lesley Fraser might have the latest data to hand, but I think that our churn rates in the Scottish Government have reduced in recent years, down to about 7 per cent churn within the organisation. That compares well against others across the four nations.

We believe in the importance of establishing stable expert professions and professional teams to support ministers through change. If I take something like social security, the programme director and the chief executive have been on that journey since its beginning and have stayed the course. That is often something that we ask senior leaders to do, to make sure that we keep that corporate knowledge in the system as we move through any political cycles.

On your point around consistency, we use a number of mechanisms to try to scrutinise that to ensure the quality of, for example, financial scrutiny. If you are interested, Jackie McAllister could say a bit more about the accountable officer process. For spending, we want and need to have assurance that something is regular, proper and, therefore, lawful and derived from the authority of the Budget Act, but also feasible and value for money. We would derive that from objective evidence. We use templates to do that with a set of thresholds for approvals, so that that is not simply done in the portfolio but has cross-Government scrutiny that might come from a finance business partner, the chief finance officer or myself, depending on the level of spending.

The final point that I made in my statement was around structuring challenge. Groupthink is a risk. We want to make sure that the work that we are doing is informed by the very best scrutiny, data, evidence and opinion. If I think about something like the national performance framework, we have worked with a lot of external colleagues, including the evidence that you and other committees heard during your inquiries, to make sure that what comes next in the wellbeing framework is informed by scrutiny.

We get to consistency by ensuring that we have the right capabilities in place and the right structures and controls to support that. Then we

make sure that we also bring external challenge to that to try to develop the very best policy and delivery that we can.

The Convener: Thank you for that. You have also said:

“devolution has afforded some scope for differences in matters of people policy and on how the Scottish Civil Service operates”.

Can you expand on that a wee bit?

John-Paul Marks: As a small example, the Scottish Government operates as a single team and I observe that every day. It is impressive. It has the same operating system, the same pay and conditions. People can move. Given your point on churn, that needs to be managed, but people can move between finance, the economy directorate and the corporate directorate in quite a seamless way. The Cabinet meets every week when the Parliament is sitting and the sense of collective endeavour is well organised and structured through Cabinet and Cabinet subcommittees, as well as through our corporate governance.

I find that that is very noticeable compared to an experience in Whitehall. I say that with huge respect to the way in which we have organised the civil service there, but the operating systems of Government departments in Whitehall are often different from each other—the pay scales are often different and it is sometimes harder to move between Government departments in the same way that is more facilitated in a smaller, devolved Government single operating system. That partly reflects scale. We have one press office for the Scottish Government. Government departments in Whitehall will have multiple press offices for each of their Government departments serving each secretary of state. We try to ensure that, whether it is comms, digital, commercial or human resources, as best as possible we have a single shared service model. That supports efficiency, but it also supports the capacity of the Government to move in a co-ordinated way.

The Convener: Would you say that that makes the Scottish Government more effective, more efficient and more flexible?

John-Paul Marks: There are certain capabilities that I have just explained that colleagues in Whitehall are moving towards. For example, on shared services, Lesley Fraser is leading our shared service programme. There are a number of programmes like that in Whitehall to also move to more shared operating platforms across departments. That enables data sharing and it supports delivery.

It is a different model for a different context. Like I said, devolved Government has grown up with changing powers to deliver according to what is devolved and what is within our competence. That

has enabled us, to an extent, to start again and learn from the past. Social Security Scotland is a good example of that. It works closely with the Department for Work and Pensions and it has learned from some of the DWP’s experiences and is putting that learning into practice.

The Convener: I am quite intrigued by job families and how that operates. I wonder whether Lesley Fraser would come in here to talk about job families. We have some background information on it, but for the record I am keen to hear about how you envisage it working. Could you also touch on the people strategy and workforce planning? I understand that there has been a 29 per cent reduction in contingent workers over the piece.

Lesley Fraser (Scottish Government): Yes, you are quite right. Our people strategy has been a big area of focus for us in the improvement journey that the permanent secretary has just set out. We are looking at the development of the capability of our people.

We have 22 different professions within the Scottish Government and we are identifying those clearly and giving our colleagues the opportunity to identify which job family they are in. There are a number of benefits for those colleagues, because they are then on a clear trajectory for personal development. We are looking to learn from the best.

09:45

A good example of that would be our programme and project management profession. We have a project council, which is led by one of my DG colleagues who has huge expertise in programme and project delivery. If someone is coming into their first role in Scottish Government, wherever they come in, and they desire to join that profession, they can now follow that ladder.

The focus on job families and training our professions is one of the strands. We are also looking at the organisational design of the Scottish Government, which has grown up organically as different powers and responsibilities have come over the years. When we take a step back and look at it, there are ways in which we can become more efficient and more effective, and we are looking at those.

All that is being underpinned by up-to-date 21st century systems. We are joining our HR and finance systems and moving on to the cloud. That will give us a lot more capability in management information and real-time information about where our people are, how they are progressing in the organisation and areas that we need to focus on, but also an ability to manage money in conjunction.

We are also looking at hybrid operations and how we are underpinning that by the use of our estate. We are seeing the issues in the round.

One thing that I have been particularly pleased to see this year is the development of our new diversity and inclusion strategy. We know that we want to do more and do better in that area to ensure that, in the future, the Scottish Government is more representative of the people we seek to serve by being a welcoming and inclusive organisation that focuses on how people can thrive and have good opportunities in the organisation.

The Convener: Is it not already welcoming and inclusive?

Lesley Fraser: It is. We do reasonably well. We benchmark pretty well against other organisations, but I guess we are particularly interested in looking at where we can and should do better.

The diversity and inclusion strategy has looked at data from the past few years and it is also very much built on our colleagues' lived experience. They are very good and very generous at telling us where improvements can be made. When we put that together, it gives us areas where we can highlight and focus our improvements.

Good is good but we want to be better. We want to be the best in class where we can.

The Convener: Is that diversity based on ethnicity, gender, social class or a combination of all those?

Lesley Fraser: It is based on all those things. Our new diversity and inclusion strategy looks at the intersections because what we have seen is that, if someone is disadvantaged in one area, it is sometimes in combination with others. It is about looking in the round to see what we can do as an organisation that would help in that circumstance.

The Convener: Permanent secretary, I understand that corporate capability has also been strengthened with the introduction of mandatory risk management learning for all civil servants within the Scottish Government and through an annual assessment of risk management maturity. What does that entail?

John-Paul Marks: Jackie McAllister has led a lot of that work, so I will bring her in, if that is okay. We have stepped through as an executive team and then across the organisation that mandatory training for colleagues in risk and assurance and a regular risk review at our delivery executive, which meets each week on a Thursday. We use that to ensure that risks are escalated to ministers early when indicators are moving in the wrong direction. We want to make sure that is as visible and transparent as possible.

The Convener: When you talk about indicators moving in the wrong direction, in what regard do you mean?

John-Paul Marks: For example, a programme might get an amber/green gateway review, but the risk assessment might change, which might lead to a rapid escalation for us to understand what the underlying cause of that is so that we can support the team. It might be about capacity. It might be about bringing in second-line support to the team, and also making sure that we escalate to ministers quickly so that that transparency is there and in case there are also things that ministers might wish to do.

As Lesley Fraser was saying, we are trying to encourage an open culture in relation to diversity and inclusion. It also includes a culture of it being safe to speak out when people are worried about something, and risk is part of that. Do not keep reporting the same risk score each month if you know that something is struggling and getting worse. Make sure you flag it so that support can be offered to get back on track.

The Convener: I know that you are going to bring in Jackie McAllister, but just before you do, how concerned are you about optimism bias? What I mean by that is we all, I think, get pretty fed up when ministers stand up and say they will bring in a plan, a strategy, a statement, blah-blah-blah, by, say, the end of May—we had an example of that this morning with the medium-term financial strategy—and then, lo and behold, it is June or it is next September. They never seem to say that they are going to bring something forward in May and then they actually bring it forward in April. It never seems to happen the other way around.

It always seems to me that there is this drag whereby—it is not that stuff never happens on time but things often seem to drag. We then stand up in the chamber and say, "This was meant to have happened two months ago. We are still waiting on it. Minister, when will it happen?" and we never seem to get a date. For example, one of the most annoying phrases is "in due course". When I ask for something, I want to know when it will happen. I do not want to hear "in due course".

I was talking to a colleague earlier this morning and I said that when I was at university, I never handed an essay in late, but I never usually started them until the day before. The position is that if you have a deadline, you always meet it. I worked in the private sector. I cannot remember ever not meeting a deadline because your head would have been on a chopping block if you had not met it. Even if it meant you had to put all the hours in, you met that deadline. That does not seem to happen here a lot of the time. Whether it is ministers or civil servants or a combination of the two, we get a lot of drag in statements,

policies, plans, strategies, whatever. I realise that that is all at a bit of a tangent from what I asked earlier, but could you say how that is being addressed?

John-Paul Marks: There is quite a lot in there, but I share your memory of essays in university and deadlines.

If we stand back a minute and think about major projects and delivery, one of the probably two most structured risks that they can face is certainly optimism bias; I totally agree with you about that. When we look at the research in the major projects leadership academy, we can see that misrepresentation, optimism bias and that sense that you can minimise the cost and maximise the benefits is not unique to Scotland. It is a factor of major projects across the world. The research shows that it is a risk to always be conscious of.

Do I worry about it? Is it something I think about regularly? Absolutely. That then brings us back to the controls that we try to put in place, including, of course, parliamentary scrutiny of programmes, legislation and delivery to assure us that they are feasible, value for money and affordable. That is part of the control framework that we put in place.

I have seen a lot of good delivery in Scotland in the long haul, if we go back and look at the Queensferry crossing and the devolution of social security. I have spent 10 years of my life working in social security down south and I genuinely see the way in which Scotland is devolving social security as best practice.

It is not without its challenges, of course. It is a very complicated thing to do. The team is doing it in a values-based, planned and controlled way. It is hitting the milestones and there are more benefits to come. A bit more growth in the agency is required, but the underlying data on productivity is impressive in terms of the improvement in output per day. There are cultures of good delivery that we need to continue to learn from and encourage.

The Convener: I completely agree with you. There are tremendous examples of that, but let us be honest about it—the media only focuses on when it goes wrong.

John-Paul Marks: Yes.

The Convener: Therefore, when you get things that are compounded by repeated delays—ferries barely require a mention because that is probably at the forefront of everybody's mind, particularly my own since the ferries will serve my own constituency—it is about minimising that. It almost becomes part of the culture that, when ministers say that a statement will come next month or the month after, it will not happen the next month or

the month after. That is one of the concerns I have.

John-Paul Marks: That is not the culture that we want to be perpetuating at all. To take your point about the ferries, I acknowledge the critical need to get our ferry fleet on to a good, sustainable track with the average age of the fleet falling. Six ferries that were procured in this Parliament are due into service, and decisions on the small vessel replacement programme are due, presenting a significant additional opportunity.

You are quite right. Whether it be setting out the A9 road map, which we did in the budget, including mutual investment to complete that project or whether it be our ferry strategy and the ferries in the current parliamentary session and the next, we need to set out those delivery plans and execute them with confidence. I agree with you that, in the end, the thing that matters most to the public is confidence that they are getting value for money for tax.

On your final point, Mr Swinney talked about less strategy more delivery last week. We struggle with the level of overprogramming and expectation that has been set historically in past years, with good intent. Ultimately, particularly with the consolidated effects of double-digit inflation and the pandemic, and a number of other factors that we can go into if you wish, our real-terms spending capacity has been squeezed significantly. We have just talked about how we are all trying to address workforce pressures to balance budgets, so our capability and capacity also need to be managed.

We talk a lot about the importance of aligning programme, budget and capacity and capability of systems to execute change. That reality needs to be talked about openly in Parliament, the Cabinet, the Government and with partners, so that we proceed with the right programmes to deliver the best outcomes and we do not try to do more than we can cope with.

The Convener: Okay. Jackie McAllister has been waiting very patiently.

Jackie McAllister (Scottish Government): That is no problem at all. It all links very nicely to that conversation on delivery.

The point that I would make in addition to the permanent secretary's points about risk management improvement is that the improvement programme has been on-going since 2019 and it remains on-going in 2024-25. One of the biggest wins is linking the conversation about risk and risk management to delivery and performance. Indeed, some of the governance improvements that the permanent secretary has introduced that he spoke about in his introductory remarks, including the delivery executive team

conversations, bring all those conversations together.

In addition to the mandatory e-learning module that the permanent secretary alluded to—more than 90 per cent of the Scottish Government officials have now undertaken that training—we have also been looking at a number of different risk areas. This year, for example, we have been looking to progress the development of risk appetite statements so that we can better articulate where and how we are willing to take risk. Of course, we cannot deliver in a vacuum of risk. There will be risk, but it is about how we mitigate and manage it. Risk appetite and how we think about risk appetite has been an area of focus.

We have also introduced a strategic risk landscape report. That lifts away from the corporate risk register and looks across the risk eco-environment, if you like, to understand some of the more systemic emerging and horizon risks and brings them together into a regular report that can be considered and discussed.

We have also undertaken risk management assurance maturity assessments. We have now done three of those, so we can see how the maturity has progressed across the organisation. We can also focus in on the areas that might not have progressed as we would have liked.

The final point to bring out on the improvement programme to date is about developing a network of risk champions. Of course, risk is best managed where the risk exists within the organisation, so having that network across the organisation that has that enhanced capability and understanding is important. As I said, we are also continuing with the improvement programme and we have another series of activities that we intend to take forward in 2024-25.

10:00

The Convener: Thank you very much for that comprehensive answer. I am sure that, like me, colleagues will have spent a joyous weekend in the sunshine reading the quality production that I am holding up—the Scottish Government’s bill handbook. One of our concerns about that is that it does not seem to include a definition of a framework bill. That issue has caused great concern to this committee over the past couple of years, particularly in relation to, for example, the National Care Service (Scotland) Bill. I am wondering what progress will be made to try to ensure that we have a definition of framework bills.

John-Paul Marks: Lesley Fraser and I met the team yesterday to discuss that some more. I know that the then Minister for Parliamentary Business wrote to you in April with a significant explanation

of the handbook and the accompanying documents. A critical aspect of that is the offer to work with the committee on how we can improve the guidance, financial memoranda and the support for Parliament in terms of what you are not seeing currently and what you would like to see, and how we can plug that gap for you.

On framework bills, if it would help for us to commit to putting something in writing around the definition so that we can be clear what is and what is not in that bracket, we can try to do that. As you know better than me, over the years of devolution, this Parliament has seen legislation that starts in its primary stage with a set of objectives and principles and a level of detail but that, as we understand, part of system transformation is to iterate based on user need and to develop service design through co-production. The issue is how we get the balance right so that Parliament has confidence at the primary stage but knows that, where costs change and secondary legislation is introduced, you will be given the chance, the detail and the time to properly scrutinise that as well.

If I think about agricultural reform at the moment, there is significant dependency on United Kingdom Government choices on funding, which means that there is a range of possibilities or scenarios on what the package will look like. The committee that is scrutinising the Agriculture and Rural Communities (Scotland) Bill has said that the framework arrangement is appropriate at this stage.

We are totally committed to doing everything that we can to support Parliament in its role to scrutinise legislation properly, and we would like to follow through on that engagement with the committee by bill teams on the handbook and the financial memoranda in order to improve them where we can.

The Convener: The issue for us is that we are keen to see as much stakeholder engagement and so on—and, indeed, co-design, which is a phrase that has come out of the woodwork over the past year or two—taking place before stage 1 wherever possible. That is a priority for this committee, because of the difficulties in scrutinising as we progress through legislation.

Others colleagues are wanting to come in. I do not want to cover that issue any more, as I think that others will want to ask about it. However, I want to cover financial memoranda. Page 92 of the bill handbook says:

“Financial Memoranda are required so that the Parliament can have the best possible information about the costs and/or savings arising from proposed legislation ... Estimates should be comprehensive and the level of detail should be sufficient to enable the Parliament to come to a view on their robustness.”

We had a cabinet secretary at the committee a couple of weeks ago who was arguing that when a bill is introduced, we should more or less accept that financial memorandum, despite the huge changes that could happen between then and it coming before us for scrutiny. Do you not agree that the financial memorandum that a committee scrutinises should have the most up-to-date and comprehensive information at that time rather than when it was introduced?

John-Paul Marks: Yes. That is why the procedure requires that, where changes occur through amendments or changes to the scope to a bill, the financial memorandum should be updated and provided to the committee. My understanding is that that is exactly what the bill team that is dealing with the National Care Service (Scotland) Bill is seeking to do, given amendments and changes in scope to the bill.

Jackie McAllister could say a bit more about—

The Convener: Sorry to interrupt. That is happening with the National Care Service (Scotland) Bill, but the plan with the Police (Ethics, Conduct and Scrutiny) (Scotland) Bill was to provide that information at stage 2, which meant that we were scrutinising a financial memorandum that bore no resemblance to what was introduced. There was some—

John-Paul Marks: That related to Police Scotland's costs, did it not?

The Convener: Yes, indeed. The Government was pushing back on that. It was basically saying, "Oh, no, it was introduced in June 2023 and that should be the figures you scrutinise." We thought that that was nonsense, because there has been a completely different set of figures since then.

I just want to try to tie that down so that, in future financial memoranda, the figures that are presented to this committee for scrutiny are the most up to date possible, not from way back when the bill was introduced, whenever that might have been.

John-Paul Marks: Yes. We agree with the principle that you are articulating. We want Parliament to have the very latest information, and it should be as robust as possible to ensure that the scrutiny is as current and as informed as it can be. Finance business partners will work with bill teams—Jackie McAllister leads that team—to ensure that accountable officers and ministers sign off financial memoranda and are confident that they provide you with that scrutiny opportunity.

From my perspective as principal accountable officer, that scrutiny process is critical as part of assurance, value for money and feasibility, and, ultimately, whether that is proper and regular is a

function of Parliament and whether it gives its authority for legislation to proceed.

The only thing that I would say—and this is only because of the nature of how we want to think about effecting change—is about how we create some space, whether it is co-production, co-design, iteration or agile development, to carry out service design developments that are based on user need in a live environment. Sometimes, you have to take the powers to create that, but that means returning to Parliament to provide clarity on cost, benefits and delivery. That might have a secondary legislation consequence. I think that that is where we are with the National Care Service (Scotland) Bill now, but I know that your committee and other committees will be looking at the amendments and the revised financial memorandum.

There are lessons to be learned here because, clearly, the original legislation and the financial memorandum costs have changed as a result of the scope changing. We have worked with the Convention of Scottish Local Authorities, trade unions and other partners to adjust the proposition. That took place over the past two years. It has been a good process, because there is a better consensus around the opportunity of reform. However, I recognise that the changing scope and nature of the legislation has affected the costs and the benefits, and that longer-term uncertainty remains as to whether it includes children's services and justice services and what the scope of a national board or agency would be.

To an extent, particularly on that latter question, that should be iterated in a live environment and tested to show that it can improve outcomes, reduce delayed discharges, support more people out of hospital into better social care and build the capacity of that system. Those are very complicated things to do, but that is fundamental to the long-term sustainability of health and social care.

Jackie, do you want to say anything on financial memoranda and the process?

Jackie McAllister: The permanent secretary has already covered most of the salient points. I think that the committee is already aware of the actions that we have agreed to in terms of improving the approach to financial memoranda. Guidance will be strengthened and training will be enhanced. The regular engagement that finance business partners already have with legislative teams will increase—they will meet more periodically. We will engage more frequently with the committee's clerks not only to better understand your concerns but to engage where appropriate at an earlier point with future bills and future financial memoranda so that we can head

off some of those concerns as the memoranda are being developed.

The Convener: Colleagues will lynch me if I continually ask you questions. I will just ask two more. It is the answers; the answers are very detailed.

It would be remiss of me if I did not touch on the consolidated accounts, so I will ask a question about that. The resource budget for 2022-23 was underspent by 0.4 per cent. That is not even a day and a half of the Parliament's resources. I really think that bringing that down to such a fine margin is a remarkable achievement. We have been told that, with all the background chaos and issues in relation to Westminster and all the rest of it, achieving such accuracy is like trying to land a jumbo on a sixpence, so that is an incredible achievement.

However, I have to say that the contrast between that and the capital budget is quite extraordinary. In that budget, there was a 13.5 per cent underspend at a time when we are currently short of capital. I have obviously read the reasoning for that, but the underspend seems to have been across all portfolios. It is significant, and I would have thought that, when it looked like there would be such a huge capital underspend, there would be—this is what we used to call it 10 or 15 years ago—shovel-ready projects in order to ensure that that money was spent effectively. We all drive on roads full of potholes, for example. There must be some way in which we can redirect some of that capital. Will you explain why we have that huge 13.5 per cent underspend? The contrast with resource is quite astonishing.

John-Paul Marks: Jackie McAllister will say a little bit more after me. I appreciate your point about resource because a huge amount of effort goes into ensuring, as we must, that we balance the budget. As I said in my opening comments, we did that for 2022-23. The provisional outturn for 2023-24 will, I think, confirm that as being true again. We are, of course, into 2024-25.

On the capital underspend, Jackie McAllister can give you the latest information. We think that we will still have a small underspend from 2023-24 into 2024-25, but it will be much smaller as a percentage than 2022-23.

Your challenge is a fair one. That figure is too high. The underspend tends to drop out of capital budgets in quarter 4. You made a point about optimism earlier. Programmes might set up for the year expecting to spend X; for capital, that is X minus 10 per cent.

To be fair to teams, in 2022-23, as you know, the inflationary shocks and the impact of events in Ukraine and the effect on supply chains meant that a lot of capital programmes were struggling to

get the capacity into them that they wanted. Take housing for example. We had more approvals than completions. That reflects the fact that the pipeline is there but not all of it was built. In quarter 4, we saw some of that drop out of budgets. After that financial year, a lot of scrutiny went into baseline forecasts for 2023-24 to try to challenge that more to reduce that underspend.

Jackie, do you want to say anything more on capital?

Jackie McAllister: Yes. The important thing to note is that the budgets that are voted by the Scottish Parliament, which we spend within, are not just related to regular spending. They relate to non-cash items, provisions and write-offs. The majority of the capital underspend of £321 million related to non-cash transactions.

We introduced a new accounting standard this year: international financial reporting standard 16. Of the underspend, £117 million related to that. It was ring fenced; we could not spend it on anything else. In fact, the final outturn for capital for 2022-23 that just came to Parliament was only £32 million. We only carried forward an underspend on capital of £32 million, which is very small; it is minimal.

The Convener: [*Inaudible.*—per cent.

Jackie McAllister: Indeed, yes, exactly. As I said, the budgets have to reflect all the non-cash and ring-fenced transactions, but when we think about the spending power in terms of the underspends that carry through the Scotland reserve those were very modest for capital. As the permanent secretary has said, we have done a tremendous amount of work during 2023-24 to scrutinise forecasts and we expect the outturn for 2023-24 to be in line with our forecasts.

The Convener: There are a lot of areas that I have not been able to touch on, because of time and colleagues needing to come in. My final question is: how has transparency improved over the past year?

10:15

John-Paul Marks: It is something that we want to work hard on. I covered a couple of examples in my opening statement. A small example is the bill handbook, which you have on your desk and I have on mine. We want to work more openly with the committee on how we advise, support and improve legislation and financial memorandums. As an example, we have published the AO delegation. We have written to the committee recently with the latest updates on propriety and ethics following the harassment reviews. We published our first performance report alongside the 2022-23 annual accounts, which consolidates

into one place not just the inputs and outputs in financial terms but the outcomes that we are seeking to achieve and to what extent they are on track or not, which goes back to your point on delivery.

Across our portfolio areas, we want to maximise transparency. I mentioned freedom of information. In 2022, we were averaging 83 to 85 per cent on freedom of information and I think that, for this March, the figure was 97 per cent, so we have really improved the responsiveness on freedom of information. We have also done so on parliamentary questions, which we discussed a few years ago. There are areas that are improving but, similarly, as part of our open government strategy, when we publish our next action plan, we want to go further. There are opportunities through the review of the national performance framework, as a wellbeing framework. There are opportunities for more real-time data and more transparent publication of horizon-scanning reports and briefings. The committee called for that in its review on decision making, so we are working on that.

If there are specific areas on transparency where the committee would like us to focus and where we are not doing that, we are very happy to pick that up. We know that, ultimately, confidence with Parliament and openness will lead to good government.

The Convener: Thank you very much. I will open out the session now, at long last. The first colleague to ask questions will be Michelle Thomson.

Michelle Thomson (Falkirk East) (SNP): Good morning, and thank you for joining us. I will pick up on a couple of points that the convener has already asked about. I, too, seem to have a marginal sign of a misspent weekend in terms of going through the bill handbook and specifically looking at what is stated on financial memorandums. The point is about what, not how. To return to Jackie McAllister's comment about training, I personally would be interested in hearing more detail about the new training that is planned and what gaps you are seeing being filled. It is a specialism, and the committee has twigged that people have not been across this in the way that they should have been.

Thinking about framework bills, which we have also touched on, the permanent secretary made a comment about the use of agile methodologies and how that can impact on the rigour of the numbers that are provided. I want to understand how you manage the risk. In using framework bills, there is a risk that any figures provided, even if we have much better quality of FMs, will be fundamentally out of sync. I would appreciate your

comments on how you are addressing that in the light of significant public sector constraints.

John-Paul Marks: My experience of leading big agile transformations is that risk needs to be constantly managed through governance and, as far as possible, that should be subject to independent scrutiny and regular gateway reviews, and there should be an independent chair and non-executives and updates to Parliament. Certainly, in my past, with things such as the kickstart scheme or social security reforms, we worked hard to create a space for creative agile developments within a governance framework that could ultimately contain cost within a business case and provide scrutiny.

With the Agriculture and Rural Communities (Scotland) Bill, at stage 1, the lead committee stated, quite reasonably, that the approach of a framework bill is appropriate to establish a long-term basis for future support schemes but with a recognition that the scope and scale of those support schemes is not yet certain. That is partly because we do not have total control over the revenue that will be available to fund those, but we want to create the framework for that dialogue.

Michelle Thomson: If you do not mind me interrupting, the Agriculture and Rural Communities (Scotland) Bill is a good example, because of the uncertainty of funding. It is more appropriate to concentrate on bills where there is not that same uncertainty. For example, with the National Care Service (Scotland) Bill, I recognise that the bill team and the minister did a lot of work to address our concerns around the FM and so on, but we still face the risk that there will be a considerable uptick in spend that the Parliament and members will have much more limited opportunity to scrutinise. The details that you have outlined were about how you will monitor and the general governance. That may well address your concern, but it does not address our concern as to how we scrutinise things. What risks therein have you articulated and how are you managing them?

John-Paul Marks: We need to hear the feedback from the committee, and we have. As I said, I met the team yesterday and I spoke to the director general this morning with regards to that point. We have to make sure that the committee is given the very latest information to do that scrutiny in a way that you feel is as informed as possible, given the assumptions that we have at this stage.

On the National Care Service (Scotland) Bill, the team is working on the revised financial memorandum. There is a set of features that I know you understand clearly around establishing the care service, reformed integration joint boards, the right to breaks for caring, and Anne's law in terms of the Care Inspectorate. For each of those features, we need to consider what the costs are,

what the scope is, how the legislation is configured, and whether the committee can scrutinise that clearly. We also need to think about what has changed. As you know, the engagement with COSLA and with local government around asset transfers, estate and workforce has led to a change from the originally introduced proposition to where we are today. That has been important work because, as we all know, long-term transformation will be lasting only if it commands consensus, including in this Parliament.

I share your point that we have to give you the very best and the very latest informed detail to provide that scrutiny and then, where Parliament creates that framework for development—through co-design, agile iteration or whatever we want to call it—there is a process to return to Parliament for further scrutiny. Again, it is for you to consider how you would like that to happen. Ministers will no doubt want to set that out and agree that with Parliament as part of the passage of the bill.

Michelle Thomson: The fundamental point is that in no way will that scrutiny be to the same level of detail as the committee would apply on an FM up front. We often go through things line by line and say, “This is what it started off at, and this is now what it has arrived at.” That is exactly my point. How are you assessing, managing and mitigating the risk of a diminished amount of parliamentary scrutiny once we have been through the process? Setting aside some of the issues with that particular FM, the point applies generally when you are using agile methodologies. From your response, I am not entirely clear exactly how you are assessing, quantifying and mitigating that risk from a parliamentary perspective.

John-Paul Marks: I am happy to send something back to you in writing that gives a considered answer to that question. There are a set of procedures whereby Parliament scrutinises annual expenditure, for example. With the National Care Service (Scotland) Bill—as I said, I talked to the team this morning—once the bill is set and the medium-term fiscal strategy sets out, for each year, what we expect to spend and what we expect to deliver, the Parliament and the committee have the capacity to say, “We’d like to review that annually in detail with an update on risk, cost and benefits.” I think that that would be a healthy discipline and something that we would support.

As I articulated, within the Scottish Government, I would do that through a programme board with non-executives and an independent chair—whatever the right governance structures are—and a third and second line, including gateway reviews, to give me additional confidence that we are indeed delivering what Parliament has legislated for. That would ensure that the

approach is proper and regular and that we are achieving the outcomes that we had agreed in terms of benefits and value for money.

On your point that you will scrutinise an initial financial memorandum much more than what comes down the track, I suppose that, in the context of a multiyear complex system transformation of social care that will span not just one but two sessions of Parliament, we should work with the committee and make sure that significant scope for committee scrutiny is designed in at each stage of the implementation. I hope that that will provide you, the team, Parliament and the public the chance to hear about the progress that is being made. From my perspective, underlying all this, we have to know that the change is improving outcomes because, if it is not having an effect on the experience of those who work in the system and for those who need to access good social care, to an extent, it is not doing what it was designed to do.

We should provide you with that considered response. That is an important part of what happens next with the National Care Service (Scotland) Bill. There is a recognition that the scope of the bill has changed significantly compared to the initial proposition. From my perspective, it has changed in good ways: improved consensus, reduced costs, and more time to implement it safely and securely. None the less, it is clearly being implemented into a very stressed operating environment and the fiscal position is very challenging. To do it properly and well requires good scrutiny, and the committee and your colleagues will provide that. We need to give you all the support and the assumptions possible so that you can do that.

Michelle Thomson: I certainly look forward to hearing from you, with a focus on the generic risks and so on rather than the specific ones, because we are seeing a pattern emerging.

I will move on. I want to ask your thoughts on an issue relating to the emergency budget review. I have previously raised a question about the moneys from the ScotWind auction being used for day-to-day revenue. From the point of view of fiscal sustainability, is the fact that the £700 million and the £56 million have been folded in a lost opportunity to start to embed more fiscal sustainability?

John-Paul Marks: It is a good challenge, and we should avoid as far as possible using one-off income to fund recurring liabilities. We succeeded in that regard in the budget process for 2023-24. As Jackie McAllister said, the provisional outturn will be provided in June. We programmed in an assumption because we thought that we might need to access some ScotWind income to balance the budgets. However, in effect, subject to the final

reconciliation that is being completed, we hope to have avoided doing so.

That talks to your point that the emergency budget review, the savings exercises and the AO controls have been about ensuring that we balance the budget and, of course, do everything that we can to improve fiscal sustainability. I agree with you that we want to invest the ScotWind money and income into strategic infrastructure, to advance our progress to net zero, and to improve our supply chain and infrastructure to deliver ScotWind. Whether that be investment in ports, harbours, infrastructure, housing or transport, it is all on the critical path for success in delivery of ScotWind, including consenting and grid connection.

Gregor Irwin is doing a lot of work with the new Deputy First Minister in that regard and can maybe say a bit more about the green industrial strategy and the delivery of that. I know that Ms Robison spoke about the issue at the committee and will no doubt set out more on it in the MFS in June.

Michelle Thomson: Thank you. I want to touch on where we are on the issue of whole-of-Government accounts. In “The 2022/23 audit of the Scottish Government Consolidated Accounts”, the Auditor General said:

“The continuing absence of a full public sector account reduces the transparency and accountability over public spending, assets and liabilities in Scotland.”

It is a fundamental issue. We had a statement of intent in 2016. Where are we now on whole-of-Government accounts?

John-Paul Marks: We are making progress.

Michelle Thomson: That goes back to the convener’s point. Let us have something a little more specific than “making progress”.

10:30

John-Paul Marks: Indeed—and I promise not to say “in due course” in my response.

In all seriousness, last week, we wrote to Audit Scotland with a draft proposed whole-of-Government account report, which included all the data. Subject to the feedback that we receive from Audit Scotland, we hope to share that with the committee this calendar year. Jackie McAllister’s team have done a power of work in that area. As you know, it has been a challenging process, given the dependency on other data that was not available, but we are committed to getting to a mechanism that Audit Scotland is comfortable with and that is consistent with the ask that it made in its section 22 report so that we can close that off. To come back to the point about transparency, we hope to get transparency in there and to see to

what extent that helps to improve our understanding of spending in Scotland.

Jackie, do you want to say anything more on the process and what it includes?

Jackie McAllister: You have covered quite a lot, so there is not a huge amount more for me to say. One point to flag is that, back in 2016, we made an assumption that we would use the UK whole-of-Government accounts information to produce the Scottish whole-of-Government accounts. That is important, because there is a whole system infrastructure that involves a set of complex processes. As you will be aware, from a consolidation perspective, one of the key aspects of that for accounts is the removal of intercompany or intergovernmental transactions. There is quite a process around that. For it to be a set of accounts and for Audit Scotland to provide an opinion on it, we must have consistency on accounting standards and suchlike. Using the whole-of-Government accounts was absolutely pivotal to us taking this work forward.

It then became apparent, as we went through the pandemic, that there were significant delays to the whole-of-Government accounts process, which meant that it was simply not going to be possible to use that information to get timely whole-of-Government accounts in Scotland.

We have been engaging closely with Audit Scotland on what is possible in order to improve transparency in relation to the gap that the Auditor General highlighted. Since January, through workshops, we have been involved in an on-going engagement process on an approach that involves, not a formal set of accounts, but, as the permanent secretary said, a public sector financial report that will pull together the information for bodies that are within the Scottish Administration but not in the consolidated accounts. Most importantly, it will pull together some information on assets and liabilities for local authorities, which, again, are not in the consolidated accounts.

Once we agreed that way forward, whereby we were not relying on the whole-of-Government accounts information, as it were, it was within our gift to take forward that work. As the permanent secretary said, we have produced a draft public sector financial report for 2022-23. We were able to do that because we recently had all the final outturns confirmed. We have shared that with Audit Scotland. I expect that we will have a series of conversations with Audit Scotland about how it would want that process to evolve, but it is an important step forward. Once we arrive at a format and a content that Audit Scotland is content with, we can produce that information for future years, including for 2023-24, when the final outturn is available.

Michelle Thomson: I have a couple more questions—thank you for bearing with me. I would like to get a sense of things in the light of the new governmental structure and the new ministers—I am thinking, in particular, of Ivan McKee. Have you had any discussions thus far about public sector reform? Have you been given a steer on what he might be looking to do, given that we have all recognised that public sector reform needs to be undertaken? For example, the number of quangos that we have seems way out of kilter with the wider fiscal environment. Have you managed to have any initial discussions about what is intended?

John-Paul Marks: We have. Lesley Fraser and I met Mr McKee on his first or second day—or in his first week, anyway. The last time he was in the Government, Mr McKee was fundamental to setting up a portfolio of corporate transformation, which Lesley Fraser leads. It is making very important progress on workforce control, digital transformation, commercial, single Government estate and a bunch of other enablers, all of which sit at the heart of the Scottish Government. Lesley Fraser can say a bit more about some of the benefits there, which are very near term.

Since Mr McKee left the Government, the public service reform programme has been stood up as a 10-year programme of transformation. So far, Ms Robison has provided one update to FPAC, and she is due to provide another one shortly in writing on the nature of that. Mr McKee has an opportunity, which we have discussed, to continue to make progress with the corporate transformation portfolio and to take that change process into the whole system of public service reform.

There are a lot of good examples, which I am sure that we will include in the next FPAC update. Ministers will reflect on that. I mentioned social security, where we have seen very good improvements in productivity. Disclosure Scotland and National Records of Scotland are making good progress on the use of digital and technology enablers. I have been looking at each portfolio's plans on public service reform. Mr McKee will now have an opportunity to stocktake on those, to look for opportunities, whether those relate to digital, estate, cost avoidance or revenue raising, and to make sure that, for each public body and each portfolio, those plans are as accelerated as possible.

Michelle Thomson: I think that what you are articulating is that there is a renewed appetite for such reform. Is that correct?

John-Paul Marks: Mr McKee will bring huge energy to this drive. We appreciate that opportunity. He has a lot of background in lean six sigma delivery, organisational transformation and

the use of digital to disrupt underlying processes and systems and improve outcomes. We look forward to working with him to accelerate public service reform across public bodies and across systems, wherever we can.

I will mention justice as an example. In our court system, the Dundee pilots have been going well from the point of view of presentation of evidence, efficiency and throughput, and we can see that the backlogs are falling. However, we know that we have to improve productivity from end to end throughout our justice system. Our prison population reflects that. The opportunities are there right now. Some of the enablers are in place, and some need to be put in place, but we look forward to working with Mr McKee and providing regular updates to FPAC on progress.

Michelle Thomson: Thank you. My final question is about an issue on which I want to get a sense of your thinking. I have been doing work to examine the implications, or rather the risks, of looking at some of the work that we need to do to get to net zero in isolation, without taking cognisance of the financial elements. Part of the reason for why we have landed where we have is that while this Parliament can look at the issue from a policy perspective, much of the financial side is reserved. There seems to be a clear mismatch.

I always bring to mind the fact that this is a deeply serious issue. Recently, the Scottish Fiscal Commission, drawing on information from the Office for Budget Responsibility, stated that we can expect the debt to gross domestic product ratio to be at 289 per cent as a result of funding all these projects. How do you think that we will be able to square that off? We will not be able to do it without the money if we end up in a position—as you outlined in relation to the Agriculture and Rural Communities (Scotland) Bill, for example—where we cannot move forward. That is one small example, but it strikes me that the issue is one that is not being talked about much. We will not be able to make progress on it without considering the financial structuring and so on.

John-Paul Marks: One of the fundamental challenges that every nation state is grappling with is that of how to get to net zero as efficiently and as effectively as possible, to achieve optimal outcomes, to do it as a just transaction and to do it well. Huge progress has been made in Scotland. As we know, our emissions have broadly halved since the 1990 baseline. A significant programme of change has been put in place, whether in peatland restoration, forestry, heat in buildings, public transport or agricultural reform, which you mentioned.

Gregor Irwin can say a bit more about the work that we are doing on inward investment. We have

set up the Scottish National Investment Bank. Ministers have made commitments on increasing investment in the supply chain to support the delivery of ScotWind and onshore and offshore wind projects, and we are very committed to realising and maximising the benefits of that. That will bring jobs, growth and investment to Scotland. It is not a deficit proposition—it represents a positive opportunity for our economy and for our environment.

On your point about the UK Government, the permanent secretary of the net zero department came up here two weeks ago and we had this conversation. Ultimately, the UK will get to net zero with Scotland, so we need to work in close collaboration, whether on consenting or on grid connection. You mentioned funding. When we have real-terms cuts in capital budgets, it makes it very difficult to accelerate the programmes that we know will make the biggest difference.

However, the Government is committed to reaching net zero by 2045. We have set out a set of programmes to achieve that, but we must continue to accelerate those whenever we can. I agree with your point about fiscal sustainability and constraints. We have introduced two tax packages to ensure that we are using our levers to raise revenue. We are looking at things such as neutral investment models for our capital programme to bring additionality to that. We announced that in relation to the A9 in the budget. That means that we can use other mechanisms. I agree that we must keep trying to do everything that we can to realise the opportunity.

Gregor Irwin might be able to say a bit on investment and the green industrial piece if you wish.

Michelle Thomson: I am sorry, but other members want to come in.

Michael Marra (North East Scotland) (Lab): It almost sounded from your earlier answer as though the 0.4 per cent variance in the consolidated accounts was achieved through good forecasting. In fact, it was achieved through massive in-year budget cuts, was it not?

John-Paul Marks: For 2022-23, the Deputy First Minister at the time announced an emergency budget review, which was delivered in the autumn. That set out about £1 billion of savings. That was necessary because of the impact of inflation on the budget, which provided a significant in-year shock that was not forecast. When the budget was set, inflation was something like 2 per cent.

You are quite right. Audit Scotland acknowledged that we reacted quite quickly, as we should have done, and we transparently set out to

the Parliament the choices that we had made to achieve a balanced outturn.

Michael Marra: The Scottish Fiscal Commission has said that the projected deficit for this financial year is £1 billion, rising to £1.9 billion in 2027-28. There is a significant mismatch between the Government's plan, as set out, and the budget that is available to deliver it. The plan can be delivered only through very significant cuts. Are you concerned about value for money from having to deal with significant in-year variance in that way?

John-Paul Marks: On your point about value for money, having to deliver an in-year emergency budget review of that scale for 2022-23 was clearly disruptive for the teams and the programmes that they were working on. Earlier, we talked about how to deliver good transformation, which comes through multiyear certainty, whether that be for the voluntary sector, local government or the peatland, forestry or heat in buildings programmes, for example. People need certainty on scope and budgets in order to plan and deliver well. I agree that it is difficult when such disruptions occur.

Michael Marra: My point does not apply only to 2022-23. We are talking about long-term plans. In essence, we are talking about landing a jumbo jet on a stamp, but the jumbo jet was headed for Cape Town and had to land in Paris.

John-Paul Marks: On your point about fiscal sustainability, as I set out in my opening statement, I recognise Audit Scotland's good scrutiny work and the Scottish Fiscal Commission's analysis. The OBR has also made clear its thoughts on the long-term viability of some of the forecasts.

There is a risk, which needs to be carefully addressed. I expect that the finance secretary will say a lot about that in June when she sets out her medium-term financial strategy.

10:45

Michael Marra: How many ministerial directions have you had regarding the budget process?

John-Paul Marks: Since I have been permanent secretary, there has been one request for ministerial authority to proceed with expenditure, which we delivered. Ministers gave us the authority to proceed when the value for money test was not met. We have constant conversations with our ministers when we have concerns about value for money or affordability, so that we can put in place mitigations that allow us to proceed with their programme or objective in a proper, regular and feasible way that provides value for money.

Michael Marra: You are reported as having written to the then First Minister in August last year saying that there were “affordability risks associated” with his programme for government. A series of meetings took place about the commitments that the then First Minister had set out, which were clearly unaffordable to the country, but you received only one ministerial direction. We are moving towards a £1.9 billion gap between proposed policies and the money that is available. Should we have confidence that you are running this process properly with regard to the affordability of government?

John-Paul Marks: We are doing our best. I am part of our audit and assurance committee, and I provide regular updates to my non-executives in that regard. I have been very open that I consider fiscal sustainability to be a significant risk and that active mitigation is needed now. That work was done through the emergency budget review for 2022-23, and it continued into 2023-24, when we used a set of very significant controls to reduce our outturn in order to balance the books and avoid the ScotWind drawdown.

We balanced the budgets for 2022-23 and 2023-24, but I recognise that the effects of double-digit inflation, plus the sustained effects of Covid backlogs on systems and choices regarding real-terms reductions in capital block grants, mean that we need to continue to make the right choices to balance the budget. That was done for the 2024-25 budget, but I am sure that, for all concerned, it was one of the hardest experiences of prioritisation that we have been through under devolution.

Michael Marra: Have you had these conversations with the new First Minister? Have you told him that there will have to be significant spending reductions? Is that what the Parliament should expect to hear from him when he gives his update on his programmes?

John-Paul Marks: I have already spoken to him about that.

Michael Marra: You have set out the external factors, and the National Care Service (Scotland) Bill has been mentioned. The bill’s original financial memorandum that was presented to the committee projected the cost as being between £644 million and £1.2 billion over five years. Thank goodness that the committee, before I was a member, knocked it back, because we subsequently received information that showed that, had the committee allowed things to go forward as they stood, the cost would actually have been between £1.8 billion and £3.9 billion over 10 years. We are talking about cost control and scrutiny. That does not sound as though there is reasonable scrutiny of the policies that the

Government is producing, with it being given the advice that it requires.

John-Paul Marks: We talked about the national care service earlier. All Governments across our four nations have struggled with the hard reality of how we fund and reform social care, in recognition of the ageing population—

Michael Marra: I recognise that the problem is complex. I am talking about the cost and the difference between the two figures—instead of the cost being £1.2 billion over five years, it would have been £3.9 billion over 10 years, and the committee prevented the public purse from being exposed to that. That is a dramatic variance. It must worry you, as the head of the civil service, that your organisation produced those figures and then had to come back to tell us that they were egregiously wrong.

John-Paul Marks: The main change is the scope compared with the original—

Michael Marra: No, I am afraid that it is not, Mr Marks. I am talking about the revised costings in the original financial memorandum, not the revised proposals.

John-Paul Marks: We absolutely want to make sure that we give you the best assumptions. Earlier, I talked about our work to ensure that we improve financial memorandums and the work that we have done with ministers to try to reduce the cost and the risk of the National Care Service (Scotland) Bill.

However, it is a fair challenge. There needs to be due diligence so that there is as much confidence as possible in the costs. I am grateful for the committee’s scrutiny on what is a radical, long-term transformation of a complex system. We will continue to make sure that we refine the costs, as we are doing for the revised financial memorandum, which will come back to the committee shortly.

Michael Marra: We will wait and see.

When you were here last year, I asked you about the status of the resource spending review, the very large growth in the size of the civil service over recent years and the previous commitment of the then finance secretary to reduce the size of the civil service to pre-Covid levels. That finance secretary has now returned to the Government as Deputy First Minister. You were unable to tell us the status of the resource spending review at your appearance last year. Is that back on the table? Are we looking at that trajectory again?

John-Paul Marks: Ministers have not set a target for what they want the size of the civil service to be at the end of this parliamentary session or by 2030, for example. However, the disciplines of the spending review are being

delivered. Lesley Fraser spoke about some of that earlier in relation to our workforce. For example, our contingent workforce has reduced by more than 500 and is now down to pre-Covid levels, so that has been a significant reduction. The overall size of the core civil service is reducing. It is smaller this year than it was last year, and it is forecast to be smaller again. Precisely how much smaller it will be by the end of this parliamentary session is still a choice for ministers, given their priorities. We manage our attrition and recruitment to make sure that we are on a safe trajectory.

Michael Marra: The resource analysis that was done, at significant public expense, does not really inform that trajectory; it is just about where the ministerial plans are for each individual area.

John-Paul Marks: I think that the finance secretary at that time wanted to make a strategic statement that the public sector and the civil service would return to pre-Covid levels, and she did so in the resource spending review. Since then, the workforce strategy as part of public service reform has developed. There is a recognition that different systems and different public bodies are moving at different speeds, given demand. For example, there will probably still be a little bit more growth in Social Security Scotland, because there are more benefits migrating from the DWP, but overall productivity has improved. The unit cost is down, and we will be able to close that programme in the long term, which will reduce the size. That is not necessarily true for other public bodies, such as Scottish Enterprise, which has got smaller and has reduced its numbers to pre-Covid levels.

Michael Marra: I have two more very short questions. The first is quite specific. If I ask a question at First Minister's question time and the First Minister commits to doing something, do civil servants act to try to make that happen?

I will use two specific examples. First, two years ago, I raised with Nicola Sturgeon the case of a young man in secure accommodation in Dundee. He has now been in that completely inappropriate setting for a further two years, with delayed discharge. Absolutely nothing has happened. The First Minister has not contacted the family or, as far as I can tell, the health board. What happens when such commitments are made in the Parliament?

The second example, which is more recent, relates to fatal accident inquiries into the deaths of Scots abroad. Humza Yousaf, the then First Minister, committed to looking at the issue. I have written to him but had no response. I have written to the justice secretary but had no response. Is it your civil servants' jobs to make sure that I get responses to such queries on behalf of my constituents? Why is that not happening?

John-Paul Marks: I will have to go away and investigate the two cases. I am happy to do that for you to find out what has gone on. Normally, the process is as you have articulated it—if a minister makes a commitment to the Parliament, we are asked to provide advice on the issue so that they can provide an update verbally or in writing. If that has not occurred in those two instances, I am happy to look into the matter.

Michael Marra: I would appreciate it if you could do that.

I have a final question. In your conversations with the new First Minister, has he agreed not to delete WhatsApp messages?

John-Paul Marks: I have had a number of conversations with the new First Minister, but we have not talked about WhatsApp messages. He has had a briefing on propriety and ethics and on communications from the expert teams in those areas. They work for Lesley Fraser, who might want to say something about the induction. I have focused with Mr Swinney on the formation of his Cabinet, the fiscal position and his immediate appointments and programme, but there is a very structured induction with his private office on issues such as security, communications, record management—

Michael Marra: To date, he has given no assurance to you that he will change his behaviour from the way in which we have acted previously.

John-Paul Marks: As I said, those inductions have occurred. Lesley Fraser, do you want to say anything more about the P and E updates?

Lesley Fraser: Ministers are clear that we have a new mobile messaging policy that Government business should take place on Government systems, which do not include WhatsApp. However, in the event that there was a requirement to conduct some element of Government business on WhatsApp—for whatever reason; it might be lack of availability of Government systems—the private office would transcribe what was said and make sure that it was included on the record. That is included as part of our induction advice for incoming ministers in relation to how they work with their private offices.

Michael Marra: Have they agreed to take those practices on board?

Lesley Fraser: That is the way that our private offices work with ministers.

Michael Marra: Okay.

John Mason (Glasgow Shettleton) (SNP): Permanent secretary, I understand that on 16 April you met the Public Administration and Constitutional Affairs Committee at Westminster.

Do you think that there is a good understanding at Westminster generally, and certainly among civil servants, of Scotland and our particular situation?

John-Paul Marks: Yes, and a lot of UK civil servants live in Scotland. We have significant numbers of UK civil servants in Scotland working for the DWP, His Majesty's Revenue and Customs and the Foreign and Commonwealth Development Office, and more are being established in Scotland. There is a significant commitment to the places for growth programme for UK civil servants in Edinburgh, Glasgow, Aberdeen, East Kilbride and elsewhere; the programme is helping in that regard.

We have pretty much fortnightly meetings between the Welsh permanent secretary, the Northern Ireland permanent secretary, myself and the second permanent secretary for the Department for Levelling Up, Housing and Communities, who will sometimes bring along other colleagues, depending on the subject. We talk about live issues of the day.

In fact, my DG for strategy is in London this week engaging with the Foreign, Commonwealth and Development Office, given events in Iran and across the Middle East and the points that we were making on net zero and consenting of grid connection. Permanent secretaries from Whitehall Government departments regularly visit us to talk about opportunities to work together, such as Tamara Finkelstein from the Department for Environment, Food and Rural Affairs—we spent a day with her senior team in St Andrew's house talking about our shared dependencies to deliver reform. There is a very sincere commitment to improving that understanding.

Of course the optics of life in Whitehall can sometimes be towards Prime Minister's questions, number 10, the Treasury, the media and the nature of political life, as can be true in Holyrood as well. We work hard through the intergovernmental relations mechanism and relationships to make sure that we understand each other. We work well together.

On green freeports, for example, Gregor Irwin co-chairs the board with the second permanent secretary of DLUHC. The structure is intended to be an effective integration, and, hopefully, it works very well most of the time.

Gregor Irwin (Scottish Government): It works very well

John Mason: I am reassured from what you are saying that things are improving, because we have felt in the past that there has not been a great understanding. If things are improving, that is positive.

11:00

John-Paul Marks: I genuinely think they are. It matters that we encourage pragmatic collaboration and we support our teams to do that well. It is no accident that we co-chair the green freeports programme or were able to revise the fiscal framework. We are able to achieve those better outcomes for Scotland because we have good relationships, so we can get the work done and advise our respective ministers accordingly.

John Mason: In one of the letters, on the Scottish policy and research exchange, the cabinet secretary talked about rebuilding engagement between academics and policy makers, for example through an in-person event in early 2024. Can you say anything about how that is working?

John-Paul Marks: There is a lot of good collaboration with our universities. The quality of our research and innovation is a huge strength in Scotland. Poonam Malik, co-chair of our new deal for business, has deep expertise in economic innovation. Professor Linda Bauld from the University of Edinburgh is our chief social policy adviser. We are doing a lot of work with the University of Glasgow on the innovation ecosystem and with its school of governance on opportunities to build development. There is a lot of structured research in our programmes, much of which is led by the universities. That is a huge asset for the country. If you would like specific detail on the research programme, we can provide that.

John Mason: We had examples from Wales of the very strong relationship between the academic world, the civil service and Government. I wanted some reassurance that we are moving forward in that regard.

John-Paul Marks: I will bring in Gregor Irwin, because his area of work involves a lot of interaction with universities.

Gregor Irwin: The work happens in a number of different ways. Julie Fitzpatrick, who is part of my team, is the chief scientific adviser and has a university science background. We have quite a large team of scientific advisers in Government, who provide a bridge between Government and that part of the academic community.

I am DG economy and we work closely with all parts of the university sector that are involved in innovation. We are implementing an entrepreneurial campuses programme, which is about trying to create a strong link with what universities are doing—the research, the commercialisation of that research and the growth of spin-outs from universities—so that there is a very clear read-across between universities'

academic priorities and the priorities of DG economy.

We get quality advice from academics across a range of different policy areas. Academic input into policy development on net zero, for example, is really important. We get quality advice consistently across Government.

John Mason: That is reassuring. We have talked a lot about churn—people moving around. Can I ask you about what happens when you have knowledgeable, experienced civil servants retiring? Is there a cut-off or are you able to smooth that process so that you do not lose all the experience?

John-Paul Marks: I agree that that is a risk. It can sometimes be an opportunity, and you can also smooth the risk. We had an example recently where a director colleague working for Lesley Fraser, with deep experience, was happy to work part time for a period to support us on the conclusion of a project. That was really appreciated; he was a fabulous colleague and we wish him well with his retirement.

Clearly we work very hard on our succession programmes, particularly for those senior roles where we see retirements coming. We have had a number recently: Ken Thomson, DG strategy and external affairs, Jason Leitch, Scott Wightman, David Rogers—all fabulous colleagues who delivered incredible amounts for their country.

Lesley Fraser and I in particular, given that Lesley leads our people directorate, work on our recruitment programmes and strategies to ensure that, wherever possible, we are bringing in fresh, diverse talent. Taking the example of one of the colleagues who I just mentioned, we have been able to attract someone who brings exceptional global experience to our international external affairs directorate. We are constantly refreshing and strengthening the team and we work hard on managing any risk to make sure that there is not a cliff edge and ministers continue to get good support.

John Mason: We have mentioned WhatsApp messages and I believe that a review of policy in that area is going on. Can you assure us that it is still possible for a minister, a cabinet secretary or the First Minister to engage in a private conversation, brainstorming or whatever, with civil servants as appropriate? I think that that used to happen on WhatsApp and it was seen as just sharing ideas sometimes. That now seems to have been clamped down on. Is there still space, as I think there should be, for a bit of interaction that is off the record?

John-Paul Marks: It is very important that there is space for full and frank advice. Going back to Mr Marra's points, it is important that we provide

honest advice to ministers and that needs to be done in a safe environment for the ministers who receive those messages and for the civil servants. That culture is good in the Scottish Government. For example, I meet the First Minister at least twice a week, at Cabinet and one to one in Parliament, normally after First Minister's question time. We will talk about the biggest issues and the top risks and I will offer my advice on the process of making sure that he is getting the support and advice that he needs to consider those issues and, if he asks for my particular view, I will provide that in writing.

As Lesley Fraser articulated earlier, our clear preference is that Government business is done on Government devices. That is an important discipline because our Government devices are configured to be secure and safe and you give them back when you leave. We should not retain personal details or Government information on our personal devices, because they can be lost or stolen, and they are not as secure as Government devices. As Lesley Fraser said, we are very clear that what is held is subject to FOI, and we must maintain a robust corporate record so that if those personal devices are used the salient points are captured and put into the record.

Occasionally that has happened to me in the past. If I am on holiday or on leave and somebody contacts me to discuss a particular thing and it is urgent, as sadly is too often the case but that is par for the course, I would send a message to my private office and say, "For the record, I have had this dialogue; please record that in the system". There have been some examples of that. Operation Branchform is one example where those messages that I have put into the system, having received a call on a private device, have been captured for the record and subject to FOI. There are other examples.

Lesley Fraser can say a bit on the review of records management, because we want to get to best practice. We have made progress, but we recognise that this has public interest and we need to make sure that it is informed by best practice.

John Mason: I am seeking reassurance that there is a balance between things being recorded as they should be and the private space for ideas.

Lesley Fraser: It is an important point. The freedom of information legislation rightly recognises that that space for free and frank debate and discussion is important and that is an exemption. It is what we wrap around that that gives the assurance, as the permanent secretary said, that relevant information can be on the record and that we are able to account for the processes whereby we judge what is in that free and frank space and what can be released. It seems a very healthy and active space for that

work to be done. It feels as though there is good-quality scrutiny and I hope that we are improving our processes to be able to demonstrate that as well.

The review that the permanent secretary mentioned, by Emma Martins, is now under way and it will be helpful to have that external look. Of course, it is not just the Scottish Government that is wrestling with the arrival of new technology and how to make it work well in a Government space. We very much look forward to the conclusion of that work.

John Mason: Moving on to the accounts, I understand that Social Security Scotland's accounts were qualified because the DWP might be paying the wrong amount. That seems a bit harsh on Social Security Scotland. Could somebody explain why that is the case?

John-Paul Marks: I have a bit of an interest, given my past role at the DWP. Jackie, do you want to cover this? It is quite right that that is the proper accounting procedure, but it is a function of the fraud and error that is assumed in the imported data.

Jackie McAllister: You have probably covered the point that I was going to make. Yes, the accounts were qualified based on the regularity of overpayments. It is specifically to do with the DWP's approach to administering the benefits, and it is something that, unfortunately, is not within the control of Social Security Scotland.

John Mason: Sorry to interrupt, but Social Security Scotland is paying the DWP what it is being asked to pay. Therefore, Social Security Scotland is in no way at fault, surely.

Jackie McAllister: Absolutely, but in its accounts, it is accounting for spend that has been administered through the Department for Work and Pensions.

John Mason: I suppose that I accept that. That is up to the auditors.

My final question is to you, Ms Fraser. One of your letters indicated that there has been a slight increase in bullying and harassment, or reports of such, from 7 per cent to 8 per cent. Should we be worried about that?

Lesley Fraser: We are keeping a close eye on it. We are tracking with many of the organisations that we benchmark against; they are seeing a similar rise. It may be to do with more people coming back into work. Much of what we understand in this area is to do with poor management manifesting itself; for example, people are concerned about micromanagement. We are very much focusing on this. As I said about the diversity and inclusion strategy, we are particularly looking at whether cohorts of our

colleagues are experiencing this, and we are working to tackle it at root. I hope that the system-wide approach that we are taking will help us to bring those numbers back down. It is marginal but significant and something that we are watching.

John Mason: So the concern is about micromanagement—that is, managers being too hands-on and watching every step.

Lesley Fraser: Absolutely, that can be one manifestation of it—too much of your manager's time and attention on the specific things that you are doing. We are tackling that through a range of improvements, for example in the policy profession, as a third of our teams are in the policy profession. That enables us to focus on ways of improving the approaches that people take as managers, in terms of their own skills and understanding how they pass those skills on in an appropriate way to a colleague who is coming in or who they manage. There is work in the leadership and managing change space and in areas to do with our professions that we hope will bear fruit on this in the future.

Ross Greer (West Scotland) (Green): I would like to go back to Michael Marra's question about in-year budget savings and the path to balance. The permanent secretary mentioned the 2024-25 budget-setting process as being painful, which is certainly my recollection of it from the position that we were in at that point. What we ended up with was a prudent budget but, inevitably, it still carries pressure. That is inevitable every year, particularly given that public sector pay negotiations are not in sequence with the budget, so there is always a level of uncertainty. The Government will have to go through a similar process this year with the path to balance. The amount varies each year, but there is a path-to-balance process every year.

Part of my frustration with the path-to-balance processes that I was involved in was the length of time that it often took to make decisions that everybody seemed to agree were inevitable—either decisions that something would have to be cut or decisions that something was of such high priority, because of the impact that a cut would have on the public or because it was a political priority or whatever, that it definitely was not going to be cut. However, the length of time that it took created poor value for money.

In 2023-24, the delays to the flexible workforce development fund would be one example of that, but there were lots of others. Is the way we do in-year balancing not quite a poor-value process? There is a whole series of decisions that get dragged out beyond the first, second and even third quarters. Financial decisions are being made in the fourth quarter and money is being released that, inevitably, will not have the same value as if it had been released in the first or second quarter or

if it had not been released at all and had just been carried over.

11:15

John-Paul Marks: We would agree with that. An optimal process would set a balanced budget and spend the year delivering it and not have the disruption of having to find in-year savings to achieve that point of balance. As you say, we have made progress. The 2024-25 budget was a challenging process, but it got us to a point of prudence that was hard earned and was set out by the then Deputy First Minister to Parliament and was subject to scrutiny.

We try to make sure—and Jackie McAllister might say more on the process—that the essential-now spend should continue. We have tried to work faster this year, given feedback, to ensure that, for example, the vast majority of grants for the voluntary community sector are issued, recognising the importance of multiyear certainty and fairer funding, where we know we want to do more. The medium-term fiscal strategy will hopefully support that.

I agree that we do not want to delay money going out the door where doing so creates sub-optimal outcomes. At the same time, we need to provide assurance to our ministers that for each portfolio they have a viable path to balance, given known pressures and known risks, some of which we know will crystallise in the next 12 months.

Jackie McAllister: First of all, it is fundamental that we have funding in place to deliver the Government's priorities. However, one of the challenges that we have is that, as we move through the year, a number of different factors will change. Your budget is your plan; it is your plan at the start of the year. Of course, as we move through the year, conditions will change, judgments will change, and risks will materialise or otherwise. As you know, a significant amount of our spend is demand led. As we move through the year and understand how that demand is materialising, we change and we reflect our forecast accordingly.

Also, a considerable of the Scottish Government funding is derived from the UK Government block grant and there are in-year consequentials as a result of the changes in the UK Government funding. We have to make a judgment as we move through the year on what we think those changes might be. There are a multitude of variations and variables that we have to manage as we move through the year. I completely accept your point about the delays in decision making. We have to balance that with maintaining a credible path to balance as we move through the year. Of course, we cannot breach the Scottish budget. We are

getting better at managing some of those variables and the processes and the controls that the permanent secretary has put in place, including the spending controls. Although they delay the process, they provide a rigour in the assessment of value for money and affordability that is very important in the current context.

We keep that under constant review. As we move through the year, we will review at various points whether the process is proportionate, whether it is adequate and whether it needs to change. We have scaled up and scaled down the control process. However, we would all like to move away from it completely—that is the aspiration for us all—so that we do not have a central spending control process and we empower portfolios to deliver within budgets that are affordable, to achieve the priorities that have been set out by ministers.

Ross Greer: Taking on board what Jackie McAllister has just said about the significant range of external factors that affect us as well, you both agreed that there is some frustration with the delays in making these decisions. What are the internal factors within the organisation that are causing these delays? Ultimately, these are decisions for ministers to make. To what extent are the delays the result of decisions that could be made sitting with ministers perhaps for some time because, for quite understandable reasons, they hope that, if they wait long enough the situation will improve and they will not have to make an unpleasant decision, and to what extent are they delays that are happening elsewhere in the organisation and not at ministerial level?

John-Paul Marks: As Jackie McAllister said, expenditure must have a source of public funds to be proper and regular, and we need to provide assurance in that regard. If a portfolio has achieved a balanced plan at the beginning of the financial year, as the economy portfolio has already, we want to maximise the empowerment for that portfolio and for those ministers to deliver their programme without interference from the centre. The only complicating factor is the wider Scottish Government position, where the finance secretary is quite reasonably saying, as has been the point in the past in terms of controls, that, if something is essential now, proceed, but if it is not and there are choices still to be made, given the scale of pressure that we face, the risks ahead and uncertainty on consequentials, we need to make some risk-based judgments.

These are choices for ministers. We provide advice on those and part of the essential-now criteria, particularly in the quarter 4 controls that you experienced and saw us deliver, was that, if not proceeding will create suboptimal value for money or economic detriment, clearly we should

proceed and not hold that expenditure, as we do not want to create that effect. However, at the same time, if we can slow expenditure down in quarter 4, which we succeeded in doing, we do not spend ScotWind income on what is a recurring liability. That is ultimately what we achieved last year in quarter 4 controls. It was not popular and it slowed some stuff down, but it avoided spending any ScotWind income. I think that that was ultimately the right thing to do. However, it is harder and we need to keep improving the process to make it least disruptive.

Ross Greer: Finally, I am interested in how you manage portfolio reallocation as part of that in-year process. If we look across the past three years, which is probably the best period to look over, we see that there are certain portfolios where it is easier to make savings in-year than it is in others. It is easier to make in-year savings in education and health than it is in justice. So much of the justice portfolio is very fixed from the start of the year. However, when we have year-on-year compounding uncertainties, particularly over the past three years because of things such as double-digit inflation, that means that we end up with disproportionate in-year savings in certain portfolios happening year after year. The compounding effect of that is quite significant. How does the Government control for that? My worry at the moment is that that is not being sufficiently controlled for and that portfolios such as education in particular have lost out over the past couple of years. When we get to halfway through the year and so much spending is locked up, understandably the only place we can go is areas where there is flexibility, but those are the same areas as in the previous year and the year before.

John-Paul Marks: It goes back to the point about the underlying structures of our budget. Half of it is pay bill, a significant and increasing proportion of it is social security and a lot of it has a level of statutory commitment to it in terms of contracts, maintenance and the like. As you say, the discretionary element is quite small and the effect of inflation is such that that discretionary element is getting smaller. Each year, the challenge feels harder and it requires that strategic prioritisation. We have done that in the budget process and we did it in the emergency budget review. We are trying to do it strategically rather than at an in-year moment that might then not be optimal. My expectation is that the finance secretary will seek to address this again in the medium-term fiscal strategy next month.

Jackie McAllister can say a bit about how we make sure that that is transparent for Parliament because, as you say, portfolio allocations, ultimately through the budget revision and the

budget process, should all be transparently set out.

Ross Greer: Before Jackie McAllister answers, could I press on that a bit? Is the disproportionate impact on certain portfolios being discussed in the Cabinet? I assume that that gets discussed in the Cabinet because cabinet secretaries, particularly those who are losing out, will want to represent their own portfolios. At your level in the civil service, is that specific point about the compounding effect of certain portfolios having to bear the brunt of it being raised discussed and assessed?

John-Paul Marks: Yes, but also we are constantly in the process of looking at what are the top priorities—the new First Minister set out his four—and how we can provide assurance to the First Minister that the investment is optimised to deliver those priorities and outcomes as well as possible in the short, medium and long term. Then we are making those optimal choices. Then, to go back to the point on scarcity, for example of capital, we are considering whether there are innovations that could bring more additionality, such as mutual investment, which we have programmed into the A9 programme. That dialogue of strategic prioritisation is ultimately the budget process, and it feels as if we conclude one of them and it is not long before we start the next one.

Jackie, do you have anything more to say?

Jackie McAllister: I have just one or two points to add. The first point is of course, as the permanent secretary said, that the budget is the process whereby those choices are made. Ministers make those choices through the budget, and it is agreed with Parliament. First, what we expect is for portfolios to manage within those allocations. What you have alluded to is that we have some portfolios where the pressures are such that it is not always possible to manage within them. The examples that you have given are those that perhaps have the most significant pressures to manage within their own commitments. I am not quite sure that some of those portfolios are being asked to subsidise other portfolios to that extent, but budgets are set, ministers take those decisions, and portfolios to the largest extent possible have to manage within those.

Then, of course, when we get in-year, it comes back to the fundamental point that we cannot overspend the Scottish Government budget. Where we have to take those decisions, it is done in a very transparent and collective way from a Cabinet perspective in terms of what is technically feasible to stop in-year, recognising that we want those decisions to be at the margins as much as is feasible but still we may have to take them. Then

we have the future budget process to try manage any impact.

The permanent secretary spoke about the budget revision process. Hopefully, it is very transparent, and we have tried to increase the transparency around budget revision processes in-year, including the amount of information that we give this committee on the adjustments that are made through the budget revision process. There have been quite significant changes to budget in recent years. Some of that has been due to the context that we have been in. We would all like to see far fewer in-year budget revisions and for it to be a much more streamlined and technical process but, fundamentally, we need to balance the budget.

Liz Smith (Mid Scotland and Fife) (Con): My apologies for being slightly late this morning. Can I return to the question of fiscal transparency and sustainability, which is the most important thing for this committee? Is it your view, Mr Marks, that the increasing number of framework bills that we have seen over the past 18 months has made the challenge of identifying the transparency and sustainability of the money that goes with those bills more difficult?

John-Paul Marks: We have heard that challenge and the importance of giving this committee the best possible assumptions that we can with financial memorandums, whether it be for the national care service, agricultural reform or the police. We will commit to that and make sure that that engagement with the clerks and the committee from bill teams is improved. Jackie McAllister set out some of the processes to improve those financial memorandums.

Without repeating what I have said, the need to set out a framework and seek parliamentary authority for system transformation is an important part of how we enable agile change, but it needs to have as much definition in it as possible while creating a bit of space to still do service design that is informed by user needs, co-production and evidence. That is the balance that the national care service team needs to strike. I know that they will be coming back to provide more updates on that.

Liz Smith: Why do you think that we have had an increasing number of framework bills compared with what we have had in previous Parliaments?

11:30

John-Paul Marks: I have not seen data that demonstrates that. I know that the Minister for Parliamentary Business has written to you, reflecting on the history of devolution, the number of framework bills in the past and the ones that are currently before committees.

Given the volume of legislation, we certainly want to give the Parliament, ministers and committees the very best detailed information that we can. There is no strategy or plan to increase the number of framework bills; indeed, I think that the new First Minister has been very open and clear about his desire to build cross-party consensus on long-term reform. Clearly, if committees do not feel that they have the information to do that scrutiny properly, we are going to find that difficult.

We are not seeking to increase the number of framework bills. For example, with the Agriculture and Rural Communities (Scotland) Bill, we think that, with regard to the committee's scrutiny, it has been properly done. However, Ms Thomson and Mr Marra have raised concerns about the National Care Service (Scotland) Bill's financial memorandum and your experience in that respect, and I will meet that team and make sure that what they return with reflects your feedback.

Liz Smith: I think that there are two frustrations for the committee, the first of which is that, too often in the recent past, we have found ourselves, as Michelle Thomson and Michael Marra have said, having to send back a financial memorandum, because it has been incomplete and, in some cases, inaccurate and based on out-of-date figures. When it comes back to the committee, it takes up time in our work programme that we should be using for other things. I am interested to hear your reflections on that. After all, if we want Parliament to work effectively, it is not terribly helpful to have financial memoranda coming back to the committee all the time.

The second issue is the timing of some of the preparation for bills. I absolutely understand why a framework bill might be advantageous if you want to involve a lot of stakeholders in designing the legislation, but if that co-design process is to go on for quite a long time after the bill starts the legislative process, that puts us in an almost impossible situation, because it is very difficult for us to have any idea of how to estimate the cost. Do you accept the committee's frustration about these two things?

John-Paul Marks: I accept that challenge and your frustration. It is clear; I have seen the correspondence, I have spoken to the teams and we need to address it. With the Police (Ethics, Conduct and Scrutiny) (Scotland) Bill, Police Scotland provided revised costs later on and therefore we needed to revise the costings. However, it is a fair challenge, and the team need to reflect on that.

With the National Care Service (Scotland) Bill, the scope has been very much reset following engagement with COSLA, local government, the Society of Local Authority Chief Executives and

Senior Managers, trade union colleagues and partners on workforce and estate issues and the operating model. I think that that has been properly done to build consensus and an understanding of what the care service could be.

There is a set of features for which we could provide more certainty on costs at this stage, but, ultimately, it is a judgment for ministers and this committee, based on the best advice that we can provide, whether you feel that you have enough information at this stage to deal with the legislation. I recognise the committee's feedback about your uncertainty in that regard and I think that the team and ministers need to respond to that so that you can have that debate in the autumn.

Liz Smith: That was very helpful, permanent secretary. It is undoubtedly a frustration that we have felt, and I think that we as a committee have put it on the record that we do not appreciate having to come back several times to review something that could have been worked through in a much better way.

I am very conscious of time, convener, so I will leave it there.

The Convener: Thank you very much.

Jamie Halcro Johnston (Highlands and Islands) (Con): Good morning. My question is on the same point, although I am conscious that we have already covered it extensively.

When we were looking at the financial memorandum for the Police (Ethics, Conduct and Scrutiny) (Scotland) Bill, one of the things that I found most concerning was that, despite the fact that the police had made officials aware that the costings were going to change, it did not seem, certainly from what we were told, that a huge amount of effort was being put into establishing how much those cost increases were going to be. Does that concern you?

John-Paul Marks: Yes. As I have said, we need to give you the very latest assumptions to inform good scrutiny. I am happy to look further into the process behind the Police (Ethics, Conduct and Scrutiny) (Scotland) Bill to see what more we can learn to improve for the future.

Clearly any cost increase is a concern for me, as it is for the chief finance officer. As Mr Greer alluded to, we spend most of our time trying to ensure that every portfolio can demonstrate a sustainable in-year and multi-year pathway, given the assumptions that are known. Because, ultimately, we have a finite budget, it is a zero-sum game, and if a programme returns with a cost increase, something else has to give. That should be a concern for the programme director, the bill

owner, the ministers concerned and the accountable officer for the team.

We would want good scrutiny of that cost increase from Police Scotland to be assured that it was indeed based on robust assumptions and that there were no mitigations available. We will always try to deliver the very best value for money for taxpayers and, where there is a cost increase, it should cause concern and will require good scrutiny.

Jamie Halcro Johnston: My next question is slightly tangential but is linked to my previous one. We are talking about the scrutiny of financial memorandums. What confidence can you give us that scrutiny is being carried out of particularly contentious projects such as the ferries that we talked about earlier, the Lochaber smelter and Prestwick airport, on which huge amounts of public funding is at stake or being spent? How confident can we be that scrutiny is being carried out on those on-going projects to the level that we need it to be done?

John-Paul Marks: I am very confident about that and, indeed, have put a lot of effort into improvements, but instead of my telling you all about that, why do I not let the DG who leads the work do so? We have worked hard to ensure that lessons are learned from the past and applied both now and in future. That has been one of the important bits of feedback from this committee; Audit Scotland supported us in that process; and our strategic commercial assets division now leads the work.

Gregor Irwin: We have worked closely with Audit Scotland, have benefited greatly from its scrutiny and advice and have taken on board its recommendations in several different ways. Starting at the governance level, in May 2022, we set up the strategic assets review group, which I chair, and which includes the permanent secretary, the chief financial officer, non-executive directors and the DG for net zero. The group provides broad oversight of what we are doing, including assurance on cost control and scrutiny of risk management and other such areas.

We have also established the strategic commercial assets division, which leads work across Government on strategic assets, which include Ferguson Marine, the Lochaber smelter and Prestwick airport. It has overhauled the framework in that respect, working closely with finance and other colleagues. For example, we have created a new business investment framework as part of the SPFM to provide very clear guidance on how to approach issues such as accountable officer tests, risk management, due diligence when required, and monitoring and management of asset investment.

At a practical level, with issues such as Ferguson Marine and the ferry programme, the team works intensively week in, week out, on the ground and at the yards, with technical advisers such as Caledonian Maritime Assets Ltd to ensure that we are doing everything possible to provide good risk management, good risk control and control of costs.

Jamie Halcro Johnston: Ferguson Marine is a very good example. If there is a concern that the cost is going to go up, how quickly is that identified and reported to ministers?

Gregor Irwin: The responsibility to provide cost updates rests with the chief executive of Ferguson Marine and his executive team. If he is of the view that the cost estimates need to increase, he will discuss that with his boards and then, of course, write to the Net Zero, Energy and Transport Committee to inform it of the cost increases.

Jamie Halcro Johnston: Is there a required timescale for that?

Gregor Irwin: It needs to be done in a timely manner, but the chief executive provides quarterly updates to that committee.

Jamie Halcro Johnston: “In a timely manner” sounds a little bit like “in due course”.

Gregor Irwin: Updates are provided to the committee on a quarterly basis. There is then a process of due diligence by which we rigorously test the assumptions that underpin any cost increases. The process is well established.

Jamie Halcro Johnston: Thanks for that.

I want to touch quickly on a couple of other areas. The first question is perhaps for Lesley Fraser. How do you measure productivity in the civil service, and how has it improved or not over the last few years?

Lesley Fraser: It is an area that we are working on along with colleagues across the UK. The range of civil service activities within Scottish Government is very broad. In areas such as social security, we can measure productivity more easily, but it can be harder when it comes to, say, strategy development or Marine Scotland activities. The introduction of our new HR and finance system will very much help us, as it will give us live-time data about staff deployment and costs and enable us to map and track those things.

Jamie Halcro Johnston: Bearing in mind the importance of productivity to Scotland, can you measure it within the civil service at the moment?

Lesley Fraser: Not easily everywhere. We can do so in certain areas.

Jamie Halcro Johnston: And in certain areas, has it improved or stood still?

Lesley Fraser: It absolutely has improved. Perhaps one of our more recent examples in that respect is social security. I also work closely with Registers of Scotland, which has quite dramatically improved productivity in its casework turnaround. I work, too, with the Scottish Public Pensions Agency, and it is on a journey of looking to improve productivity. We can look at this issue principally in those public-facing areas where a service is being provided, but we are very much looking at it as part of the overall people strategy that I outlined earlier.

Jamie Halcro Johnston: Mr Marks, I have two questions for you. Over the past few years, we have seen the minutes of Covid gold command meetings not being recorded; legal advice from the Salmond inquiry not published, and then published but not in full; and emails relating to decisions on Ferguson Marine lost or not found, then searched for and suddenly found. Minute taking and the recording of information have not been strong points of the Scottish Government. Are you confident that that has improved—

John-Paul Marks: Yes, I am.

Jamie Halcro Johnston: And what gives you that confidence?

John-Paul Marks: With regard to Ferguson Marine and the point about the historic contentions around the events of 2015, the strategic assets and commercial capabilities that we have established were very much derived from committee recommendations and Audit Scotland’s scrutiny. We have been seeking to ensure that, as Gregor Irwin has set out, whether it be current value for money considerations with regard to Prestwick, the Lochaber smelter or Ferguson Marine and/or considerations of future strategic asset investment, the level of due diligence, the transparency, the expert insight provided and then the decision making are all per best practice, as set out in the business investment framework that has been published. I am very confident in that regard.

As for some of the more contentious historic legal cases, Lesley Fraser has done a fabulous job of establishing our propriety and ethics capability in government, which is a new development. I think that good lessons have been learned on first and second-line involvement in cases and the proper procedures. Again, all of those are published and are subject to external input as well as assured and tested. Those are well-established procedures and there has been a lot of good sharing, with people looking at what we have done to learn lessons elsewhere, too.

As I understand the latest information, we have published the gold command minutes and meetings, and of course, we have shared everything requested of us with the Covid inquiry. We await its report and, of course, will respond to its recommendations, but we recognise that, as far as the response is concerned, there will be lessons to be learned. People worked flat out in a global emergency and responded with real determination, but I am sure that, where there is learning to be had, the statutory inquiry will set that out clearly, and we must ensure that that learning is taken forward into how we deliver good government in the future.

11:45

Jamie Halcro Johnston: On a general point, are all Scottish Government meetings recorded and the correspondence and so on kept?

John-Paul Marks: Yes.

Jamie Halcro Johnston: Are there any cases where they might not be?

John-Paul Marks: All correspondence is kept on our MiCase system, as are all parliamentary questions and freedom of information requests. We have gone through a significant programme of improvement with regard to minute taking and have established new corporate capabilities and systems for record retention and retrieval. We are trying to ensure that we have established best practice and are consistently applying it.

To go back to your question about productivity, I would note that the volumes are at record highs. We are responding to more FOIs, more correspondence and more PQs than ever before and with a lower head count; therefore, productivity is up, because we are responding more quickly than we used to. However, it is all about doing so while maintaining quality and control, as you have said. We are determined to keep improving, but I can assure you that correspondence, the PQs and the documentation are all retained.

Jamie Halcro Johnston: So, there should be no excuses about minutes of this or that meeting not being recorded or retained.

John-Paul Marks: Yes, I think so. I am sorry—I did not quite catch the question.

Jamie Halcro Johnston: My point is that, if a request is made for minutes of a meeting by politicians or the media or through an FOI, there should be no excuse that no minutes were taken for that meeting or were not retained.

John-Paul Marks: Yes, I think so. If it is retained, it is subject to FOI, and the systems are in place.

I pause, because I am thinking of Mr Mason's earlier point about full and frank conversations and about the expectation of every sentence of every conversation having to be written down every day destroying the effectiveness of government and engagement. When I meet the First Minister for my weekly dialogue, we capture key actions and then deliver them, but we do not write down verbatim exactly what we say to each other every day. If I had to do so, I would spend my whole life writing minutes instead of getting on with delivering government.

I suppose that that is the only reason for my pausing slightly in response to your last sentence. We must ensure that we can run the country well, while ensuring that we respond to an increasing demand for information through FOIs, PQs, correspondence and every other channel through which we are increasingly getting requests. We are trying to strike that balance; we do that according to published guidance and subject those systems to independent assurance.

Jamie Halcro Johnston: Thank you.

The Convener: Thank you very much. Of course, the discussion has stimulated further questions in my mind, but I am not going to ask them. We are well over our time and we must be fair to our second panel of witnesses, who have been extremely patient, given that we have overrun by about 50 minutes.

I thank the permanent secretary and his team for answering our questions so directly and frankly, and I thank colleagues, too, for their questions. I will now call a two-minute break while we change witnesses.

11:49

Meeting suspended.

11:54

On resuming—

Scotland's Commissioner Landscape

The Convener: Our next agenda item is to continue to take evidence as part of our inquiry into Scotland's commissioner landscape. Before I welcome our witnesses, I apologise for the fact that they have been kept waiting for almost an hour by the question and answer session beforehand. That was not anticipated, and we will try to ensure that it does not happen in future. I want to formally apologise for the time that you have been kept waiting.

Our witnesses are Lynda Towers, convener of the constitutional law and human rights committee of the Law Society of Scotland; Dr Ian Elliott, senior lecturer in public policy, centre for public policy, University of Glasgow; and Professor Alan Page, emeritus professor of public law at the University of Dundee. I welcome you all to the meeting and I will now open up the session to questions from members. I intend to allow around 75 minutes for this session, depending on colleagues' questions and of course your answers.

I want to start by asking about something that I found intriguing in the Law Society's written submission. Basically, it is about the comment that

"The recognition of a fourth branch of government in addition to the three traditional branches—the Legislative, Judicial and Executive—has been occasionally proposed in constitutional law literature."

That is, the integrity branch, which includes audit offices, independent corruption commissions, ombudsmen and parliamentary committees. Ms Towers, will you expand on that a wee bit?

Lynda Towers (Law Society of Scotland): That is an area of law that has been with us, or discussed, for some considerable time. The article that was referred to in the Law Society submission dates back some time as well. It is fair to say that it is a thing that goes in and out of favour in discussions among constitutional people in the United Kingdom and in America and Canada.

I suppose that, in effect, it is about who looks after the people who are looking after things, if I can put it that way. We have the three traditional parts of the state—Parliament, the executive and the courts—and, in the new world that we live in with so many regulatory bodies, whether you call them commissioners, ombudsmen or whatever their oversight role is, we add in the question: who will oversee the overseers? That is the on-going discussion.

At the moment, the issue is certainly being raised again as a topic to be discussed in light of

the way that constitutional law and the bodies have developed in the United Kingdom, including in Scotland and in England and Wales, and elsewhere. That is something to think about, but I do not think it has yet reached the same status of the three constitutional divisions that we are already aware of.

However, for the committee, in conducting this particular inquiry at this time, the issue is very relevant, because it is part of on-going discussion and relates to the matters that the committee no doubt will wish to raise with us in relation to further iterations of commissioners, or whatever we call them, that we know are likely to be coming up. There are also the two areas that we will face arising out of the Scottish human rights bill and the mental health law review, which will undoubtedly raise issues. I suspect that there will be a huge push at that stage for different bodies to regulate different aspects of matters that will arise out of those subjects, which are likely to be very big.

There is a question about whether we can identify an efficient approach, in terms of operational and budgetary matters arising out of those, in addition to the matters that the committee has already identified. Now is the time to think about how you are going to deal with those additional matters.

The Convener: Yes. One thing that I thought about when reading that point about a possible fourth branch—an integrity branch—is that it almost consolidates commissioners and so on as part of the landscape. I do not know that committee members are necessarily all too enthusiastic about that, given the issues of democratic accountability, costings et cetera. Professor Page, what is your view?

Professor Alan Page (University of Dundee): I very much enjoyed what you said there, convener, because in a sense we have been here before. If you go back long enough to the early 2000s, when the idea of commissioners was first mooted, I think that the Scottish Information Commissioner was the first commissioner and, as I think that I said to Jim Wallace at the time, it must have seemed like a terribly clever wheeze. They said, "How do we create a body that is independent of Government? Guess what? Let's make it a parliamentary body," which is what happened. Then, a succession of commissioners were created and, before we knew where we were, the Parliament had become seriously disenchanted with its commissioners for exactly the reasons that you have indicated, convener.

12:00

On the 2006 Finance Committee inquiry, the history as set out in your background papers is

pretty sketchy and misses out some of the more important details, but that committee was highly critical of the existing arrangements. It said:

“It would appear to the Committee that, whilst protecting the independence of commissioners and ombudsman within establishing legislation, insufficient checks and balances have been put in place to reassure the Parliament that commissioners and ombudsman represent value for money.”

That was the start of a process. As you will remember, we had a minority Government from 2007 to 2011. That led to a review and eventually to the rationalisation of the existing system. Instead of, I think, six commissioners, we ended up with five, with two being collapsed into one another to form the Commissioner for Ethical Standards in Public Life in Scotland.

Bearing that background in mind, I will fast forward to where we are today. My concern is that we simply rerun that experience. My point therefore is that we need to rethink the commissioner model in a way that simply was not done when commissioners were first set up in the early 2000s. The model was not properly thought through then and, now that we are facing a potential expansion in the number of commissioners, it badly needs rethinking.

The Convener: I will ask you in a second how you feel that we should be rethinking that, but I first ask Dr Elliott to answer the question with regards to what the Law Society has said about the integrity branch. What is your view on that?

Dr Ian Elliott (University of Glasgow): I do not want this to sound like a cop-out when I say that I agree with everything that everybody else has said so far, but there are a lot of important points there. The system of commissioners that we have developed in a fairly ad hoc way, so this inquiry is very timely and important, as it allows us to consider the best possible way to think about that fourth level of Government or Parliament.

There is value in commissioners—I would not say that they are either a good thing or a bad thing. There is a balance to be struck, and maybe the question is whether we have the right balance now and going forward.

The Convener: Do you think that we do?

Dr Elliott: The real issue is that the situation has developed in an ad hoc way and we need to consider, for example, whether there should be fewer commissioners but with larger budgets and more powers, or whether we have lots of smaller ones with smaller budgets. Of course, the risk of having lots of smaller commissioners is that there is a risk of cross-cutting agendas, whereas if you have fewer but give them more powers, perhaps you can have a more strategic approach.

The Convener: The committee is aware of all those potential iterations, but I am quite keen on finding out what your view is. Do you feel that we should have an expanded Scottish Human Rights Commission with a rapporteur, for example, rather than independent commissioners?

Dr Elliott: That is one model. Obviously, one of the challenges is that the Government has more powers, particularly since the Scotland Act 2016, and a few of those powers have been mentioned already.

The Convener: A few are being taken back, actually, but never mind.

Dr Elliott: Yes, but more powers are being devolved to Parliament and yet we still have the same number of MSPs and the same number of committees. How do we ensure scrutiny when we have all those additional powers with the same resource?

I was in the public gallery during the committee’s session this morning, which was very enjoyable, and the word “scrutiny” was mentioned a lot. How do we enable better scrutiny? Commissioners are an effective way to add more scrutiny to Government, particularly in a unicameral system. For example, in New Zealand, which has a fairly similar sized Parliament to Scotland—obviously it has many more powers because New Zealand is a fully independent country—there are just three commissioners, but they have much bigger budgets and are overseen by a specific committee in the Parliament, the Officers of Parliament Committee.

I do not want to be rude about how the situation here has developed over time, but that is a much more thought-through approach whereas, in Scotland, the commissioners have developed in an ad hoc way through different acts that have come into being that have recommended commissioners without thinking about whether the powers could be put into one of the existing commissioners, rather than setting up a new one.

The Convener: Lynda, you were nodding when I talked about rapporteurs.

Lynda Towers: I am nodding, and I am not nodding.

The Convener: My God. [*Laughter.*]

Lynda Towers: Some of you may remember my previous role in this building. A number of years ago, the Scottish Human Rights Commission was set up by a committee of this Parliament. At the time, one of the suggestions that came from what was then my office was about whether the committee needed to set up an additional commissioner when at the same time Parliament was considering the question of a children’s commissioner. I happen to think that the

children's commissioner should be separate, because it does a very different thing, but one matter that was considered at that time was whether it could be made part of the human rights commission with one commissioner who had particular responsibility for the children's aspects. That might be a way of moving forward with the Scottish Human Rights Commission. We could have different people with particular expertise but who also exercise a wider role in relation to the commission. Therefore, the Parliament would not have to set up another commissioner and you would have the expertise within that organisation.

At the time, that committee decided that it was not how it wished to move forward. The thinking was that the issue was very important and the committee wanted to have something with a separate name. That kind of thinking has to an extent permeated many of the bills that have gone through. The commissioners' functions are very important to look after various things. Therefore, when committees have considered those—the Law Society has supported a lot of the appointments—the process has generally been, “Do we need a commissioner? Yes. Is the easiest way to do that to have it as part of the bill? Yes.” That tends to be how it goes, as opposed to a committee asking, “Well, we need somebody with commissioner responsibilities, but is there an existing body that could be given additional powers to enable a particular set of functions to be exercised?” That would cut back on the overarching needs and the complexity.

The scene has changed from the early days, when we had four or five commissioners. Given the number that we have now, without going away and looking at the legislation, I would struggle to say exactly what each commissioner does, what their powers are, and how far they can exercise those powers. In that context, there might be an argument for looking at how commissioners are set up in a similar way to the approach taken to inquiries in the Inquiries Act 2005. That is not the same topic, but that act was set up both for the UK and for Scotland, with different rules for how inquiries operate. There is a basic set of powers and then different powers are allowed to deal with different kinds of commissioners or inquiries or whatever you want to do. That approach would mean that all that information would be in one place.

The Convener: Professor Page, you talked about a rethink. How would you rethink this landscape?

Professor Page: Earlier, I mentioned the Finance Committee review in the early 2000s, which reflected the Parliament's disenchantment at that time with its commissioners. Although that review was carried out by the committee, it was

driven by the Scottish Government, and, in particular, the then First Minister. The stance of the current Scottish Government is completely different—there has been a complete volte face. It is not saying that we should tidy up the system and have fewer commissioners; it is saying that we should have more of them. That is astonishing. The Government is saying we should have more of them, and there is the model whereby the Parliament can set them up and the Government will provide the money for them—the Government is saying, “Don't worry about that; there will be plenty of money.”

However, my fundamental question is, are those bodies parliamentary bodies or are they executive bodies by another name? In your papers, there is correspondence from the then Deputy First Minister, Shona Robison, about how we have a ministerial control framework that sets a framework within which we can make decisions on the establishment of public bodies and so on, and can provide Parliament with a bit of advice, should it be needed.

My worry is that you are in danger of doing something that the Parliament should think long and hard about whether it should be doing at all.

The Convener: What you are saying is interesting. Last week, in private session, we spoke to two former MSPs who had previously put forward commissioner proposals, which are still live but with others pursuing them—one is being pursued by the Government, and the other by a back bencher. Neither of those MSPs now support the establishment of the commissioners that they advocated for some years ago. One of them said that that was because of a lack of evaluation or evidence of the positive impact that commissioners have made. That might be unfair on certain commissioners, and we have heard commissioners and others argue quite passionately the opposite. I would like to know our witnesses' views on that.

Professor Page: There is absolutely a serious question to be asked and answered about the accountability of those bodies, which is another way of raising your question about the evaluation. The danger, as I see it, is that the bodies are established, the Parliament funds them, sets their budget, appoints people to them and all the rest of it, but they then occupy a certain no man's land—I do not know if that expression is politically correct—where they are not really accountable to anybody and no one is responsible for saying whether or not the system works or whether it should be rationalised and so on.

My starting point is that I am entirely sympathetic to the idea of commissioners—that relates to this talk of an integrity branch and the idea that you need additional checks on

Government, and I accept that 100 per cent. However, my question is whether those bodies need to be parliamentary bodies. Is the Scottish Government not just shuffling off responsibility that properly belongs to it? We have lots of independent bodies that have been established by the Scottish Government—they do not have to be parliamentary bodies in order to be independent—and are kind of forgotten about. The Scottish Parliament information centre briefing paper has a little bit of information on their relationship with committees, but my sense is that that does not really amount to very much at all—there is ad hoc or occasional engagement, not systematic engagement. I understand the reasons for that: you are busy people who have a lot of things to do. However, what it means is that you end up with something that is, not quite a fourth branch of Government, but perhaps a non-branch of Government whose role is not properly thought through and just grows—

The Convener: Arms and legs.

Professor Page: Yes.

12:15

Dr Elliott: It is quite useful to look back to the time around 2006, when a lot of these reviews took place, including the Crerar review. That was much broader, because it looked at all public bodies, not just commissioners. You need to take that into account as well. Work has also been done on the issue by the UK Parliament. Around 2007, it published a useful report called “Ethics and Standards: The Regulation of Conduct in Public Life” that looked at what it termed “ethical watchdogs”. It praised the Scottish commissioners at the time, which is quite nice, isn’t it?

The question of how to get evidence of effectiveness is hard to answer. How do you prove the effectiveness of a scrutiny body? How do you prove the effectiveness, frankly, of this committee? It is a difficult thing to prove because you are designed to scrutinise and, of course, no Government particularly likes to be scrutinised. The idea of having fewer scrutiny bodies is probably a good thing from the point of view of any Government of any nature. Often commissioner bodies are set up as the result of a crisis or some sort of scandal. For example, the Committee on Standards in Public Life was set up in 1994 as a result of lots of scandals in the UK Parliament and the UK Government at the time. However, if there is no subsequent scandal or crisis, does that mean a body that was set up to prevent them happening has been effective? How do you prove the lack of the existence of something?

As with many things in public administration it is difficult to prove whether something is effective or

is providing value for money. How much money should we spend on scrutiny of Government policy or law? It is a difficult question to answer.

The benefit of those bodies is that they have that independence from Government, or, at least, they should have. Realistically, in the standard model, the appointment of a commissioner should be independent of Government, the funding should be independent and the reporting should be independent. The reporting mechanisms for commissioners might be one of the things that needs to be considered a bit more. Who do they report to? Where is that accountability? Is it to one particular committee? Is it to this committee? Should there be, as is the case in New Zealand, a separate committee specifically for officers of Parliament, or should they be accountable to all committees? Again, that relates to the accountability issue that you were asking about.

Professor Page: Dr Elliott mentioned the House of Commons Public Administration Select Committee’s report “Ethics and Standards: The Regulation of Conduct in Public Life”, which looked at the Scottish experience and the Scottish model with a view to recommending whether it should be followed in the rest of the United Kingdom. Its conclusion was that there had been a strong focus on commissioners’ independence from the Scottish Executive but that too little attention had been given to their

“consequential ‘dependence’ on the Parliament ... and on their accountability arrangements.”

That is what I meant when I said earlier that the model has not been properly thought through. We got a model, we rationalised it and we have lived with it, and many of the commissioners do a very good job—no question about that—but we are now suddenly going to be expanding the number of them, even though there are those issues that have been there from the start and which should not simply be glossed over.

Lynda Towers: I agree that one of the questions that arises in relation to commissioners is, how can we say whether they are doing a good job? Others are whether they are truly independent and the extent to which there is operational transparency. All of those are good issues to consider.

I am not sure whether you have heard from the SPCB in this context yet, but, in my experience, the commissioners who had to appear in front of the SPCB were given a robust and challenging session in relation to their outcomes, their budgeting and their aims. Commissioners now come to Parliament to speak to particular committees, but that can sometimes seem a little perfunctory. Further, because of the issue of departmental changes, commissioners do not

necessarily build up a level of expertise in relation to a particular committee.

One of the changes that was made, which I think provided a good way forward, was that, instead of having two relatively short periods for commissioners being appointed—say, two four-year or five-year periods—they are now appointed for a longer time but for a one-session period. That allows a commissioner to develop a relationship with committees of the Parliament and to develop a more realistic strategy for what they are doing in that context.

There is undoubtedly scope for more commissioners being given an opportunity to build up those relationships and for them to be given proper scrutiny by the various committees. I would not underestimate the independence of the commissioners. Those that have a role in lobbying, if I could put it that way, as opposed to scrutiny and supervision—people such as the Children and Young People’s Commissioner, the Information Commissioner and the Scottish Human Rights Commission—have all very much influenced the development of legislation and strategies and have lobbied, although that is not a nice word, on behalf of their clientele. That would not have been possible had they not been independent of the Government.

On the question of the funding, it is true that the SPCB gets funding for the commissioners from the Government, but everybody is subject to constraints in budgeting, so it is not beyond the wit of man to see that there could be constraints in funding that might have an impact on how some of the commissioners can operate if matters go on as they are at the moment. Further, the more that that spending becomes an increasing proportion of the Parliament budget, the less attractive it might appear.

The Convener: You were head of legal in the Scottish Government, so you have a unique experience in that you are able to see things from the inside and the outside. You have said that consideration should be given to a more systematic approach to post-legislative scrutiny involving legislation relating to commissioners. Can you expand on that? How long after legislation has been passed should that post-legislative scrutiny take place? A year? Two years? Five years?

Lynda Towers: That depends on what you are dealing with. The Law Society has taken the position that a lot of legislation would very much benefit from a review. Often, as Dr Elliott has said, commissions are established and legislation is passed as a result of something happening and, therefore, that might require a different level of scrutiny. However, if you are setting up something like a human rights commission, that might require

a longer period of time to have passed before post-legislative scrutiny can take place, because its remit is wide. A biometrics commission is much more factual and numbers-based—it concerns how much data you have to look at, how much you have to get rid of and so on—and there is a question about whether it is really necessary or whether that task could be done in another context.

There is not an absolute rule. The issue should be looked at by a parliamentary committee at the time, with consideration being given to the powers that are being given in the legislation to that particular commissioner.

The Convener: Dr Elliott, do you agree with that? Do you feel that there is mission creep on the part of some of the commissioners? There seems to be a concern that there is a degree of empire building as well as overlap and duplication.

Dr Elliott: Yes, the issue of overlap and duplication is clearly a concern. Again, I agree with everything that Lynda Towers has said. There almost seem to be two different models of commissioner being developed: one that is fairly technical in nature, an example of which is the Information Commissioner, who has a clearly defined role; and another that involves commissioners that are more policy orientated and have a much broader remit, such as the Children and Young People’s Commissioner. Those two different models have developed over time in an ad hoc way, and there are questions about, for example, the extent to which the role of the Children and Young People’s Commissioner would overlap with the roles of a future generations commissioner or a sustainability and wellbeing commissioner. That is a risk, which is why this inquiry is a good thing to have.

At the same time, I recognise exactly what Professor Page said earlier about the fact that many of these debates have already been had. If you look at the 2006 report of the Finance Committee, you will see that there were similar debates and that similar points were made. I guess that the current challenge lies in the growth in the number of powers that the Parliament has.

The Convener: Yes, indeed. We have the SPCB before us next week. If you were in our shoes, what questions would you put to it?

Dr Elliott: I would never want to be in your shoes—that is too hard a job for me. *[Laughter.]* What sort of questions would I ask? The accountability issue is key, and I would probably delve a bit more into what the SPCB sees its role to be in the accountability process.

I go back to Lynda Towers’s point and to the question. If we are not going to have more commissioners or we are not going to use the

current commissioners and extend their powers, the question then becomes: what is the alternative to that? Is that about reforming Parliament more generally? Should we have more MSPs and more committees?

I do not think that it is realistic to say that the Parliament that was set up in 1999 should just continue for ever in exactly the same way, because the whole nature of Parliament has changed radically in the past 25 years. The 25th anniversary is a useful period on which to look back and, given how much has changed over that period, to ask: is there a need for a different way of undertaking scrutiny and the role of the Parliament? That is a very valuable discussion to have.

Although a lot of the debates were had in 2006, the context that we are in now is radically different and it is worth while having those debates again.

The Convener: Do you want to respond, Professor Page?

Professor Page: What should you be asking the SPCB? Is this a job you want? Do you relish this job? Is this getting in the way of other things that you should be doing? I think that that is a serious question.

That goes back to my earlier concern about the Parliament being diverted from its course and becoming not so much a Government in waiting but a surrogate Government that is doing things that the Government should be doing. There is a change in focus with some of the new bodies from ensuring the integrity of Government and that government is being properly carried on to a more advocacy role in which they are saying, "We really need to be thinking about this, and we ought to be getting on with that and doing this and the next thing." Should not the Government be doing that and being held to account by you in respect of how well or badly it does that, instead of your being presented with a commissioner about whom nobody is quite sure where they fit into the overall structure?

Lynda Towers made a point about commissioners having a single, longer period in office being a good thing. That was introduced as a way of providing an additional guarantee of their independence. In other words, they would not be sitting in post for three years worrying about what would happen at the end of that period or that any keenness on being reappointed would not be influencing the way in which they set about their job. The idea was that, after a number of years—was it six or seven years?—that would be the end of the appointment and there is no question of someone carrying on as a commissioner beyond that point. That was the reason for the introduction of the single term of office as opposed to the

system before where terms of office could be renewed.

The Convener: Okay. Thank you. I will open up the session to colleagues. Liz Smith will be the first to ask questions, to be followed by Michael Marra.

Liz Smith: Thank you for your very interesting, thought-provoking responses so far. Has the increasing demand to have commissioners come about because we are failing to deliver the public services that people want? I do not mind who goes first.

Professor Page: I am happy to say something without necessarily giving you a yes or no answer. That is a way of appearing to do something without necessarily doing anything, or it is a way of being able to say, "Look, we have set up this commissioner." Great.

Liz Smith: This is an important question for our deliberations. If the demand has come about because certain aspects of public services are failing or there is a gap in delivery, can we do something to improve delivery rather than having another commissioner? That is the real question.

I think that the evidence that we have had so far, which is now quite extensive—we have been scrutinising the topic for something like six weeks—is that the demand for commissioners to deal with an advocacy issue rather than a regulatory matter or something to do with complaints is a result of an issue not getting the attention or the delivery that it needs in order to improve, for example, the lives of vulnerable people, whether that is disabled people, older people or children. I am interested to know if you share that reflection.

12:30

Dr Elliott: Those things often come about due to a perceived failure. I have mentioned a couple of examples of that already. There is that risk. I completely agree with Professor Page. Government should be doing those things anyway and then, of course, Parliament should be holding the Government to account. I suppose the question is: what if the Government is not doing those things? Take the issue of developing Government in a more strategic way, with longer-term decision making. I know that the committee has carried out an inquiry into decision making. How do you ensure that Government is making decisions that are based on long-term strategy? Having a future generations commissioner could be one way to hold Government to account for that and to scrutinise what it is doing.

Ultimately, there are different ways of doing this. I do not think that there is necessarily a right or

wrong way. However, many people have a concern about the sheer proliferation or potential proliferation of commissioners without thinking about where there might be a risk of crossover or duplication of effort. That is where the focus should be.

Liz Smith: That is interesting. Professor Page also said something very interesting when he suggested that, if we were to go back to the evidence from 2006, it would make sense for us now to have a complete overview of what the structure should be and to consider where we are going with this and how we can make public life and the Scottish Parliament more effective. That begs the question: should we accept some of the demands for individual changes or should we have a complete review of the whole set-up and of what a commissioner is supposed to do? From your responses so far, I think that you are suggesting that it should be the latter.

Dr Elliott: Yes, I would definitely support that. We need to bear in mind that Parliament was only seven years in at the time of the 2006 review and there was a concern about proliferation of commissioners then. Now, the context is very different. I would absolutely support that idea of having a much more thorough review into the nature and the role of commissioners.

Liz Smith: Lynda Towers, you mentioned the possibility of a fourth estate, if you like. Do you think that demand for greater integrity has come about because the public trust in Government and in the ability to be effective in delivering public services has been questioned or is perhaps failing?

Lynda Towers: On behalf of the Law Society, I am not going to answer that one directly; I will answer it in a slightly different way. That goes back to what we had in the early days and how things were developed. Nowadays, we have an awareness of peoples' rights and how we should approach people that was not there 25 years ago when the Parliament was set up and was looking at its initial commissioners.

One useful way to look at that is to consider the word "disabilities". We have a disability commissioner for Scotland coming. At the moment, disabilities can be covered by the Scottish Human Rights Commission, by the Equality and Human Rights Commission, and by the Scottish Public Services Ombudsman if people are not getting the right help in the national health system, in the justice system and in all sorts of other systems. Should the disability commissioner deal with that when all those other areas have an impact? That is before you even get to the definition of what a disability is.

One thing that the Law Society has been looking at is the United Nations Convention on the Rights of Persons with Disabilities. The definition in that is different from the definition that we have under the mental health legislation and under various other acts. How would you get a commissioner that can deal with all the different aspects, and how do you know which commissioner you should go to if you have a concern about how you are being dealt with and about what your rights are?

I think that the problem, without going into the political side of it, is that, as a practical issue, we think differently about people. Also, people are rightly expecting more from services because we are more aware of the various rights that we have, albeit those are diverse.

One idea is to have a fairly radical overview on the basis that, although it was okay to have four commissioners who dealt with those narrow areas in 2000 to 2005, given that we are approaching 2025, we need to look again at that whole area and at whether it is right to have a commissioner dealing with those separate things. Another idea would be to go back to basic rights, and to set out what needs to be looked at, how that will be delivered and whether that should be done by X number of commissioners or through a piece of legislation that sets out what all commissioners do, with a menu from which you pick what commissioners can do. That would also give clarity as to the powers of commissioners.

For example, I might be better going to the Equality and Human Rights Commission for something, but it is not allowed to enter into a court case on my behalf. I could go to the Scottish Public Services Ombudsman, but they are not allowed to give me any money if they find a breach of my rights; however, they can tell somebody to do something. Therefore, it is about looking at what is right for different people and, at the moment, there is huge confusion as to where someone goes and what rights they can exercise. How does the citizen find that out?

Liz Smith: That is a very helpful answer. Thank you.

Michael Marra: Thanks for the evidence for far. This slightly more principle-level discussion in respect of how the institutions perform and interact is very useful for giving context to much of the detail that we have had from previous witnesses.

I will start on the fine difference between advocacy and scrutiny. I was also interested in the idea of an integrity branch. Lynda Towers, it feels to me that there is an issue around scrutiny and what I have been proposing to call the taxonomy of commissioners. One branch of that is those who watch the watchers, which includes the Ethical Standards Commissioner and the Scottish

Information Commissioner—that is, those functions that scrutinise Government and performance under the law. Another branch, in which the Scottish Biometrics Commissioner sits, covers areas of technical detail that parliamentarians do not have knowledge of and that we would not expect them to have in order to perform certain roles that might be for a short time only. The third branch is more around the rights-based advocacy space, which many of the new proposals for commissioners sit within. How does that advocacy role fit within your integrity branch idea?

Lynda Towers: I think that it is similar; it is a different aspect of the same thing. Advocacy can be very important in looking at the context of helping somebody to exercise their rights and of advising them where to go. Equally, advocacy has different meanings. If you look at advocacy in the context of the Mental Health Act 1983, that is about helping somebody who is not perhaps able to take part in the formal process hearing to enable them to do that and to make sure that they understand their rights.

Advocacy can also be, particularly in the children's commissioner area, about making sure that people take account of the different needs of children in different areas. On some occasions, children cannot possibly deal with that, so advocates speak on their behalf.

All those aspects are covered within the question "Is the state exercising its powers correctly?" With a child, is the state taking account of them at all? Does it need reminding by the children's commissioner that there are particular aspects that relate to children? The first question is: what is a child? All the different ages that apply is another issue—let us not go there.

There are different aspects of advocacy, but the problem that Dr Elliott raised is that they all fall under the same umbrella of commissioner. Also, why is the SPSO an ombudsman and not a commissioner? There is no real difference in what they do, but the name suggests that—this is what I would say in a court context—if it has a different name, it must mean something different. However, it probably does not.

That is part of the context of the whole oversight aspect of the commissioners. Do you need to call them something different? How do you work out who is doing what, and does everybody understand the difference in their roles? Some of them might have all three of those elements in their functions—that is, they might have technical, advocacy and lobbying functions.

Michael Marra: Dr Elliott, do you have any thoughts on that fine difference?

Dr Elliott: Yes. The commissioners have—or, at least, they certainly should have—a public role, and the independence of the commissioners is quite important in their being a voice for and supporting the public in their engagement with Government. It has been found that having commissioners can improve trust in public services, but there is a risk that a proliferation of commissioners can create real confusion, as can the different terms that are used, which include ombudsman, commissioner, parliamentary watchdog and officer of Parliament.

The fact that so many different terms can be used that essentially all mean the same thing makes it very difficult to explain to the public what the different bodies are. As Lynda Towers said, how do people know who to go to when they have a particular need or are facing a particular issue? Again, that only serves to highlight the importance of having a more fundamental review of the role and function of commissioners in Scotland. I would probably argue that there should be fewer of them, but that they should have greater powers.

Professor Page: By way of a preface, I would like to say something on the notion of the integrity branch, which the convener raised. I think that that is something of a red herring, if I can put it like that. The concept of the integrity branch is essentially an Australian concept. It came from Australia, and the reason the idea was developed in Australia is that Australia has a very rigid separation of powers. Bodies are either executive or judicial. "Judicial" is very narrowly defined, and bodies that are not judicial must be executive, but then people say, "Actually, if we look at all these bodies that we are classifying as executive, some of them do things that are different from the things that the normal run-of-the-mill executive bodies do. They are not delivering services or making policies—they are acting as a check on Government."

The idea of an integrity branch was developed with a view to underlining the importance of the part that is played by those bodies in the control of Government. The thinking was that we could develop that concept and have a more systematic, more clearly defined system. I wrote something in which I quoted a leading Australian academic called Peter Cane. Although such bodies are absolutely important—there is no question about that—

"there are few signs of any inclination to move beyond what Cane describes as 'reactive and somewhat disjointed attempts to create effective counterweights to [executive] power'."

That is what we are talking about, so I would focus on that. We should focus on what role such bodies play in the control of Government, instead of

getting too hung up on whether we should call them an integrity branch.

There are a lot of these bodies, as we have discussed. We have not mentioned the quintessential one—the Auditor General for Scotland. It was the first such body and is written into the Scotland Act 1998. We also have the Scottish Public Services Ombudsman and the Scottish Information Commissioner, which are the classic fourth-branch or integrity-branch bodies.

Michael Marra: Much of the evidence that we have had has been about the question of priorities. The argument is that we should have an older persons commissioner because older people do not have a voice and perhaps do not get a fair cut of the pie. A similar argument is made in relation to why we should have a neurodiversity commissioner. Those are political questions, which are really about prioritisation.

On a more principled level, are we witnessing the reality of a rights-based discourse coming up against fiscal and political reality? How can we combine the two? We tell people that they have rights and that we will put in place a certain infrastructure to help them to realise those rights, but there is no money to pay for that. Is that not part of the core question here as well?

Professor Page: Yes, I think that that is a very good way of putting it. My question would be, “What exactly are those rights? Where do we find them?” We are saying that more attention should be paid to people’s rights, but we are not really pursuing it beyond that point, are we?

12:45

Michael Marra: Part of the question that we have asked about the children’s commissioner has been about the fact that, although it has existed for 21 years, in my view, there is little evidence of its having advanced outcomes for children. Child poverty is getting worse, educational attainment is getting worse and there is a national mental health crisis. We are no further forward in realising the rights that we might say that children are entitled to, despite the public money that has been spent on the commissioner and what has been a growing commission. I have no problem with the people who have been the commissioner or the people who work there. My issue is the principled issue of where we spend the money.

Dr Elliott: I think that that is where it can be quite useful to think about the commissioners as an integrity branch of Government, because they are not directly delivering services. In that sense, they are not delivery bodies. If outcomes for young people have not improved, there is probably a need to look at local government, the third sector or parts of the public sector that deliver services. If

we think of the commissioners as an integrity branch, what we are asking is whether we understand why outcomes are not being delivered. Is anybody offering that strategic oversight?

That is one of the reasons why a commissioner can be helpful, in comparison with, say, a parliamentary committee, because a commissioner cuts across all aspects of policy and all the areas that are covered by the different parliamentary committees. That means that they can offer a strategic overview of a particular policy area in a way that a parliamentary committee might struggle to do. In addition, they are independent from Government, which I think is very important in this context. Therefore, asking why the children’s commissioner is not doing more to improve children’s outcomes is problematic, if I can phrase it that way.

Lynda Towers: I go back to what I said earlier about the overarching view. I agree that the rights of the child might not be that different from the rights of the parents to have particular housing and particular levels of education. That takes us into the economic arguments. Is it right to keep the rights of the child separate? In the early years, when the children’s commissioner was created, it was probably right to do that, because children were still, to a certain extent, seen and not heard, and were perhaps not listened to in the way that we would now expect.

However, perceptions of how we should treat children and people more widely have changed and perhaps now is the time to consider whether we ought to have a large commission to deal with human rights, including those of people with disabilities, children, older people and people who would be covered by a future generations commissioner. Should such a commission also deal with the rights of more niche groups? “Niche” is the wrong word. Should such a commission cover neurodiversity, or should that be covered by a mental health body? Is it right to make decisions about that now when we know that major legislative changes are to be made to the mental health system? Should we be doing that now?

That makes it even more important for us to start thinking, “We have created all these bodies. Has the landscape in which they have been created changed over that period of time?” Therefore, we might need to look for something different to take us forward in the next few years, in order to preserve those rights, while not taking away from the fact that many of the commissioners that were created, particularly the early ones, were what was needed at the time, and some of them might still be needed.

For instance, the Scottish Information Commissioner is still needed. People tend to forget that although the Information Commissioner

is appointed and paid for by the Parliament, the commissioner will still, on occasion, seek to obtain information from the Parliament, so you are still subject to that as well. There is perhaps no need for a huge change to the role of the Information Commissioner, but when it comes to the rights-based and advocacy-based commissioners, there is perhaps a need to give some consideration to what would deliver more effectively now and what is needed by the relevant people now.

John Mason: We have had a lot of good input already. Mention has been made of the commissioners that we are not looking at, which include the likes of the Scottish Fiscal Commission, the Auditor General and the relevant bodies for prisons and constabulary. Have we made a mistake in just concentrating on the ones that are supported by Parliament? Should we have been looking at the wider landscape?

Professor Page: Your terms of reference are quite tightly drawn: they say that we are looking at Scottish Parliament-supported bodies but not at executive bodies. That is fair enough, but I go back to what I said at the beginning. An important question is whether some of the commissioners that are now proposed should be set up as parliamentary bodies as opposed to executive bodies.

John Mason: Because we set up their remits.

Professor Page: Yes, but that is the way I read your terms of reference: we are looking at Scottish Parliament-supported bodies; we are not looking at executive bodies. However, you are dead right—there are equivalent executive bodies. That is an alternative model.

John Mason: Those bodies—or some of them, at least—are seen as being very independent.

Professor Page: Absolutely—there is no question about that. Independence is not a quality that is exclusively associated with being appointed by the Parliament. Some of the bodies in question could be set up by the Scottish Government with suitable independence if that was felt desirable. That was the point that I was making earlier on. It is very easy—one could say that it is almost lazy—to say, “We’ve got this model, so let’s set up these commissioners and Parliament can look after them.” Hang on a minute. As you say, there are lots of examples of executive bodies that have a high degree of independence. Why not set up such bodies as part of the Executive, which can be held accountable in respect of them in a way in which the corporate body cannot be held responsible, which is a difficulty that we face with the present set-up?

Dr Elliott: If we ended up reviewing all public bodies, one of the challenges would be to do with the fact that the commissioner model is quite a

distinct being. I guess that there are some public bodies that it could be argued are quasi-commissioners. For example, the Police Investigations and Review Commissioner has “Commissioner” in its name, but it is not a commission for the purposes of the inquiry that we are participating in today. Should it be? You mentioned a number of other bodies that have “Commission” or “Ombudsman” in the name. Should those be considered as part of a broader review of the commissioner landscape? Yes, they probably should be.

Lynda Towers: I do not disagree with that, but, frankly, I think that the committee has a huge job in looking at the bodies that it is already looking at. To go back to the area of mental health, there is the Mental Welfare Commission for Scotland. There are all sorts of different overlaps there. The commissioners that you can control or review are the ones that are responsible to the Parliament. There might well be scope for looking at other such bodies—the committee might be showing the way on how to look at a proper review of scrutiny, advocacy and oversight bodies.

John Mason: I will move on. I have been thinking for a while that it would be good to have just one body—the obvious one would be the Scottish Human Rights Commission—and to plug lots of other things into it, although I accept that that would probably not be appropriate for some commissioners, such as the Scottish Information Commissioner. What you have said today has strengthened my thinking on that, but what would be the disadvantages of that approach? Why would it not work, or why could it not work, to put most of the commissioners into the Scottish Human Rights Commission?

Lynda Towers: Bodies such as the SPSO are very transactional. It looks at whether an organisation has done things right and obeyed all the rules and whether a remedy can therefore be given at the end of the day. That is what that body looks for. That is very different from the Scottish Human Rights Commission, which tends to look at rights and what needs to be done but does not tend to get too involved in individual cases. It might get involved in the wider aspect of a case, but not in an individual case. I am not sure that putting everything into one body would necessarily suit the different functions that the organisations have—

John Mason: Even if we widened its powers?

Lynda Towers: Yes, because we might want to keep the transactional aspects separate from the overarching policy and scrutiny with regard to thinking differently. There would be a disadvantage in having too big a body, because it might be seen as too amorphous. Even within a

body, it can be difficult to find out what is happening.

Before you thought about doing that, you might want to look at putting all the commissioners that already have similar remits, such as the rights-based commissioners, in the same place. You could then perhaps look at the transactional bodies, including the Ethical Standards Commissioner, who also carries out research and investigations, although that is of a slightly different nature from the SPSO and on a smaller scale. You could put the different kinds of bodies together. As Mr Marra talked about, you could divide up the different aspects of what the bodies do, which would still reduce the landscape and, therefore, the potential for confusion.

Dr Elliott: I will not give a number for how many bodies there should be, whether it be one, three or 12. I advocate starting off by giving serious thought to the role and function of a commissioner. What is it that needs to be done? What is the best model for doing that? Is the commissioner model best, or should there be another type of parliamentary reform? There should be an open debate about that. We do not have to have commissions. Not all countries in the world have commissioners. We need to think about what function we are looking for. That should naturally lead us to the areas in which a specific commission might be needed. We should follow that process, rather than starting by saying, "Let's have three, because three is a nice number, and then we can work out what they will be called and what they will do." We need to start by thinking about their role and function.

John Mason: One school of thought is that everybody should have a commissioner—I am being half serious—and that the Parliament should make a plan to set them all up. We would have a women's commissioner, an animal rights commissioner and so on, to cover absolutely everything. Would that be feasible?

Dr Elliott: Ultimately, it comes back to public trust and, frankly, public understanding. If we have a very cluttered landscape of commissioners for different purposes, there will be risks relating to cross cutting and the duplication of effort, but there will also be the issue of the public knowing where to go. Should people go to the human rights commissioner, the young people's commissioner or some other commissioner? As Lynda Towers set out earlier, having fewer commissioners leads to greater clarity on where members of the public need to go to have their rights supported and upheld. That is one of the key benefits of having fewer commissioners rather than having one for everybody, as you put it.

John Mason: Professor Page, what are your thoughts on putting everything into the SHRC?

Professor Page: Under the model that you described, is my MSP not my commissioner?

We need to bear in mind two different questions. In relation to the proposals for new bodies that you are faced with, the first question is whether they should be set up as parliamentary bodies. Should we expand the landscape, or should we stop and take stock before we make a decision on that? The second question is whether the structure for the existing bodies is ideal. Should it be rationalised or reformed along the lines that you have said or in some other way? I do not have a view on that, but that is the way that I would approach the matter.

John Mason: Thanks very much.

The Convener: I call Ross Greer, who will be followed by Michelle Thomson.

Ross Greer: I am all good, convener. There is no point in repeating what Michael Marra asked; I had the same line of questioning.

13:00

Michelle Thomson: I have one quick question. Thank you very much for being here. It has been an extremely informative session.

I was particularly taken by Lynda Towers's compelling articulation of the considerations of different types of rights. As you know, we spoke to the permanent secretary in our earlier session. The committee has struggled to get people to think beyond their own silos—they think that their commission or commissioner is good—and look at things across the piece. My question is for Lynda Towers only. If the Government is advocating for the creation of a particular commissioner, how should things be looked at across the piece, as you so clearly articulated?

Lynda Towers: It is like when you are drafting legislation—you first need to think about what you want to do. It goes back to Dr Elliott's point about considering what you want a particular commissioner to do. Having sorted out what you want them to do, you should consider whether there is an existing body that could be doing that, whether things could be added to it and whether there is already secondary legislation that could be used.

If, after going through that complete exercise, you decided that there was no other place where the functions could go, you could say, "Right, I need a free-standing body that will do only this and will exercise its functions in this particular way, and you're going to find out about that in that particular piece of legislation." You also need to think about what kind of powers to give the body and whether they will cut across existing powers.

In most cases, legislation is the last resort, because there is no other way to sort something out, and the same should be true of commissioners. I was looking through the various papers that the Law Society has sent to various committees on such proposals. Our general position is usually that we agree that there needs to be some kind of commissioner, but, in a paragraph further down, we usually say, “Does it need to be a free-standing commissioner? Have you looked more widely at whether it could be put in somewhere?”

As a principle, commissioners are not a bad thing and are very often a good thing, but you need to think about why you are using them, whether you are using them in the right way and whether there is some way in which the powers could be exercised by an existing body by extending its powers. There would need to be an acceptance that the existing body’s functions might have to be expanded, that it might require additional expertise and that the cost might be a bit more, but the chances are that that would probably cost less than it would cost to stand up a new commissioner. I heard only the very end of your discussion on finances and on costs not always necessarily being transparent and rigid. That is also true in relation to the cost of setting up commissioners, whether it is the big ones or the little ones.

That is my answer to your question. People who suggest having a commissioner should be asked whether they have thought about whether there is anything else, because, with a Government bill or a member’s bill, it is their thing, so it is inevitable that they will want a commissioner to go with that thing. I have not done this exercise, but I think that a disproportionate number of the commissioners will have been set up, through either a committee bill or a member’s bill, because that seemed to be an easy way to give a degree of prominence and importance to that particular issue, whereas there might have been a different, more effective way of doing that.

Michelle Thomson: Thank you very much. That is very clear.

The Convener: That applies not just to the commissioner but to the MSP who puts forward the proposal, of course.

That has concluded questions from the committee. Before we wind up, do any of the witnesses want to make any final points on any issues that they feel we have not covered?

Lynda Towers: I do not think that there is anything that I wish to add. You have given us the opportunity to cover the matters, which we have dealt with at a high principle level. There is scope for improvement and for undertaking a full review

of what you are doing at this stage. That does not mean that what went before was wrong or was not appropriate at the time, but it is probably the right time to think about how appropriate the current system is for delivering the rights that we are now considered to have.

Dr Elliott: I think that Michael Marra made a point about delivery earlier. I am really struck by the New Zealand example, because, as I said, its population is similar in size to Scotland’s, although it obviously has a much larger land mass. New Zealand has 123 MPs, and we have 129 MSPs, so our Parliaments are of a fairly similar size, but New Zealand has only three commissions, so it takes a much more condensed and strategic approach to commissions.

It is interesting that, although the Government is becoming more involved in delivery, particularly in relation to social security, most public services are delivered not by the Government but by councils. If you are interested in delivery, that is the thing that you need to change, not commissions. I will draw on the New Zealand example again. We have similarly sized Parliaments, but New Zealand has 78 councils, whereas Scotland has 32. If you want to address delivery, you should go down that route, rather than thinking about having more commissions.

The Convener: Of course, Sweden has more than 400 councils, and I think that Oslo has about 20.

I thought that there were 19 commissioners in New Zealand, not three.

Dr Elliott: There are three officers of Parliament—there is the public service ombudsman, there is one for the environment and I am struggling to remember the other one—and they are directly accountable to the Officers of Parliament Committee in the New Zealand Parliament.

The Convener: Right. In a presentation that we were given, there was a list of 19. That might have been going back to the 19th century.

Dr Elliott: That might be to do with how we define a commissioner. For example, as we mentioned, some bodies in Scotland are called commissions but are not directly accountable to the Parliament. I was referring to the three officers of Parliament in New Zealand.

The Convener: Okay. I thank our witnesses not only for their patience in waiting so long to speak but for the excellent level of evidence that they have presented in response to our questions.

Before we go into private session, I note that, next week, we will take evidence from the Scottish Parliamentary Corporate Body.

13:07

Meeting continued in private until 13:22.

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Official Report
Room T2.20
Scottish Parliament
Edinburgh
EH99 1SP

Email: official.report@parliament.scot
Telephone: 0131 348 5447
Fax: 0131 348 5423

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