



OFFICIAL REPORT
AITHISG OIFIGEIL

Public Audit and Post-legislative Scrutiny Committee

Thursday 3 May 2018

Session 5



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PUBLIC AUDIT AND POST-LEGISLATIVE SCRUTINY COMMITTEE
11th Meeting 2018, Session 5

CONVENER

*Jenny Marra (North East Scotland) (Lab)

DEPUTY CONVENER

*Liam Kerr (North East Scotland) (Con)

COMMITTEE MEMBERS

*Colin Beattie (Midlothian North and Musselburgh) (SNP)

*Bill Bowman (North East Scotland) (Con)

Willie Coffey (Kilmarnock and Irvine Valley) (SNP)

*Iain Gray (East Lothian) (Lab)

*Alex Neil (Airdrie and Shotts) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Ian Bruce (Office of the Commissioner for Ethical Standards in Public Life in Scotland)

Kenneth Gibson (Cunninghame North) (SNP) (Committee Substitute)

Bill Thomson (Commissioner for Ethical Standards in Public Life in Scotland)

CLERK TO THE COMMITTEE

Lucy Scharbert

LOCATION

The James Clerk Maxwell Room (CR4)

Scottish Parliament

Public Audit and Post-legislative Scrutiny Committee

Thursday 3 May 2018

[The Convener opened the meeting at 10:00]

Decision on Taking Business in Private

The Convener (Jenny Marra): Good morning and welcome to the 11th meeting of the Public Audit and Post-legislative Scrutiny Committee in 2018. I ask everyone to switch off their electronic devices or put them on silent so that they do not affect the committee's work this morning. We have apologies from Willie Coffey, and Kenneth Gibson is attending in his place.

Item 1 is a decision on taking business in private. Do we agree to take item 3 in private?

Members *indicated agreement.*

Public Bodies (Governance)

10:00

The Convener: Item 2 is governance of public bodies. I welcome our witnesses: Bill Thomson, Commissioner for Ethical Standards in Public Life in Scotland; and Ian Bruce, public appointments manager in the commissioner's office.

I ask Alex Neil to open questions for the committee.

Alex Neil (Airdrie and Shotts) (SNP): Good morning. Commissioner, we decided to take a closer interest in this process because of the evidence that we got in relation to the Scottish Police Authority. The issues that were highlighted there could be applied to many other public bodies. For example, we have recently been dealing with NHS Tayside, where substantial issues have arisen and matters have not worked out in the way that they should have. We have looked at various other public bodies since the last election.

The issue does not exclusively concern the SPA, but I will pick the SPA to start with, as it is a good example of where we all believe that there is something not quite right with the public appointments process. The SPA is now on its third chairperson. The first two chairs were, to say the least, not outstanding successes, even though they had obviously been through what was supposed to be a thorough process before being presented to the Cabinet Secretary for Justice as possible candidates to take the position.

If you look at the role of the non-executive directors in the SPA—I am not referring to the new appointees—it is hard to find one who obviously was doing the job that they were meant to do. Indeed, quite the opposite appeared to happen, which is that members such as Mr Barbour and Moi Ali appear to have been victimised by the then chair for doing the job that they were meant to do. From where we are sitting, the public appointments process, certainly in relation to the SPA, has not been a raving success. Would you care to comment on that?

Bill Thomson (Commissioner for Ethical Standards in Public Life in Scotland): Convener, there are in my remit at the moment 96 regulated public bodies and Mr Neil has mentioned two in which there have been rather well-aided difficulties.

Alex Neil: I could mention many others, by the way.

Bill Thomson: If the question is whether the process fails to deliver, I think that it would be better to have a sense of the extent to which

failures may exist. I think that the process has a lot of merit. I am extremely aware that Mr Neil presented a bill in 2001 that would have led to a different process and which probably prompted the Public Appointments and Public Bodies etc (Scotland) Act 2003, under which I operate. I suspect that all the members of the committee—particularly Mr Neil, having been a minister—will be aware that the appointment by the minister is based on a code of practice that was drafted and adjusted by my predecessors in consultation with the Scottish ministers and the Scottish Parliament. It has three criteria or principles, the main one of which is merit. I appreciate that the point of this question goes right to that issue.

Appointments are made on merit. In simple terms, merit is identified at the start of the appointment process by the minister or at least on behalf of the minister. That is the job specification that should link to the requirements of the board and the person specification in terms of the qualities, skills, experience and knowledge that are being looked for. That has to be signed off by the minister at the start of the process.

The second principle is integrity. The process has to go through on the basis that those are the criteria for appointment. It has to be open and transparent and there cannot be any change. In other words, new criteria cannot be introduced part of the way through the process.

What I am saying in rather a longwinded way is that you get at the end of the process what you look for at the start of it. If you are not satisfied that people who are appointed at the end of that process are sufficiently capable, I think that that leads to a question about what was identified at the outset as being merit and whether the correct things were looked for at that point.

Alex Neil: Having been a minister, particularly in health—the health secretary appoints more public appointees than any other cabinet secretary or minister—I know that you are right to say that the minister signs off the process. Let me give you an example of what happens. The minister does not see any names until he or she is presented with the final two or three. When I realised that, I asked to see the names of the original applicants. It turned out that, in my view, some of the people who were turned down would have been much more eminently suited to the job than the people who were recommended to me. There were many instances of that, but it would be inappropriate to name names.

One of the motivations for the changes in the public appointments system was a desire to ensure that politicians could not appoint their pals, as it were. I think that, in that objective, we have been successful, but it seems to me as though there are some people who appear regularly in

public appointments and hold more than one public appointment. For example, when I was health secretary, there were two people who were on the regulatory body of the health service while simultaneously on health boards. Until I raised it and duly disposed of their services in the regulatory system, it had not struck anyone that somebody who is part of the regulation should not be sitting on the bodies that are regulated. That, in my view, is very poor governance. There are a whole load of issues.

As we saw with the SPA, it is inevitable that, with any process, you are going to get one or two appointments that do not work out, for whatever reason. In the case of the SPA, which had about 16 board members when it was at full strength, it did not appear that any one of them was able to do the job that they were supposed to do.

Bill Thomson: I do not have an answer for that.

Alex Neil: There is something wrong in the system if those people are getting through and other good people are not getting through.

Bill Thomson: I am not an expert on the difficulties that were experienced in the SPA. Obviously I have paid attention to the examination of the issues by this committee and others. I think what you are getting at is the problem of a group of people not behaving in the way that you think that they ought to.

Alex Neil: It is not a question of what I think they ought to be doing. What is expected of a non-executive director is very clear. There is plenty of written material from the Institute of Directors and many others about what the role of a non-executive director is. We were very hard put to find any non-executive director from chairman downwards in the SPA who was doing the job that they were appointed to do.

Bill Thomson: Obviously, if that is the committee's position, all that I can say is that in terms of the public appointments process, the people who were appointed met the criteria for appointment. If they did not subsequently behave in the way that they were expected to, that could be due to a flaw in the public appointments process or it could be for a different reason.

The Convener: Can I interject, Mr Neil? A few weeks ago, we took evidence from a couple of members of the SPA, one of whom has since resigned from the SPA board. In terms of looking back at governance issues, we felt that their answers to our questions were extremely poor and showed a lack of understanding or recollection of the detail of any of the things that had gone on. You said that you had paid close attention to the committee. If you saw that evidence session could you talk about that example? Did you feel that their performance came up to scratch?

Bill Thomson: This is going to irritate you, but it is not meant to. The performance of board members once they are appointed is completely outside my remit. I am not trying to be awkward with the committee; I am here to try to discuss the issue constructively. My remit goes as far as ensuring that the appointment process is conducted properly, which, as I have explained at some length, means that the criteria that are set out at the beginning are the ones that are used to assess the candidates. If they do not then perform, it could be because the criteria were set out wrongly in the first place, or it could be something to do with the circumstances in which they found themselves. I do not have an answer for that.

Alex Neil: Or it could be that the people who are doing the interviewing are not getting it right. We do not know the answer to the question of why they are getting it wrong. What we know, certainly in the case of the SPA, is that they got it massively wrong, going by what eventually happened—that is the case in relation to a number of other organisations, too. That suggests that there is something flawed in the process. It might be the criteria—I know that some of that is set in statute and secondary legislation and so on. I realise the limits of your remit, commissioner, and I know that, once someone is appointed, it is not part of your remit to monitor their performance. That would normally be done by the chair of the board and subsequently the minister, and there is a separate issue about why ministers allowed things to go on as far as they did in the SPA.

In the real world, we might expect one or two out of 16 board members to not be performing adequately. However, when you get 16 out of 16 not performing adequately—that is, when 16 people who are not up to the job all end up in the job—it suggests that there is something fundamentally wrong somewhere. What we are looking for is why you think that happened.

Bill Thomson: I am sorry; I am not trying to obfuscate in any way, but I do not know the answer to that. I am not in a position to comment on all of those 16 people and I am not wholly sure that you are. In general terms I think that the chair appointment in any public body is critical to the way that the body operates. I simply do not have an answer to the question as put to me. I do not monitor their performance. The chairs are responsible for monitoring the performance of all board members.

Alex Neil: The point is that we would want to be in a position in which the people who are appointed are, generally speaking—there are always some exceptions—up to the job. In the SPA, we are on to a third chair. The first two proved to be disasters—I think that that is a commonly held view in Parliament and in the

country. That suggests that people are coming to the top of the selection procedure who are not up to the job. There appears to be a systemic problem in the process.

Bill Thomson: I am not in a position to identify any systemic problem in the process. I have suggested that one of the issues to consider is how the criteria are set in the first place. I do not have in front of me the criteria that were set for the two appointments of the chairs that you are talking about. I believe that the criteria were adjusted prior to the appointment of the current chair of the SPA.

10:15

The way that the board operates, frankly, is something that I cannot comment on. The only thing that we are doing at the moment that might help is some research into the impact of diversity on the governance of boards, which might contribute some light on the subject that you are asking me about, but we are not yet in a position to publish the results of that.

The Convener: Mr Thomson, it might be useful for the committee if you could briefly explain what your role in the public appointments process is.

Bill Thomson: As I have mentioned, there is a code of practice for ministerial appointments to public bodies that was drawn up by my predecessor, as part of a slightly different role. That sets out the basis on which appointments to regulated public bodies are to take place. When we are talking about high-profile appointments, such as the chair of almost any public body and certainly the chair of the SPA, there is a public appointments adviser. There are 13 such advisers who are contracted to my office. They are independent. They are experts in human resources issues in general and in selection and appointment in particular. One of those will be allocated to the process. One of the improvements that has been made to it in recent years is that there is early engagement with the advisers to the minister—and sometimes with the minister—to discuss the needs of the board and, in that context, to identify what is required and therefore which criteria will be suggested to the minister for the appointment.

The planning for the appointment round also includes discussion of which means should be adopted to attract a wide range of candidates. By the way, one of the things that we have been trying to encourage is a reduction in the number of criteria. The more specific the job description is made, the narrower the field of people who feel that it will apply to them.

There are different ways of trying to attract people into a role, some of which are quite novel—obviously, social media was not an issue when the

2003 act was first promulgated. The selection process that follows tends to be conducted by way of interview, but there are a number of alternatives that are permissible under the code of practice. The code of practice is not specific as to the means that have to be used for assessment.

The Convener: Do the 13 people you mentioned conduct the interviews?

Bill Thomson: No, they do not. That was the system in England and Wales until recently, where the equivalents there would chair the panel. If there is an interview, the interview panel is normally chaired by a senior civil servant from the department advising the minister. It is quite common for the chair of the body—obviously, that will not always happen—or a representative of the body to be present. In many cases, there will be an independent panel member—we have issued guidance on the qualities that are required for that—and sometimes there will be another civil servant who will have experience in public appointments. Through the public appointments adviser, we offer briefing to the panel. Some are very experienced and do not need much by way of briefing. Others are fairly new to it, and we give guidance on unconscious bias and other aspects of the process.

The Convener: Your 13 advisers are responsible for getting a pool of candidates together. It sounds as though it is up to civil servants to make the decision.

Bill Thomson: I am afraid that that is oversimplifying it. The responsibility for making the decision lies with the appointment panel chair, who will tend to be a senior civil servant. The adviser will advise and support. They are experts, they are aware of good practice, and they will support and be part of the panel in a high-profile round like that.

The Convener: Mr Neil, I interrupted you. Do you want to continue?

Alex Neil: Yes. I have a request for information. It would be interesting to find out how many people applied for appointments in the past year or the previous year and what percentage of them got through and ended up being nominated or appearing on the shortlist. It would be interesting to find out whether it would be possible to categorise those candidates by previous job, because there is certainly a suspicion that a high percentage of retired civil servants end up on the shortlist. I do not know whether that is true, but I have heard it said.

Bill Thomson: That was one question that I had anticipated. Over the past two years, there have been 45 appointments as chair of a public body. Twenty of the people appointed had a private sector background and five of them had a mixed

background that involved different sectors, including the private sector. In the year in which the previous chairs of the SPA and NHS Tayside were appointed, there were, I think, 97 appointment rounds in total and 1,790-something applicants. I cannot remember the precise figure, but there were more than 1,790 applicants for those rounds. The number of applicants per round is not huge, but it has risen steadily from about 14 in 2010 to 18 or 19 per round. That is an average. The numbers who apply for a chair post tend to be lower. That is true in health, which Mr Neil was asking about.

Alex Neil: That is interesting. Of the 45 people who were appointed as a chair, you said that 20 were from the private sector and that five had a mixed background. Does that mean that the other 20 were ex-public sector?

Bill Thomson: Yes—they will have had public sector experience.

Alex Neil: Many people whom I have spoken to down the years who have applied feel that there is a built-in bias towards the likes of retired civil servants. Whether that is true, I do not know, but it is clear that we are often not ending up with the right people. That is certainly the case in the SPA example, but it is also true of the health boards. A number of health boards have had chairs who have had to be removed, the latest example being the chair of NHS Tayside. When I was the health secretary, I had to remove the chair and the chief executive of NHS Grampian. A fair number of the people who have been appointed have not performed. As well as the NHS Tayside situation, we have the position of NHS Ayrshire and Arran, which is suffering significant financial difficulty. There is also the NHS Lothian situation. I am not saying that, in every case, the situation that those boards find themselves in is because of poor chairmanship or poor non-executive directors, but there is certainly a concern.

One of the other influencing factors is remuneration. I know that a lot of people—particularly those who have retired—take up such positions not for the remuneration but because they want to give something back to the community. The contract of the chair of a health board is usually for three days a week, but they often end up working five days a week, so remuneration might be one reason why we are not attracting the right calibre of people for the top jobs. If someone is running a health board, the chances are that they will have a budget that runs into hundreds of millions of pounds and, in some cases, well over £1 billion.

My final question at this stage is whether remuneration is an issue. You said that you do not have a flood of applications, and I know that, in some cases, it is difficult to find enough of a pool

to select people from. Is remuneration a possible reason why we are sometimes not getting the calibre of people that we need?

Bill Thomson: Of course it could be. I do not have firm evidence of that, but it is self-evident that that could be the case.

The Convener: That was a short answer to a long question, but I think that that was appropriate.

Iain Gray (East Lothian) (Lab): You have said a little about what is within your remit. Am I right in saying that the ability to conduct audits and reviews is within your remit?

Bill Thomson: Correct.

Iain Gray: Could you say something about those and about what would prompt you to undertake an audit?

Bill Thomson: I will hand over to Ian Bruce for the detail of that, as he is more directly involved. We gather information from those who are on the appointment panels to find out whether they have any concerns. We also gather information from applicants to establish what their concerns are. We have conducted reviews of the process on an annual basis, but I think, in fairness, I would have to ask Ian Bruce to explain why some of the appointment rounds are selected for closer examination.

Ian Bruce (Office of the Commissioner for Ethical Standards in Public Life in Scotland): I should preface my response by indicating that, fundamentally, the work that we and the public appointments advisers are engaged in is enabling the Government to continuously improve on the practices that it adopts. We try to embed best practice in recruitment and selection. Fundamentally, our reviews are aimed at making appropriate recommendations in order to improve on the outcome of any given appointments process. Our most recent thematic review made a number of recommendations that we are currently following up on. One of those was that the Scottish Government should have a more systematic lessons-learned process.

I do not wish to go into too much detail, but I will say that the practicalities of the process involve surveying the applicants. At the end of each and every appointment round, we gather their demographic data, including information on the sector that they have come from. We gain an understanding of their views about different aspects of the process and areas in which it could be improved on. That information is then fed into selection panels as part of a pack of management information. It is about process improvement, more effective outreach, addressing underrepresentation by protected characteristics

and adopting application or assessment methods that are appropriate for the target pool.

Traditionally, there has perhaps been an overreliance on competency-based assessment at the early stages, which we know has potentially been a barrier to people from the private and voluntary sectors. The lessons-learned process helps our advisers to make recommendations to panels such as—if, for example, they are looking for experience of governance to fill a particular post—“Why not use an application that asks people to provide their life history?”

The thematic reviews make recommendations. One of the other recommendations that was made in the most recent review related to the fact that there was not necessarily a good understanding of diversity, which is sometimes confused with protected characteristics. As committee members will understand, it is the range of attributes on a board—the mix of skills, experience, perspectives and backgrounds—that contributes to good governance. We are now pursuing that in our current thematic reviews.

The follow-up relates to succession planning and is about ensuring that boards have an understanding of what their needs are, and that that is communicated to the minister in order to identify what they need for their future activities. The lessons-learned process is about whether what we encouraged Government to do has become embedded. That is what we are engaged in at the moment.

Iain Gray: Where governance has clearly failed or run into problems—be it the SPA, NHS Tayside or the other examples that Alex Neil talked about—could or would that not provoke or lead to an audit or a review by your office?

Bill Thomson: I think that there are different issues here. I am sorry if I appear to be pussyfooting around it, but I am not. The implication of the questions that have been asked so far is that, because the people who have been appointed have not performed as expected, therefore there was something wrong with the appointments process. I think that that is what Mr Neil's questions were driving at and it is also what Mr Gray's question is.

Iain Gray: The implication is that that might have been the case. I do not think that we know.

Bill Thomson: Indeed, yes. The difficulty that I have is that I would be driven back to trying to establish whether the process identified the best candidate in terms of the specification at the outset, which is not going to answer the question that I think is troubling you, obviously quite rightly.

Iain Gray: Surely that is not the case, because you said earlier that the first principle that the

appointments process is designed to deliver is merit.

Bill Thomson: Indeed.

Iain Gray: Therefore, if there appears to be an instance where the process has failed to deliver the required merit, surely that begs the question about the process itself, which is your remit.

10:30

Bill Thomson: I am going to repeat myself, convener, and I apologise for that, but it is the correct answer. I also said that merit is defined at the outset and that is signed off by the minister. What you are asking about is merit in terms of the performance of someone in the role maybe a year or two down the line and in some cases their response to issues that may have developed but not been properly dealt with before they were appointed as chair. There are different questions in there and I do not think that my remit would extend to what is in effect an assessment of the performance of the chair, or for that matter, as Mr Neil said, the whole board.

Iain Gray: If I understand you, your answer to my initial question is no. A failure in, for example, the SPA would not lead to you auditing the process. The converse question is, what would? What would prompt you to audit a selection process?

Bill Thomson: In some cases, we will do random selection of processes, but that is not what we are talking about.

Failure to attract applicants. Errors in the process—we had one that went quite high up the system: the information that was collected by the selection panel was not correctly reported to the minister who was making the appointment. That was obviously a fundamental flaw with the process and resulted in errors being made. I think that we would also look at lack of diversity. If appointment rounds continued to fail to attract, even in gender terms, a proper diversity of applicants, we would be concerned about whether the criteria had been set properly and whether it had been advertised and promoted properly. None of that drives at the point that interests you—I am sorry.

Iain Gray: Do you feel in any way constrained by this? If you look at a board in which you—or your office; it might have been your predecessor—had oversight of the appointment and the governance has clearly failed, does that not prompt you to think that you should be concerned about that?

Bill Thomson: Of course I am concerned because, like you, I am concerned that public bodies deliver.

Iain Gray: You are saying that your remit does not allow you to be concerned.

Bill Thomson: I do not think that my remit allows me to look into the performance of those who are appointed.

The Convener: Do you think there should be changes to the 2003 act to give you that power?

Bill Thomson: The short answer is no. I do not think that I would be the appropriate person to examine the performance of people appointed to boards. As I have mentioned before, the theory—and I believe the practice—is that the performance of board members is assessed by the chair. If there is a problem with the chair, there may well be a problem with the assessment of the performance of the board members. The performance of the chair is assessed by the senior sponsor within the Government, who will be a senior civil servant. I think—and this is not rocket science—that the success of the whole thing depends on the quality of relationships between the minister or the minister's department and the public body. If there is a missed communication there, things are almost bound to go wrong, but I do not think that my office would be the right one to look at the performance. It is more appropriate that it is done through this committee with reports from the Auditor General or from ministers.

Bill Bowman (North East Scotland) (Con): You said that you look after appointments to 96 regulated bodies?

Bill Thomson: That is correct.

Bill Bowman: How many positions does that translate to?

Bill Thomson: Six hundred and thirty-something. I am sorry—I have forgotten the precise figure.

Bill Bowman: How many of those are multiple appointments? How many people have more than one appointment?

Bill Thomson: The last statistics that I have, which are from April 2018, show that there were six people with three appointments and 36 people with two appointments.

Iain Bruce: From 633 regulated positions.

Bill Thomson: It is roughly 14 per cent.

Bill Bowman: Do you consider that multiple appointments are a good thing or a bad thing and does the process look at that when you are appointing?

Bill Thomson: Yes, it does look at it, in as much as there is what is called a fit-and-proper-person test, part of which is whether the person who might be appointed has the capacity and the

time to devote to the appointment that they are seeking. Is it a good thing or is it a bad thing? This sounds trite, but if they are the right person for the job, it is a good thing. If they are not or if they are overstretched, it is a bad thing.

Bill Bowman: Whether they are the right person for the job I think is the key thing. Earlier, you said that, if you get the criteria wrong, the process will just go ahead. To me, that is another way of saying the rather unpleasant phrase “rubbish in, rubbish out”. If you get the wrong person in, nothing will stop that person getting through—is that what you are saying?

Bill Thomson: If you set the criteria wrongly, you should get someone who meets the criteria. If those are, in your words, rubbish, the person you appoint will qualify on that basis.

Bill Bowman: How do you look at the criteria?

Bill Thomson: I mentioned public appointments advisers. They are part of the planning process in which the criteria are discussed. The criteria are then put to the minister for agreement and endorsement.

Bill Bowman: I have one last point on that. Do you and advisers have experience in the recruitment or appointments industry?

Bill Thomson: Very much so.

Bill Bowman: And yourselves?

Bill Thomson: I do not. Ian Bruce does.

Liam Kerr (North East Scotland) (Con): I would like to explore some of the things that have been raised earlier in a little more detail, in particular in relation to the other board members, who Mr Neil was talking about. One of the things that we have noticed in this committee is that it is very important that members of the board are prepared to challenge and are prepared to speak up and to avoid groupthink and proactively say if there is something that they are concerned about. How does the appointments process ensure that the individuals who are being recruited to the boards are prepared to step up and to make that challenge?

Bill Thomson: It is frequently one of the criteria and it may be tested in different ways. In some cases—not all cases, by any means—it is tested by some sort of roleplay such as a group exercise based on a mock-up of a board meeting. Even that is no guarantee that, in the circumstances in which the newly appointed member finds themselves, they will do that. There are all kinds of potential inhibitors. That brings us back to the approach that is taken by the chair. If you have a chair of a body—and I am not talking about anybody in particular—who is authoritarian and tries to squash dissent and does not allow people to have

their say or will not allow anything to be said that is potentially embarrassing, which is a feature of some public organisations, it is more difficult.

This is one of the conundrums in the process. I am actively trying to promote diversity—not only visible diversity but diversity of approach and background. That means that there is the potential for people to be appointed who might be thought to be a member of the awkward squad, to use a well-understood phrase. That is not necessarily going to be welcomed by the chair of the board, so one of the big issues is how the board manages the diversity, how it deals with the diversity and whether that contributes to improved governance or not. That is what we are currently researching.

Liam Kerr: You make an important point about the role of the chair and whether they are receptive. It seems to me that the awkward squad is a good thing. It prevents a groupthink mentality. How does the appointments process ensure that the chair is actively going to welcome and enable contributions? I will ask you about appraisals and onward planning in a second.

Bill Thomson: The appointments process itself can contribute to that only at the point where chairs are being recruited. I contribute to meetings that the Government has recently set up of chairs of bodies from across the spectrum at which such issues are discussed, but I think that it can properly be addressed only in the appraisal of the chair's performance. Assuming a chair is somebody who is open to behaving in a way that you and I would like them to behave, that would be tested in the appraisal process.

Liam Kerr: Could you tell me a bit more about the appraisal process? We touched on it in an earlier question. Section F of the code of practice suggests that there should be some kind of on-going appraisal process, but what I am hearing is that, once the recruitment piece has happened, you step away. Who does the appraisal process and are you confident that appraisals are happening to a level that we would hope?

Bill Thomson: Like you, I am dependent on what I am told by the officials in the Scottish Government, because it is the Government officials who are responsible for the appraisal process. I mentioned before that somebody who is identified as the senior sponsor in the appropriate department will be the person who conducts at least an annual appraisal of the chair of the body. I do not have any detail on how that is conducted.

Liam Kerr: Do you have a view on whether the appraisal processes are happening to the level assumed?

Bill Thomson: I do not have that information. I presume they are, but I cannot say that on the basis of evidence. I do not have that information.

Colin Beattie (Midlothian North and Musselburgh) (SNP): Since we are so enthusiastic about process, I would like to continue on that theme. I see five areas in which the commissioner is involved in these boards and maybe you would like to go through that. Under the 2003 act, the commissioner regulates the appointment of non-executive members to the boards of public bodies. You regulate and own that process, in terms of the appointments, and the Government administers it, presumably based on whatever you regulate as the process. Is that correct, simplistically?

Bill Thomson: Simplistically, it is correct. Ministers are expected to follow the code of practice for ministerial appointments, which as I said before, was drawn up in consultation with Scottish ministers at the time and the Parliament. Where they do not do that, and if I consider that the failure to follow the code is a material breach of its requirements, I have to report to the Parliament. I have to submit a report to the Parliament if I think that there is no prospect of the breach being remedied.

Colin Beattie: Obviously, you own the code of practice because you are responsible for enforcing it, as you just said, if there is a deviation. You also give statutory guidance on the application of the code, which again the Government is expected to follow. You oversee the selection process by sending a public appointments adviser; you conduct audits and thematic reviews. Looking at this in the round, the Government does not seem to have very much leeway. You lay down the process, the regulation, the guidelines and the codes of practice, and the Government simply has to follow that. In effect, I would have said—looking in from the outside, as a layperson—that you own the whole process of appointment.

Bill Thomson: I think that the flaw in that characterisation of the process is that the process is instituted, finalised and run by or on behalf of ministers. The other factor that needs to be taken into account is that the code is very flexible on how the criteria are set, how the assessment is done and how the post is advertised. There is a great deal of flexibility within the system.

10:45

Colin Beattie: Presumably you monitor that, at least on a sample basis.

Bill Thomson: Yes, I do.

Colin Beattie: I realise that there are hundreds of appointments, but at least on a sample basis you are monitoring the process so that you are satisfied that it is followed.

Bill Thomson: Yes.

Colin Beattie: I return to the point that you own a huge chunk of the process. You have direct control over it, which is why I am a bit confused about why you do not have an easier system of intervening when things go wrong. What happens when someone complains about a board member? Do people ever complain to you about board members?

Bill Thomson: I wear several hats when I am at work and one of them involves dealing with complaints about the conduct of board members. If it is within my remit—in other words, if the complaint concerns an alleged breach of the code of conduct for that board—I investigate and if I think that there has been a breach of the code I report to the Standards Commission for Scotland.

Colin Beattie: Do you think that that particular piece of the process is adequate?

Bill Thomson: I have no reason to suppose that it is other than adequate, but I have not received very many complaints about that over the years for which I have been in post.

Colin Beattie: The concern that is being expressed is very similar to the concern that we have expressed previously about the internal audit process. You have a perfect process, and everybody ticks all the boxes and gets it right, but what comes out at the other end is not fit for purpose. That is what the committee has found in serial cases with boards that we have been dealing with and which we have had here in front of us.

Bill Thomson: I do not accept that that is true also of the process for dealing with breaches of the code of conduct. There is no evidence that there are wholesale breaches of the code of conduct.

Colin Beattie: We have evidence that boards are not doing their job—that they have failed in their duty.

Bill Thomson: To return to where you started, that is a different process. The code does not say that the person must do an excellent job; it says that they must perform their role in certain ways and that there are certain things that they must not do, such as have a conflict of interest; I know that that is of interest to the committee. It is specified that they are required to register certain interests; I am sure that, as an MSP and a former councillor, you are familiar with that. You are required to register certain interests and in certain circumstances you must declare them.

Colin Beattie: What is frustrating is that we have the process, the regulations, the codes of practice and all these other things, but clearly the system is not working.

Bill Thomson: I appreciate the frustration. I cannot speculate on why things go wrong. Things go wrong, regrettably, in all walks of life.

Colin Beattie: Given the fact that this has now extended across quite a number of public bodies that the committee has looked at, do you think that there would perhaps be some merit in revisiting how all this works to see whether it can be done better?

The Convener: Do you mean the appointments process?

Colin Beattie: Yes.

Bill Thomson: I would have no argument if you think that it would be worth re-examining the process to see whether it could be done better. I think that it delivers what it sets out to deliver. If it is aiming at the wrong target, that would certainly be for the Parliament to identify.

Colin Beattie: I think that it is not delivering what the public are looking for, but I will leave it there.

The Convener: Would such re-examination require a re-examination of the 2003 act that designates your powers, Mr Thomson?

Bill Thomson: That is one possibility, although the code of practice could be re-examined without re-examination of the 2003 act. I would point out that the process in England and Wales was re-examined—ironically, by the chair of a Scottish financial institution—and has been adjusted recently. I am not a fan of the system down there, let us put it that way.

Kenneth Gibson (Cunninghame North) (SNP): You have touched on the issue that I was going to ask about. Your role and remit are determined by the 2003 act. Do you feel that there is anything in the 2003 act that could perhaps be tweaked to improve the way in which you oversee the delivery of public appointments?

Bill Thomson: I have probably tried to address Mr Gibson's point already. I do not feel that I am hamstrung in performing my role as commissioner for public appointments under the 2003 act. I appreciate that that is a different issue from whether the act is delivering what you think is required by way of effective boards.

The Convener: I think that you are saying that determining whether the 2003 act needs strengthening is a matter for us as politicians. You are doing your job. Is that correct?

Bill Thomson: I am, and I do not feel that I am inhibited in doing it.

Kenneth Gibson: You are saying that if the process is to be improved, we do not have to look again at the legislation. There is something post-

legislative that is causing some of the concerns that have been raised by committee members.

Bill Thomson: I appreciate that that is within the committee's remit, convener. That is not what I meant to say and I am not looking to find an argument here. The public appointments process is set out in the code of practice, which can be adjusted without adjusting the 2003 act. It does not mean that the 2003 act is perfect, but it is possible for adjustments to be made to the public appointments process without looking at the 2003 act.

Kenneth Gibson: How can the process be improved in that regard?

Bill Thomson: Most of what we do is trying to seek improvements to the process. We have introduced a number of things with the co-operation and agreement of the Scottish Government officials who are involved in the process. I have already mentioned earlier engagement. Although we are not so involved in this, there is a smarter sponsorship initiative within the Government that ought to improve the quality of the communication and the relationship between the appropriate Government department and the public body. That may involve looking at the appraisal issue, which is obviously of interest.

We have prompted new guidance on succession planning by boards. I appreciate that it is not the responsibility of boards to get the right people, but if they are able to identify their needs going forward and to make them plain to the minister or to the department, it is much easier for that to be properly reflected when an appointment round comes up.

We are also trying to improve the diversity of those who are appointed to public boards; that is a big issue. We do that through outreach and by trying to ensure that the way in which the selection process is conducted does not directly or inadvertently eliminate certain people who might otherwise be attracted to it. For example, even the use of language can be offputting to some people. As I said, too many criteria narrow down the field. That is quite a challenge and it requires resources. We have a very small resource. Ian Bruce is the only full-time person in my office who is involved in that work, and he has part-time support. Roughly a third of my time is spent on public appointments. To return to Mr Beattie's question, there is no way that we run the process. We are a very small part of it.

Kenneth Gibson: Are there any improvements that you have tried to make, Mr Bruce, but which you have been unable to bring in for whatever reason?

Ian Bruce: As I indicated earlier, we are encouraging the Government to do more on

lessons learned because it is vital that we learn as we go along; that is true, in particular, of attracting applications as well as making the process bias free. To an extent, that speaks to some of the discussions that we have had today. I have been engaged in this activity for some time now and I have seen a lot of improvements. There is definitely room for improvement, but I have no doubt whatsoever that the talent is out there. An area of activity that I would like to see improved on, or in which perhaps more could be done, would be outreach and encouraging people who have not considered applying for these roles to put themselves forward. Obviously, we need to make the process as straightforward as possible for people when they apply.

Application numbers have been rising, but I think that there is scope for many, many more people to put themselves forward and potentially be successful, because the outcome of any appointment round will only be as good as those who decide that they want to take up that sort of position in public life.

Alex Neil: I have two quickies, the first of which is a factual question. Does the senior civil servant who chairs the selection panel normally also interview candidates for the chair position, for example, as the sponsoring civil servant?

Bill Thomson: In the highest-profile rounds for the chairs of the largest, highest-profile public bodies, it is generally the director general who chairs the appointment panel. As I understand it, the senior sponsor is likely to be somebody slightly lower down the hierarchy.

Alex Neil: Would it be unlikely for the civil servant who chairs the selection panel to then monitor performance?

Bill Thomson: I am sorry, but I do not have that information. I am not trying to evade the question. If things had a high profile, I would have thought that a very senior person would do it, but I do not know.

Alex Neil: My second question is very short. Westminster has adopted a policy for senior positions whereby ministerial nominees require the approval of the relevant select committee. In your opinion, is that a useful additional tool?

Bill Thomson: That is not a quickie. I am sorry, convener, but I do have an answer to it.

The Convener: Be as brief as you can be, Mr Thomson.

Bill Thomson: The practice has been used three times in the past couple of years in this Parliament. My office calls it “dual scrutiny”; at Westminster, it is called a “pre-appointment” hearing, because, as I am sure Mr Neil knows, in most cases at Westminster, the minister can

decide to proceed with the appointment even if the committee does not favour the nominee. Under the dual-scrutiny approach in the three cases that I mentioned, the Parliament effectively had a veto. If the Parliament said that it did not approve the candidate, the minister could not proceed.

There will be circumstances, I think, where dual scrutiny is appropriate. What I have been arguing for behind the scenes is a more strategic approach, so that there is clarity as to the circumstances in which dual scrutiny is appropriate and so that it is not introduced in other cases, given that it introduces a complication and a risk. The complication is obvious: it is another part of the process that adds time to the whole process. The risk is that the committee, no matter how well briefed—and I am not talking about any individuals here—might decide to disapprove a candidate on grounds that were not set out in the criteria for appointment. That then damages the integrity of the process. There is also evidence from pre-appointment hearings at Westminster that although committees initially—in my terms—behaved very well and stuck to the script, they became more aggressive and the whole process became more politicised. At that point, there is a risk of discouraging people who might otherwise be prepared to put themselves forward. If what we are trying to do is improve the diversity of people across boards, we need to be careful not to add in an unpredictable barrier that might discourage people from less traditional backgrounds from putting themselves forward.

Alex Neil: Needless to say, I do not entirely agree with you on that, but I accept that it is your point of view.

The Convener: Mr Thomson, I do not know to what extent you have followed the detail of the situation at NHS Tayside, but the most recent row, if you like, about what has happened there started when it came to light that money had been transferred from the charitable endowment fund to the core budget of NHS Tayside for use on an information technology project. It also came to light in reports that the trustees of the charitable fund had a dual role as members of the NHS Tayside board. There are questions hanging as to whether that is appropriate. As commissioner, would you see that dual role as appropriate for people on public boards?

11:00

Bill Thomson: I am aware of the detail, convener. Ironically, one of the reasons for that dual role is set out in the 2003 act under which I operate, in another part of that statute.

The Convener: Can you enlighten us?

Bill Thomson: I think that it is perfectly possible for the system to work properly; it depends on the extent to which the trust's purposes, if it is a trust, overlap with the role of the health board. If there is an overlap then, yes, there is a risk of a conflict of interest, and I know the Office of the Scottish Charity Regulator is looking at that in terms of the trustee role. However, I think that it can work, and I think that it works in quite a number of health boards—I suspect that Mr Neil knows far more about that than I do.

If you were to change the system, you would probably need another board of trustees for the endowment fund, which of course means finding more people. As I understand it, the role is not remunerated at the moment. Where are you going to find people for all the health boards? Also, I am aware that when appointees to the health board are told about the situation, they have the option not to take up a position as trustee. I do not have detailed knowledge of that, but my understanding is that nobody has yet declined, although that may change.

The Convener: The reports in the media suggest that, at NHS Tayside, the trustees felt obliged, given the tenor of the meeting, to make that transfer. Do you think that there is a failure of governance there?

Bill Thomson: Convener, I would like to take the fifth, or whatever it is, on that. There is still a theoretical possibility that I may receive a complaint that somebody on the board failed to comply with the board's code of conduct, and in the circumstances I would rather not express any opinion at this stage.

The Convener: I understand.

I was a little surprised by your earlier evidence on the appointment of chairs. The chair of the SPA and the chairs of many health boards are huge public appointments in Scotland and are of great significance. I was a wee bit surprised to hear you say that that work is delegated to the 13 public appointments advisers in your office. That is what it sounded like to me. I would have expected, and, perhaps, the public would also expect, someone more senior, such as yourself, to be involved in the process, particularly with big roles such as chair positions. Is there any scope for such involvement?

Bill Thomson: I have two answers to that. First, I already work slightly more than five days a week, so in practical terms there would be a little bit of a problem. I think that the real difficulty is that I am not an expert in selection and appointment, which Mr Bowman asked about, whereas the public appointments advisers are. They are recruited from across the United Kingdom, as it happens, and they have significant expertise. They also

have access to a lot of guidance within the office from Ian Bruce, who is sitting on my left. We have meetings with them every few months at which we discuss issues that have arisen and issues that we anticipate. We receive a report from them at the end of each appointment round, and they are very carefully assessed in some detail as to their performance in those appointment rounds. I actually think that they are the best resource—they contribute an awful lot more than I would be able to. Some of them are extremely politically aware as well; others have been less close to the political process.

Ian Bruce: Might I add to that?

The Convener: Yes.

Ian Bruce: The public appointments advisers are, to an extent, also slightly at arm's length from the commissioner. Let us say, for example, that the view was that I as a full-time member of staff in the commissioner's office should sit in directly on appointment rounds. My role is also to investigate complaints, and the usual reason for people feeling aggrieved is non-selection. If someone raised a complaint about how an appointment round had been conducted it would be very difficult for me to oversee the appointment process and then subsequently investigate a complaint in which I had been directly involved.

The Convener: I understand.

I have a final question. Mr Thomson, the committee, as you can gather and as you know, is very concerned about poor governance, as we would characterise it, in several boards across the country. From your evidence today, I get the impression that you feel that the appointments process is working and that perhaps it is a job for us if we feel that it is not. What do you think has led to the failures in governance?

Bill Thomson: I am not sure if that is something on which I am entitled to have an opinion, convener.

The Convener: Fair enough. I thought that I would ask anyway. Thank you both very much indeed for your evidence this morning. I now close the public part of the meeting.

11:06

Meeting continued in private until 11:27.

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