LOCAL GOVERNMENT COMMITTEE

Tuesday 14 December 1999
(*Afternoon*)

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LOCAL GOVERNMENT COMMITTEE
12th Meeting

CONVENER:

*Trish Godman (West Renfrewshire) (Lab)

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*Mr Kenneth Gibson (Glasgow) (SNP)
*Donald Gorrie (Central Scotland) (LD)
*Mr Keith Harding (Mid Scotland and Fife) (Con)
*Dr Sylvia Jackson (Stirling) (Lab)
*Johann Lamont (Glasgow Pollok) (Lab)
*Mr Michael McMahon (Hamilton North and Bellshill) (Lab)
*Bristow Muldoon (Livingston) (Lab)
*Mr Gil Paterson (Central Scotland) (SNP)
Mr Jamie Stone (Caithness, Sutherland and Easter Ross) (LD)

*attended

WITNESSES:

Frederick Marks (Local Government Ombudsman, Scotland)
Bill Magee (Accounts Commission)
Bill Speirs (Scottish Trades Union Congress)
Matt Smith (Scottish Trades Union Congress)

COMMITTEE CLERK:

Eugene Windsor

ASSISTANT CLERK

Craig Harper

Scottish Parliament

Local Government Committee

Tuesday 14 December 1999

(*Afternoon*)

[THE CONVENER *opened the meeting at 13:33*]

Petition (Bridge of Allan Public Interests Association)

The Convener (Trish Godman): The first item on the agenda is a petition—do any members need to declare an interest in this matter?

Mr Keith Harding (Mid Scotland and Fife) (Con): I must register my interest as a former member of Stirling District Council and a current member of Stirling Council. I will not take part in the debate.

The Convener: Thank you, Keith.

As this is the first public petition to come before the committee, members have been given a briefing paper. There are other notes from the clerk, which explain the situation of some councils, such as City of Edinburgh Council and Dumfries and Galloway Council. There are also two letters from David Wilson. The petition asks us to consider how councils, rather than Parliament, deal with petitions. Are there any comments?

Mr Gil Paterson (Central Scotland) (SNP): I have a general comment. As Parliament has regulated the procedure for dealing with petitions, it might be a good idea for us to consider creating a similar mechanism for councils. Some councils have limited procedures that they operate from time to time, while other councils have no procedure at all. We would be doing a great public service if we could produce or recommend a system to deal with petitions.

The letter from David Wilson included a complaint that time is wasted because there are often campaigns of petitions—several petitions on the same subject. If we had a system in place for dealing with them, the public would be aware that there is an appropriate procedure for presenting petitions. I would hate to be a council official faced with several petitions that must be progressed. The documents that we are considering might lead us towards production of a formalised system for the whole country. I welcome that.

Donald Gorrie (Central Scotland) (LD): We should follow the suggestion in the document and consult the Convention of Scottish Local Authorities and Stirling Council. I assume that the committee does not want to get drawn into the campaign to save the Museum Hall in Bridge of Allan, but, as Gil Paterson said, it is desirable for all councils to have a suitable system for dealing with petitions. We should ask COSLA to discuss the matter with councils. We should not be too prescriptive. As long as there is an agreed system, different councils might take different approaches to it.

Colin Campbell (West of Scotland) (SNP): If we are to have a democratic process, the importance of the democratic participation that is represented by petitions—many of us have been involved in a petition at one time or another—must be recognised. From Mr Wilson's letter, it appears that Stirling Council completely ignores petitions—that is not a tenable position. Regardless of the outcome of a petition, it should, at least, be registered that a petition was submitted and the opinions in it should be made known.

The Convener: We should ask COSLA to comment on the matter. It is clear from the evidence before us that there is no standard throughout Scotland and, in the long run, it would be sensible to pursue that. We could ask COSLA for its opinion. It might have more information on how councils deal with petitions; there appear to be marked differences in the ways in which councils deal with petitions and that is unfair.

Does the committee agree?

Mr Harding: I should not really participate. However, I would appreciate it, convener, if you would write to Stirling Council to ask how it handles petitions—it is wrong to say that it ignores them.

Colin Campbell: I am only referring to what is said in Mr Wilson's letter.

The Convener: I do not think that the committee should do that at the moment. I will ask COSLA to comment on the general principle of the way in which councils should deal with petitions. However, we will let the convener of the Public Petitions Committee, and the petitioner himself, know what we have decided to do. When we get the information back, we shall take matters from there, but I do not see us being able to fit any in-depth discussion of the subject into our programme in the next few months. Do members agree that we should wait for COSLA to come back to us on that?

Members *indicated agreement.*

The Convener: We now move to the next item on our agenda—

Mr Kenneth Gibson (Glasgow) (SNP): I am sorry to interrupt, convener. This matter is not on the agenda, but I seek clarification about the locus

of the committee regarding business rates. Last week, the Minister for Finance made a statement that I am sure most members of the committee will have heard. In that statement he said:

"Over the next 12 months, Henry McLeish and his team will examine the case for small business rate relief and consider the best way forward."—[*Official Report*, 8 December 1999; Vol 3, c 1262.]

Does that mean that the committee will no longer have any part in that debate? Will we be the second-tier committee on business rates, or will we still have an input into that? Our deliberations in recent weeks do not seem to have had much impact on what the Minister for Finance has said so far.

The Convener: I do not see this committee as being second in line for anything.

Mr Gibson: I certainly hope that we will not be.

The Convener: We will not be. The minister has made a statement and we will send our report, when it is ready, to Henry McLeish or to Jack McConnell as appropriate. We will listen to what our adviser has to say before reaching conclusions about our position on that matter. When Jack McConnell spoke in Parliament, I did not get the impression that he was pushing us to one side. We have undertaken a piece of work that we will complete and on which we will publish a report with our opinions. Jack and Henry will consider that report as part of their deliberations.

Mr Gibson: I certainly hope that that will be the case. Have you had a response to the letter that you sent to Jack McConnell?

The Convener: Not yet. I will chase that up.

Subordinate Legislation

The Convener: Four statutory instruments are before us today. Members should all have received an e-mail asking whether any clarification was needed. If there is no need for clarification, I shall ask the committee to agree that we have no comment to make on those instruments. Is that agreed?

Members *indicated agreement.*

The Convener: It is agreed that the committee has no comment to make on the four Scottish statutory instruments.

Frederick Marks is due to give evidence at 2 pm. The clerks will find out whether he is here yet.

Donald Gorrie: We may have to filibuster on the statutory instruments.

Mr Gibson: Johann Lamont could ask one of her labyrinthine questions.

The Convener: If Mr Marks is not here, we shall have to suspend the meeting.

Mr Gibson: Does anybody know why Frank McAveety does not have his specs on in the photograph in the standards in public life document? Perhaps that is part of his image remake.

The Convener: You realise that this chit-chat will get me into trouble with the Presiding Officer. The official reporters are writing everything down.

Colin Campbell: Yes, they are terrible for that.

Mr Gibson: Colin puts me up to it before the meeting starts. I am completely innocent.

The Convener: We should suspend the meeting.

13:44

Meeting suspended.

13:46

On resuming—

Draft Ethical Standards in Public Life etc (Scotland) Bill

The Convener: Good afternoon, Mr Marks. I am sorry that we called you in early. We had finished our previous business sooner than expected.

Frederick Marks is the local government ombudsman—there actually is one; it is not just an address that one writes to.

We would like you to give a short presentation, after which members of the committee will ask you questions.

Frederick Marks (Local Government Ombudsman, Scotland): I do not know the extent of members' knowledge about my function as ombudsman, so it might be helpful to explain that first.

The post of local government ombudsman was created in 1975. The remit is to consider complaints from citizens who believe that they have suffered an injustice as a result of maladministration. I was appointed by the secretary of state and by royal warrant. The period of service is from the date of appointment until the end of the service year in which the person appointed reaches the age of 65. In that period the appointment can terminate through death, misconduct, incapacity or voluntary resignation. It is a position of considerable independence. My funding comes indirectly from the local authorities through the Accounts Commission, which is

designated as the body responsible for providing me with staff and office accommodation.

The main thrust of my concern is not the merit of decisions reached by local authorities but the way in which they are reached. I try to ensure that the local authorities follow proper practice. If they do, no decision that they make is subject to review by me. There are limits to the issues I can consider but, generally speaking, I review their administrative practice.

The bill that we are considering is a step along what has been quite a long road that started with the Nolan committee. That committee made a number of recommendations and I played a part in the early stages of consideration of them. The last consultation paper was issued in April 1998 and was entitled "A New Ethical Framework for Local Government in Scotland". In my response to that consultation paper, I suggested that the local government ombudsman might have his role extended. That would allow me to undertake investigations into cases where questions of misconduct were involved. However, in view of the proposals that are contained in the bill and, in particular, in respect of the proposed function of the chief investigating officer and the intention to include other public bodies in the scope of the bill, I do not think that the holder of my office is in a position to undertake the role of investigating officer.

In responding to all the previous consultations, I have been keen to stress the importance of the perception that the public might have of any arrangements that are put in place. In my view, the arrangements have to be—and have to be seen to be—independent and robust enough to inspire public confidence. One element of that is the need for uniformity. It has always been my view that a single code of conduct should apply to all the people who are governed by it. I understand that the bill proposes that and I welcome that. I also welcome the proposals to standardise the arrangements for registering interests. I understand that, if the proposals are followed through, the Convention of Scottish Local Authorities might be invited to prepare a code in consultation and I would be happy to participate in that process.

I will deal with the provisions for enforcement. It must be borne in mind that the chief investigating officer and the commission are likely to be in a highly charged political situation as they are being asked to judge conduct. Therefore, their independence must be real and must be seen to be so. It is proposed that the chief investigating officer will be appointed by ministers, that the members of the standards commission will be appointed by ministers and that the staff of the commission will be seconded from the staff of ministers. That contrasts with the situation that exists in the Accounts Commission, on which the proposals are based. Although the Accounts Commission members are appointed by ministers, it appoints a controller of audit, subject to ministerial approval and it appoints its own staff from whom it can draw independent advice. The proposals for the appointment of the commission and of the chief investigating officer do not meet the test of perceived independence and are fundamentally flawed.

I have a couple of points to make on the role of the chief investigating officer. He will have less independence than I have, partly because of the way in which he will be appointed but also because he will be subject to direction by the commission. He will be more open to criticism than I am in exercising his discretion on whether to investigate. I can investigate only in response to a written complaint. He will not be subject to such a restriction and might be criticised for failing to act in response to media pressure. In that respect, he would be in the same position as the controller of audit. The controller, however, is able to draw on the resources of the appointed auditors to each local authority before deciding whether to investigate. The chief investigating officer will have no such resource. A requirement for an accusation of misconduct to be in writing or to be the subject of a direction by the commission before it can be investigated would help to safeguard the position of the chief investigating officer.

I am conscious that your next witness is the secretary of the Accounts Commission, who is in a much better position than I am to discuss issues arising from the commission's experience. I will restrict myself to two further comments on the proposed commission's powers.

First, when I conclude an investigation with a finding of maladministration, I make recommendations as to how any consequential injustice might be remedied. It is for the council to determine whether it will implement those recommendations. In the five and a half years that I have been in post, all my recommendations have been accepted and acted on.

When the Accounts Commission reaches its conclusions, it also makes recommendations, either to the council or to the appropriate minister, who then determines what action to take. The proposal in the bill is that the standards commission will make recommendations to the appointing authorities in relation to appointed members, but will take decisions in relation to elected members. That is clearly anomalous and, in my view, unsatisfactory. My experience suggests that there is a case for the final decision to be made by councils, on the commission's recommendation. If that arrangement proved to be

unsatisfactory over time, it could be changed.

Secondly, I support the view that the range of options that are open to the commission following an investigation and a finding of misconduct—whether that is in the form of a decision or a recommendation—should be much wider. Those options should include, for example, removal from convenership or representational office.

The proposed arrangements raise the issue of the interaction between the proposed institutions and me and, in particular, between the chief investigating officer and me. On a day-to-day basis, I do not envisage any great problem in that. At present, if I receive correspondence that is obviously meant for someone else, for example, the housing association ombudsman, I simply redirect it and inform the complainant. If I received a complaint that raised issues of maladministration and misconduct, I would advise that the complaint about issues of conduct should be submitted to the chief investigating officer. Where we were both engaged in investigations into the same circumstances, we would require to co-ordinate our activities so that we neither obstructed each other nor placed an unreasonable burden on those being investigated.

It could be that, on the same facts, the ombudsman and the chief investigating officer would reach different conclusions as to whether a breach of the code had occurred. I see no obvious way of avoiding that possibility but expect it to be a very rare occurrence, and I would be content to cross that bridge when we come to it.

The Convener: I open up the meeting for questions.

Bristow Muldoon (Livingston) (Lab): I will ask two questions that are closely related. On the adjudication of the standards commission, you point out that there is an anomaly in how elected and appointed members are dealt with. I understand where you are coming from on that, but we are concerned about your suggested solution that the final decision be made by the council. Is there not a danger that such a decision would become a party political issue in the council? Colleagues of the member against whom action had been recommended might wish to defend their colleague and not accept the recommendation of the standards commission.

Secondly, I wish to ask about the appeals procedure. As it stands, there is no provision in the bill for an appeals procedure for elected members who are found to have breached the code. Should such an appeals procedure be incorporated in the bill?

Frederick Marks: On the first point, I have always strongly taken the view that the investigation part of the exercise should be external to the local authority, and that under no circumstances should it be undertaken wholly internally. I accept that allowing the council to make the final decision raises the possibility of political influence, but given that at that stage the whole matter—the investigation, the public hearing that would have to take place if there were to be a recommendation for action, and the commission's recommendation—would have been ventilated in the public arena, it would be extremely difficult for a council to take a different view, unless it could provide information or good reasons for doing so.

14:00

In my experience, councils accept my recommendation although they do not always agree with it. The important part of the exercise is much less about the penalty at the end than the exposure of the facts in the public arena, which allow members of the commission, council and public to know what they are judging and to decide whether the commission's recommendation is fair. Assuming—as I think I am entitled to at the moment—that the commission's recommendations will be seen to be fair and just, it will be very difficult for a council to overturn that for political reasons. As I say at the end of my written submission, if that arrangement turns out to be unsatisfactory over a period of time, something could be done about it.

On the matter of appeals, all these actions are subject to judicial review. One can go on having decisions that are appealed again and again, but the line has to be drawn somewhere. There is no appeal per se against any of my decisions and recommendations, but my views and actions are subject to judicial review. I think that that would be sufficient.

Bristow Muldoon: I will ask a brief supplementary question. In effect, disqualifying and debarring a councillor from office is the same as dismissing someone from a job. In the employment arena, someone who is dismissed can take their case to an industrial tribunal to try to overturn the decision. Also, most companies probably have internal appeals procedures. I am not sure that a judicial review is an adequate form of appeal, as it can be very expensive, so a person seeking judicial review would need to be pretty sure of success.

Frederick Marks: My view is coloured by the fact that I have grave doubts about whether such a penalty would ever be imposed. I find it extraordinarily difficult to contemplate a situation where a member of a council is found guilty of a breach of the code, but not of a criminal act. What breach of the code would justify suspending a member for five years, or whatever, from any possibility of membership?

If I remember it correctly, the legal position is that a person can only be disqualified in those terms if they commit a criminal offence that justifies a sentence of three months, which is a pretty hefty penalty. Although I note that suspending a member is one of the possibilities, I find it difficult to envisage circumstances in which it would be likely to be imposed.

Mr Gibson: You have said that the proposals for appointment of the chief investigating officer and the members of the commission are fundamentally flawed. How should they be appointed?

Frederick Marks: As I said, the proposition to which I object is in the covering note rather than the bill. I would revert to what the provisions of the bill say, which would make the position the same as it is for the Accounts Commission: the commission would appoint the chief investigating officer and its own staff.

Another issue, to which I may return, is that the funding arrangements for me are through a designated body, the Accounts Commission. I can only employ staff with its agreement, and it provides me with offices. I would be keen to see a distancing of the standards commission from the possibility of influence from a political source. In my own case, that is done by the nature of my appointment and by the way in which I am funded. It is more difficult to do that in the standards commission's case as far as the appointments are concerned. It may be possible to do it through the funding arrangements. I have raised the matter informally with the Accounts Commission.

It would perhaps be helpful if I say that we will examine the matter jointly. We may make a submission in response to the committee's invitation for comment by 14 January.

Mr Paterson: Mr Marks, can I take you back to the point that Bristow Muldoon raised? Could you let us know what the downside would be of a council's not making the final decision on any subsequent punishment?

Frederick Marks: The downside of that is the downside of anything that a council does in the public arena: its members have to face the electorate. I happen to believe in local democracy.

The important thing is that the facts are known. There are two other steps to take, one of which is not dealt with in the bill—and cannot be dealt with in the bill. If there is an adverse finding by the standards commission, whatever that may be, there is also the question, whether it decides to do something about it or whether it is the council that is left to decide what to do about it, of what the political parties will do about it. Will they wish to continue to be represented by the person concerned if there has been a serious breach of the code? If the party still supports that person, and that person stands, will the electorate vote for them? Whatever the standards commission may decide, that is not the end of the story.

Mr Michael McMahon (Hamilton North and Bellshill) (Lab): What did you make of the cross-cutting between you and the chief investigating officer? You have flagged up in advance that there may be potential conflicts, and that you think that they could be addressed at the time. You cannot judge what the severity of those conflicts might be. Hindsight is often a wonderful thing, but if there was a conflict between one office and the other over a major issue, hindsight would not be an adequate excuse. Do you not think that it would be better to address that now, rather than wait to see what develops?

Frederick Marks: That would be fine if I could think of a resolution to the problem. If each of the two posts has independence to arrive at their own conclusions after they have made an investigation, there is a problem if they come to different conclusions. We have a limited experience of co-operation with other bodies. For instance, matters come before me that are also of interest to the Accounts Commission. They are dealt with in the way that I have described, by mutual discussion and agreement as to who does what, and when, and as to how we integrate our activities.

That approach means that the kind of conflict that we have been discussing will be less likely. Normally, the Accounts Commission deals with financial matters and I deal with administrative matters. Those do not naturally conflict. The real problem with the proposals before us is that the chief investigating officer and I would be considering the same facts and the same question of whether there had been a breach of the code. It is possible that we could come to different conclusions.

If the two posts are to be created to do the two tasks, there is the possibility of conflict. If we both examine the same facts and come to the same conclusion that there has or has not been a breach, there is no problem. It is only if we come to different conclusions that there is a problem, and I hope that that would be a fairly remote possibility. If that happened, I am sure that I or my successor in office would feel that we had come the right conclusion; no doubt the holder of the other post would think the same.

Mr McMahon: So you would agree to disagree.

Frederick Marks: Yes. In the end, that is the only answer in such a situation.

Mr McMahon: The matter is not then resolved. Could there be a way of reaching a final decision under such circumstances on who would be right or wrong?

Frederick Marks: The decision is only the start of what is done about a given matter. If I reached the conclusion that there was no breach of the code and that there was therefore no maladministration, that would be the end as far as I was concerned. If the chief investigating officer came to the conclusion that there was maladministration, he would need to make a report to the standards commission. The commission would then need to decide whether it agreed with him.

Donald Gorrie: I wish to ask you about staff, Mr Marks. You make one or two comments on that at the foot of the second page and at the start of the third page of your submission. You compare adversely the chief investigator's resources against those of the Accounts Commission. What are your resources? Do your staff have a local government background? How can you advise us about staff and their backgrounds? With due respect to you, the work of your department is only as good as the people at the front edge, doing the fieldwork. The same will no doubt apply to the new gentleman—or lady.

Frederick Marks: The point that I was making was not so much about the quality of the staff, although that is obviously very important. It was that the staff should be seen to be the staff of the standards commission, not of ministers.

The standards commission will require advice separate from that given to the chief investigating officer. It has to come to a judgment about whether what he is recommending is correct or not. In that way, it would be similar to the Accounts Commission, which has the controller of audit and its own secretary who is responsible for advising it as to what it can and cannot do, and on its conclusions.

Some of my staff have worked in local government; some have not. Over time, they gather considerable experience of how local authorities work. I have no doubt that the fact that there have been no refusals to implement recommendations during my five and a half years as ombudsman is partly due to the acknowledgement that, over the years, my staff have developed experience and are therefore likely to come to conclusions which are seen to be valid.

Donald Gorrie: What you have said is helpful. I had not grasped this. You think that the standards commission, as well as the chief investigating officer, needs staff?

Frederick Marks: Yes.

Donald Gorrie: The proposal that you have presented seems to be that the staff are seconded civil servants. From what you have said, I take it that you are not enthusiastic about that.

Frederick Marks: I think that it is a very unsatisfactory arrangement.

Donald Gorrie: Good. Thank you.

Johann Lamont (Glasgow Pollok) (Lab): I want to ask about the role of the chief investigating officer. We have accepted that the chief investigating officer may be a woman. That aside, I was interested to hear about the pressures that the chief investigating officer would be under to make an investigation. One of your concerns was that the decision to investigate may come from pressure which has little to do with the issues and more to do with how much fuss may be generated.

Given your earlier comments about the importance of being seen to be fair, just and independent, any investigation would have to respond to legitimate concerns rather than to someone successfully winding things up in the background.

If I am correct, you suggest that the solution would be to require that the accusation be in writing—or to require that there be direction from the standards commission. Would that requirement be enough to inhibit investigations being initiated as a result of public events?

How difficult would it be to get an accusation in writing? Would you expect to set criteria to justify an investigation?

14:15

Frederick Marks: Before I decide whether to conduct an investigation, I must have a specific complaint that someone has—or thinks that they have—suffered an injustice as a result of maladministration. From time to time, it has been suggested that the ombudsman might launch an investigation of his own volition, in response to information that might reach him by some other means.

However, my predecessors and I resisted that approach. Where would that information come from? How would we decide what justified an investigation? Whatever decision we took, we would be criticised, either for investigating when people thought that we should not, or for not investigating when people thought that we should. At present, our simple answer is, "I have a written complaint from someone who specifies what they are complaining about." It seems to me that, if the chief investigating officer or the standards commission is to be involved in judging conduct, the person whose conduct is being judged is entitled to know the source and nature of the complaint that they are being asked to answer.

Whether a complaint arrives by letter or, given modern communications, by e-mail or whatever, it is important that the source of the complaint—the

person who makes the complaint or lodges the accusation—and the nature of the accusation are known.

Mr Harding: Councils have the penalty of surcharge for councillors who act illegally. Do you think that the bill should remove that penalty from councils or extend it to other public bodies?

Frederick Marks: I claim no specific knowledge of that subject—perhaps that question should be directed to your next witness, who is the secretary of the Accounts Commission. My practical experience of many years is that the threat of surcharge has a value, but I do not feel able to comment on that in a professional capacity.

The Convener: I want to raise a couple of points for clarification. Is there a system of appeal against your decisions?

Frederick Marks: No—apart from judicial review.

The Convener: Am I right to say that you have made your decisions known to councils, which have accepted the decision but not acted on it?

Frederick Marks: No. During my period as ombudsman, councils have always accepted and acted on my recommendations.

The Convener: On the first page of your notes, you say that there should be a single code of conduct that would apply to all elected members—does that proposal include MSPs and MPs?

Frederick Marks: No. My comment was made in the context of the draft bill and therefore it refers to members of local authorities and, if the code is to be extended, of other public bodies. Earlier, it was proposed that local authorities might adopt individual codes, but that could result in one authority having a different standard from other authorities, which would be inappropriate.

Johann Lamont: How many of your decisions have been judicially reviewed? Were any overturned?

Frederick Marks: I always touch wood when I say this: so far, and as far as I am aware, none of the decisions of the Scottish local government ombudsman has ever been judicially reviewed. While it has been threatened once or twice, it has not happened in Scotland, although some of the activities of the English commissioners have been the subject of judicial review.

Johann Lamont: Does that reflect the fact that people were content with the ombudsman's decisions, or is it because the judicial review process is fairly complex?

Frederick Marks: I would not go so far as to say that people are always content with the decision, but they do not feel strongly enough to take it to the stage of judicial review.

Donald Gorrie: You pointed out, as have others, that the proposal is for one rule for elected members and another rule for quangoists—or whatever they are called. If I understand the position correctly, you suggest that, instead of the standards commission making the final decision, the individual council should make the final decision, following which it would be up to the council to implement that decision.

Frederick Marks: Yes, that is my suggestion.

Donald Gorrie: Earlier, you said that this is all about justice being seen to be done. I can see where you are coming from, but if the public are convinced that their local councillors are a bunch of bandits—

Frederick Marks: The public should vote the councillors out.

Donald Gorrie: I know they should, and we will try to give them a decent voting system so that they can do that.

Do you think that leaving the decision to the council satisfies the desire to make the public believe in local democracy? You could argue both ways: it could strengthen local democracy or it could weaken local democracy.

Frederick Marks: As I said earlier, the important part of the exercise is to bring the facts into the public arena. I regard the sentencing part of it as being of less importance.

I will share a story with you. I have the unfortunate distinction of having been physically assaulted in my office by a councillor whom the courts subsequently fined. At the next election, his majority increased. [*Laughter.*] That is local democracy.

The Convener: There are no more questions, so I thank you very much for attending and for giving us your paper. If we need to call you back again, we will do so.

Frederick Marks: As I said, I may have discussions with the Accounts Commission on funding. If it would be helpful, I could make a further submission.

The Convener: Yes, that would be helpful. Thank you.

14:22

Meeting suspended.

14:23

On resuming—

The Convener: Bill Magee has joined us. We

are sorry to hear that John Mullin, who was going to accompany him, is not well today.

Before we start, I want to say for the record that the room is extremely cold. One member, who shall remain nameless, is sitting with a coat over her knees. If it gets any colder, I will have to abandon the meeting—we will hold it outside, where it is probably warmer.

Thank you for coming, Mr Magee. You have been sitting in the room for a few minutes, so you know the format. I ask you to give your presentation, following which we will ask you questions.

Bill Magee (Accounts Commission): Thank you. The member of the commission who was due to accompany me was substituting for the commission's chairman, who is also indisposed. I am getting a bit concerned, although I am feeling fine at the moment. However, we would have liked very much to have had a member of the commission present today, out of courtesy to the committee, and I apologise.

I have circulated to members an outline of what I propose to say. I will give a brief presentation and will then be happy to answer questions.

The Accounts Commission was established in 1975, when the regional and island district councils were created. The commission's original remit was the audit of local government only. In 1995, its remit was extended to include the audit of national health service bodies. I have provided a leaflet, which gives a quick guide to the commission, that I thought members might find useful. Members of the commission are appointed by Scottish ministers. The commission then appoints a controller of audit, which is a separate statutory office.

The commission secures the audit of all Scottish councils and joint boards, as well as NHS trusts and health boards. It does that by appointing auditors to each of the bodies; the auditors report to the controller of audit, who has the duty of reporting to the commission. The total funds under audit are in the region of £12 billion a year. Half the auditors are directly employed staff and half are appointed firms of accountants.

When the controller of audit makes a statutory report on a matter arising from the audit, the commission has the power to conduct hearings and to make recommendations. I will come to that process in greater detail in a moment or two.

Other functions of the commission include carrying out and reporting on value-for-money studies, the publication of performance information in local government—the annual statistics—and work on management arrangements that contribute to the best-value agenda.

The most recent development that affects the organisational structure of the commission is the provision in the Public Finance and Accountability (Scotland) Bill—which has completed stage 3 in Parliament—for the creation of a new body, which will be called Audit Scotland. The commission will continue to exist as a board and will perform its functions in local government, but the staff of the commission will merge with the staff of the National Audit Office in Scotland to create a single body that will carry out auditing work across the public sector.

We are grateful for the invitation to speak about the bill. The commission has been involved in discussions since the Nolan committee investigation into local government, to which the commission gave evidence when the committee was in Edinburgh. Subsequently, the commission commented on the Government's proposals, in particular the consultation paper on the new ethical framework.

We welcome the emphasis that is being put on propriety and conduct in local government and Scottish public life in general, as well as the proposals for the new ethical framework. The commission's view is that the general standards of stewardship and financial management in local government and the NHS in Scotland are high. The commission believes that that is a tribute to the ethical and proper conduct of councillors, board members and officers in a range of public bodies. However, that does not mean that there are no examples of improper conduct or poor stewardship. There is, therefore, a need for a robust system to deal with instances of failure. While we do not perceive there to be a general problem, we believe that a process is needed.

One of the essential elements of the public audit model applied by the commission is an objective external regime that can report in public. We are pleased to note that the bill provides for such a system. Given that there are only 32 Scottish councils—compared with the situation south of the border—which have all their functions in common, there is a strong argument for having one national code of conduct and one process for policing it. There are one or two practical concerns about the implementation of the regime, but they do not detract from our general position of support for the proposals.

The commission has argued consistently for a review of the code of conduct governing councillors' behaviour; the proposals in the bill are therefore welcome. The number and nature of Scottish councils provide good reasons for having one code of conduct that applies to all councillors. We will be happy to be part of the consultation process for the development of such a code.

14:30

It is important for councillors to have a single source of clear advice. At the moment, it is not particularly helpful that the sources of advice range across acts of Parliament, national codes and local codes produced by individual councils. We welcome the approach and general principles that are set out in the consultation paper. In particular, we welcome the emphasis on the duty to uphold the law, questions of propriety and accountability, the stewardship of public funds and honesty in relation to interest. Those are all areas in which the commission has an interest.

We welcome the idea that there should be a single source of comprehensive guidance on declaration of interests, which can be a difficult area for councillors and members of public bodies. For many of them, that issue is not at the forefront of their minds and the need to declare an interest may arise rarely, if at all, during their period of public office. It is not something that they necessarily deal with daily. It is particularly helpful, therefore, for the advice and rules to be clearly expressed and easily available from one source. The current regime is complex and sometimes difficult to interpret.

I said that I would go into greater detail about the Accounts Commission's reporting process, which may be of interest in the context of the standards commission. Each local authority and health body has an auditor, who is appointed by the commission and performs the role of external auditor. The auditor's work includes consideration of value for money, propriety and legality, which are part of the public audit model; that gives the auditor a wider remit than would be expected for auditing a commercial public limited company. It is not just a question of checking that the figures add up.

The Accounts Commission appoints each auditor and has an independent statutory officer, called the controller of audit, who reports to the commission. The controller of audit produces different types of reports. Some are general reports about issues that have arisen in all, or a number of, local authorities, for example the annual overview of local authority accounts. Sometimes reports are produced in the public interest, because the controller of audit believes that something—which is not necessarily improper or illegal—needs to be brought to the public's attention. Finally, there are special reports, which the controller of audit produces when he takes the view that something illegal has happened, or when there has been a loss of public funds due to negligence or misconduct. In any of those circumstances, the controller picks up from the auditor's activities and makes a formal report to the commission.

The commission then has the power to hold a hearing. Given that a special report can lead to surcharge, the affected parties involved have rights and can require a hearing to be held. The hearings are held in public, in the area of the local authority concerned.

The procedure at hearings is designed to be relatively informal—the commission decides on the procedure, as there are no statutory rules on how hearings should proceed—while protecting the rights of the individuals involved. The hearings do not operate as a court—there is no prosecution and defence. Through a process of questioning by Accounts Commission members, the procedure is designed to establish the facts to the satisfaction of the commission and to give the individuals involved the opportunity to express their point of view on the controller's report. After the hearing, the Accounts Commission has the power to make recommendations, either to councils or to Scottish ministers. In the case of special reports, it is possible for the commission to recommend surcharge of members or officers, which can be put into effect only if the minister makes an order.

In the case of special reports, if a point of law arises, there is a statutory power for the Accounts Commission to state a case to the Court of Session. As with other institutions, it is possible for individuals to seek a judicial review of the commission's proceedings. That is a different process from that in England and Wales, where it is the individual auditor of the council who conducts hearings and makes decisions on surcharge. We believe that the Scottish system avoids the difficulty that has been described south of the border as the auditor acting as prosecutor, judge, jury and executioner all in one. Under the Scottish system, there is a clear separation of the investigative and the decision-making roles.

When the controller of audit makes a report to the Accounts Commission, they drop out of the process of advising the commission; as its secretary, I advise the commission. The commission has made a practice of ensuring that its secretary has a legal qualification, to enable it to take advice as the process goes forward. I hope that that description is helpful.

Regarding the standards commission proposals in the bill, many of the features of the commission are similar to those of the Accounts Commission, but there are differences. The members of the Accounts Commission and of the standards commission will be appointed by ministers. They will have a separate statutory investigating officer, who will make formal reports. The chief investigating officer role is similar to the role of controller of audit, although matters will come to their attention through different routes. The controller of audit draws from the audit process

and, presumably, the chief investigating officer will draw from complaints. The standards commission may hold hearings in a similar way to the Accounts Commission, and will also be subject to judicial review.

As far as the differences are concerned, it is interesting to note that the bill provides for the standards commission to appoint its chief investigating officer, but the consultation paper says that that is likely to change to a position where that appointment will be made by the Executive. That is different from the Accounts Commission, where the controller of audit is appointed by the commission itself. Another significant difference is that the standards commission will be given power to impose sanctions directly on councillors, whereas the Accounts Commission makes recommendations only to Scottish ministers. The rationale for the Accounts Commission position is that the ultimate decision is made by a democratically accountable minister. We have also noticed that, under the law of defamation, the standards commission and the chief investigating officer and their staff are to be given absolute privilege. That is similar to the protection given to the ombudsman, but is lacking for the Accounts Commission and its employees. You might regard that as a marker—obviously, it is not a matter for this bill.

The other difference is that the funds for the standards commission will be provided by ministers, whereas the Accounts Commission is funded by a levy on the bodies that it audits. Those bodies pay an audit fee, depending on the activity that is undertaken.

Our main detailed concern about the proposals is that a multiplicity of agencies will be involved in the process. That might lead to intervention by different agencies in the same situation. There might be an investigation by the ombudsman, in which the standards commission, with its chief investigating officer, and the Accounts Commission, with its controller of audit, are involved. It is conceivable that the police might also be involved, either under the existing law or under the proposed new offence of misuse of public office. We all understand that when the field of play is crowded with players, it can lead to some confusion. That is perhaps more true if the field is overcrowded with referees.

Another concern related to the potential overlap of jurisdiction is that separate agencies investigating the same set of facts might reach a different conclusion. There may well be good reasons for that happening, but the public might perceive that there is some confusion in the way in which the matter is dealt with. Under existing arrangements, there is already the potential for that to happen. By and large, the various agencies deal with that by good communication and by co-ordination of their activities. We do not think that that needs to be solved in the legislation. We are likely to suggest that there ought to be a clear understanding—perhaps a protocol—among all the agencies involved. Clearly, their independent judgment has to be left untrammelled, but it should be possible to reach an understanding with the various agencies about conducting investigations together, thereby not imposing an undue burden on those who are being investigated.

Subject to those practical issues, which we still need to work through, the Accounts Commission welcomes the clear emphasis that is being placed on propriety and conduct in public service.

The Convener: Thank you very much. We will open the discussion for questions.

Mr Harding: You probably heard my question to Mr Marks about surcharge. In the local government bill that is going through down south, surcharge is being removed. Does the Accounts Commission have a view about whether it should be removed in Scotland, addressed in the bill or extended to all public bodies?

Bill Magee: No, the commission does not have a view on that. Its position has consistently been that if there is to be an alternative to surcharge, it ought to be ready and put in place before surcharge is abolished. The commission believes that surcharge is an effective deterrent that is seldom used. The commission is not expressing a view on the merits of surcharge. We understand the difficulties that people have with it. Much of the criticism has been based on criticism of the process—particularly in England and Wales—rather than the outcome.

It should be borne in mind that if surcharge is to be replaced by the new offence of misuse of public office, it is still the intention, as I understand it, that there will be compensation or recovery orders for someone convicted of such an offence. The idea of restitution of public funds that have been lost through a person's incompetence, negligence and so on will still be there even if surcharge, in its present state, is abolished.

Mr Harding: The main criticism of surcharge is that it applies to councils and not to MPs, MSPs and others.

Bill Magee: It applies to councillors and officers in local government. At one time it was perhaps regarded as an appropriate sanction for councillors because of the democratic way in which they achieve their position. Officers, who are ultimately accountable through the disciplinary process and dismissal, are also subject to the surcharge regime. Surcharge used to be more widespread in the public sector. It was only in the early 1980s that civil servants were removed from

the surcharge regime. That was ironic, because the sums involved were likely to be so large that it was unrealistic to expect recovery from individuals. Of course, it was much more widespread throughout the public sector in the early part of this century.

Mr Gibson: Is it your view that the method of appointing the chief investigating officer and the standards commission could damage the perceived independence of the chief investigating officer and the commission?

Bill Magee: The proposal to have the appointment made by the Executive is leading in that direction. It is not a terribly cut-and-dried issue for us. You need to remember that the controller of audit, who is appointed by the Accounts Commission, is appointed with the consent of the Executive—with the consent of Scottish ministers. The Accounts Commission appoints its own investigating officer, but the Executive has a role in that appointment. To move to a position in which the Executive appoints both the members and the chief investigating officer is a problem more of perception than of reality. There may well be a perception that it makes the standards commission a creature of the Executive.

14:45

Mr Gibson: Can you suggest an alternative to that method of appointment?

Bill Magee: I heard the ombudsman refer to what is in the bill—that the standards commission would appoint its chief investigating officer. That is the same arrangement as for the Accounts Commission and it appears to work. I have no experience of his independence being challenged by anybody, so I am inclined to say that the provisions that the bill contains are adequate.

Colin Campbell: You said in your statement that you had operational concerns about the standards commission, but you did not expand on that. Would you like to do so now?

Bill Magee: Our principal concern is with there being so many referees on the field and the possibility that one set of circumstances might have to be investigated by up to four different agencies. I appreciate that all those agencies will be approaching the investigation from different standpoints, but to those being investigated—and, perhaps, in the public perception—it might appear that a multiplicity of agencies is involved. That is a practical problem, as much as anything else. As Frederick Marks was saying earlier, we face it from time to time in the present set of arrangements and we find ways of coping with it. All that we are saying is that we need to acknowledge that it is an issue and to ensure that we put in place arrangements to cope with it.

Colin Campbell: Could you describe briefly how you cope with it, so that the public perception is not confused by the multiplicity of referees?

Bill Magee: The independence of each of the agencies is accepted by all those involved, and there is no attempt to influence conclusions. I am talking about the process—ensuring that the timing of events and activity is co-ordinated and that, where possible, information is shared, within the legitimate statutory constraints, so that the same individual is not interviewed four times about the same set of circumstances. That ensures that there is not a mismatch of conclusions, although each agency must be responsible for its own conclusions—that goes without saying.

Donald Gorrie: In your remarks on the code of conduct, you refer to "accountability" and "stewardship". On the whole, the ethical framework is about honesty and reflects the position of the Accounts Commission some years ago—although I do not think that that is its position any more. You are concerned that local authorities should not waste money in a legal fashion. Do you think that the commission should be concerned with accountability, as well as honesty—in other words, if a councillor or member of a quango makes decisions that are so daft, despite advice to the contrary, that it is almost criminal, should that be covered? Alternatively, do you think that is okay so long as you believe that the person did not pocket any money themselves, but merely wasted a lot of public money?

Bill Magee: There are different kinds of accountability. It is entirely right that if an individual knowingly makes a decision that breaks the rules, they should be held to account in a fairly particular way. As you rightly say, in years gone by, a fair amount of the commission's activity has centred on such issues. That is a particularly strict accountability and it is right that it should be a matter for the commission.

Questioning the efficacy and efficiency of decisions that are made is more subjective. Clearly, public servants must be accountable for those decisions, too, but perhaps in a different way. The commission's different reporting regimes reflect that. When there is a question of legality, the process is strict, but it is less strict for public interest reports, which are designed to expose issues. When people are seen to have made decisions that are not efficacious or efficient, or if there are issues of value for money, they are ultimately accountable at the ballot box. That is a different kind of accountability, but it has to exist.

Bristow Muldoon: I want to build on some of the points that Kenny Gibson was making about political independence from the Executive. The minister appoints members of the Accounts Commission. Is there any suggestion that that has

resulted in a lack of independence? I take it from your remarks that you do not think that the independence of the Accounts Commission has been interfered with. If there were any concerns about independence, could they be dealt with adequately through a review of the way in which appointments to public bodies are made, similar to the review that the Minister for Finance has embarked on?

Bill Magee: The Accounts Commission was created in 1975 partly because of a series of high-profile and highly political cases in the 1960s and early 1970s. People had difficulty dealing with them because the process of audit and accountability was in the hands of the secretary of state and it was felt that it was potentially a political process. The Accounts Commission was deliberately created in the legislation for the reorganisation of local government in 1975, to put an independent body between the two tiers of elected politicians—the secretary of state and councils. That was expressed as one of the reasons for the commission's establishment.

The commission and ministers have always been at pains to emphasise its independence when performing that particular statutory role. The appointments of members to the commission are made through Nolan-inspired processes. The decisions are made completely independently, and not—in my experience—on any kind of political basis.

But of course, there is no room for complacency. If there is to be a review of the way in which appointments to public bodies are made, appointments to the Accounts Commission and the standards commission will doubtless be included. Whatever may have been said over the years about the Accounts Commission and its processes—especially by those who have been at the receiving end—there has never been an allegation that it has been politically motivated.

Bristow Muldoon: Therefore, by extension, in your experience, there is nothing to suggest that there would be any political motivation in appointments to the standards commission, which would be a similar body, and would rely similarly on political independence.

Bill Magee: I have absolutely no reason to imagine that it would be any different from the Accounts Commission in that respect.

Mr McMahon: I am interested in the idea of protocols to co-ordinate responses, as you suggest. Experience here has taught us that it is better to have the protocols in place before you start working.

Are you suggesting that, if you work in a particular way according to certain protocols, you should arrive at the same conclusions; or are you saying that, after people have gone through the procedures, their responses should fit together?

Bill Magee: The latter, definitely. I do not think that it would be legitimate to say that we ought to attempt to make all the bodies reach the same decision, because they will come at the process from different directions and for different reasons. It is unfortunate, but entirely possible, that the ombudsman might find that there has been no maladministration, and that no one has suffered an injustice, but that the standards commission might find that a councillor has breached the code of conduct. It would be perfectly legitimate for him to reach that conclusion, although it would perhaps be unfortunate from the point of view of public perception.

My concern is more with the organisational processes—to ensure that there is not an unnecessary burden on public expenditure and that the individuals who are involved are not over-investigated. It is a question of the timing and the process, rather than the merits of the conclusions.

The Convener: When you were comparing and contrasting the Accounts Commission with the proposed standards commission, you said that the standards commission would have protection under the laws on defamation that you do not have. Would it be helpful for you to have similar protection and, if so, could you give us an example of how it would be helpful?

Bill Magee: The answer is yes, thank you. I cannot offer you a concrete example, but people in a position such as that of the Accounts Commission or the controller of audit should be free to express their opinions without fear of the laws on defamation being used against them. At the moment they enjoy qualified privilege, which covers fair comment in the public interest. In order to feel free to speak, regardless of pressure or influence, they should not be made to feel apprehensive that they might be sued for defamation. That protection is afforded to courts, it is afforded to ombudsmen, and it is proposed that it be afforded to the standards commission.

The Convener: Therefore, even though you do not have it, you approve of the standards commission having it?

Bill Magee: Yes.

Donald Gorrie: If I understood correctly, your commission applies a different standard of proof to surcharge issues from the one that it would apply to a general document about improving an aspect the health service. I am interested in that. People who know about these things have told me that in the police force, for example, the deputy chief constable often disciplines constables based on evidence that is less good than would be required in a court of law. Knowing how hard it can be to

prove irregularities of moral behaviour, do you think that the standards commission should accept a lower standard of proof than that required in courts?

Bill Magee: The contrast that is normally made is between the standards of proof in criminal and civil cases. The standard of proof in criminal cases is "beyond reasonable doubt"; the standard of proof in civil cases is "on the balance of probabilities". I do not think that we are dealing with criminality—although we are concerned about the proposed new offence of misuse of public office, which we believe will make criminal offences of things that, at the moment, are dealt with through what is essentially a civil process, in which the standard of proof is "on the balance of probabilities".

The Convener: Thank you very much for coming, Mr Magee. I hope that you do not end up being ill, like the rest of your colleagues, and that you have a nice time over Christmas.

15:00

Meeting suspended.

15:14

On resuming—

The Convener: Comrades—we are all comrades in the true sense of the word—let us return to business. I welcome Bill Speirs, the general secretary of the TU—STUC. Sorry, I nearly promoted you to the TUC. I also welcome Matt Smith—he has been here so often that we may ask him to join the committee—who is the president of the general council. They are going to give a presentation on the bill. We will employ the same format as before and ask questions afterwards. I thank our witnesses for coming.

Matt Smith (Scottish Trades Union Congress): Thanks, convener. I thank the committee for the invitation to come here today. This is not the first time that I have been here, but it is my first time in an STUC capacity. The STUC obviously wants to engage in discussion with the committee. You said that we would give a presentation, but I shall make some opening shots and then engage in discussion, which might be more fruitful.

We bring apologies from some of our members, particularly our women members. We do not like to appear as a single-gender delegation, but flu and other considerations have meant that that is the case this time. That is why only two of us are here. The others send their apologies.

I would like to say at the outset that we are very much part of a consultative process too. We are still engaging many of our affiliates in the discussion, and we have not yet drawn up our final conclusions on several of these issues. We want to take some of the issues back from today's discussion, so that we can engage in further discussion with trades unions—both those that are immediately involved and those that have a wider interest. There are a couple of issues that we want to touch on at this stage.

I want to raise a general issue that is perhaps not relevant to this particular paper, but which I want to make. I notice the use of sexist language in the document, when it uses "he" and "him" in reference to the commissioner. The use of that type of language might be an issue for another committee to consider.

We broadly support the idea of a framework in which individuals operate to provide public service. The STUC believes that that is important and has called for it in the past. What is interesting about this document is the uniting of councillors and quango members in the same paper. But for the fact that another paper has been published today on the issue of quangos, we might have wanted to make more comment on that—although we would be willing to address that, if the committee wants to engage us in that discussion.

There is a difference that I want to highlight at the outset: the public profile of councillors is somewhat different from that of members of other public bodies. When it is appropriate, the same ground rules should apply right across public service. The difficulty could be the way in which councillors could be challenged when others might not be, on their conduct and other matters. All of you have experience of local government—all of you have that background—and know the type of stories that circulate about elected members. There are few such stories concerning members of other public bodies, although I do not think that there is less to report about those people. The public exposure of councillors, and the fact that what they do is in the public eye, becomes an issue in itself. We must therefore be careful, when dealing with that issue, that we do not deal only with elected members.

There is an issue of democracy. Ultimately, the sanction that is imposed on those who are elected is imposed by the electorate. That is quite different from the accountability of those who serve on public bodies and there is a difference in the way in which individuals would be dealt with. It will be possible for councillors to be debarred from office by the proposed commissioners, whereas that will happen to members of public bodies only through ministerial actions. That seems to be the distinction, which is one on which we want to seek the further thoughts of our membership. That is the issue that I want to touch on at the outset.

We broadly welcome the idea of a code of conduct—a code of ethics and practice. We want public service to be accountable and we want an ethos in which issues that should be brought to the public attention are. However, we want to avoid frivolous claims and we do not want councillors to be particularly exposed when others—because of the nature of their office—might not be under such scrutiny. I invite Bill to comment.

Bill Speirs (Scottish Trades Union Congress): We will make written submissions and we are in the process of consulting widely with our affiliates, so Matt's comments are preliminary remarks based on our general approach to standards in public life.

I will highlight a couple of issues on which we have concerns or are unclear about how the procedure will operate. The first is whether paid posts on public bodies might be considered areas of employment. How would that relate to the employment tribunal and employment appeal tribunal systems? If someone were being removed, or dealt with in some other way in relation to a paid post, there is potential for either confusion or a clash between the systems. The committee should perhaps examine that further.

We are concerned that there does not seem to be an appeals procedure in the proposed structure. As matters in relation to natural justice have come up recently, we think that there might be criticism that natural justice is not being allowed if there is no appeals procedure.

Matt touched on the scrutiny to which councillors are subjected. Wearing another hat, I am a member of the renewing local democracy working group, or perhaps it is a task force—I can never remember which. It is considering a number of issues. It would be wrong for me to say anything that comes directly from that group, but I would not be giving anything away if I said the view across the parties represented on it is that public service must be reinvigorated to encourage people to stand for election as councillors.

It may not be fashionable, but it is important that whatever the outcome of the consultation and whatever shape the bill takes, the way councillors are dealt with must not be so draconian that people are further deterred from taking part in the political process and seeking public office. The appeals procedure could be important in ensuring that people feel that they are being treated fairly.

Another issue on which we are asking questions rather than making proposals is the extent to which there is a limit to the aspects of public service and public bodies that the bill will cover. For example, college councils and university courts take important decisions that often involve public money. They are involved in employment procedures. The conduct of people who serve on those bodies is every bit as important as the conduct of someone who serves on a health board. It may be suggested that the difference is whether it is a ministerial appointment, but some people who come on to those bodies are nominated by organisations rather than put on by ministerial appointment. The scope of the bill should be widened.

The way in which public appointments are made may be a separate issue, but an aspect of appointments is relevant to this bill. In relation to public bodies—as opposed to councillors—it is proposed that the nominating organisation will have responsibility for implementing any action that may be recommended by the investigating officer or the commission. That highlights the important role that can be played by a procedure in which people are nominated by other bodies.

The STUC has representation on 148 organisations of one kind or another in Scotland. We take seriously any complaint about the way in which anyone we have nominated operates—it can be as basic as not turning up for meetings. That is one of the reasons we are concerned—although we know that this is done under the Nolan procedures—that so many bodies are now filled by public advertisement and ministerial appointment. Putting an advert in the pages of *The Scotsman* and *The Herald* and calling it public recruitment seems inadequate. We believe that nomination and accountability fit in with the approach that is being taken in improving standards in public life.

Those are the main points that we want to make at the moment. The remit of the legislation could perhaps be extended to cover other areas of importance in the political process, such as the fourth estate. Setting up ethical standards for newspaper editors might be useful as well, although perhaps that would be a step too far.

Colin Campbell: It is nice to meet a dreamer.

The Convener: I thank the witnesses for their presentations. We will now have questions from members.

Bristow Muldoon: You mentioned the potential lack of natural justice in parts of the bill in relation to the absence of an appeals procedure. What do you feel about interim suspensions being given to councillors or other members of public bodies who are being investigated? Should there be a limit on the length of an interim suspension?

Matt Smith: Suspension should be considered only in extreme cases. An interim suspension should mean that the hearing will be held soon. If there is suspension over a prolonged period, people may start to assume guilt by association, which would be unsatisfactory.

Suspension of an elected member is a serious matter. It should happen only in dire situations and it should be dealt with in a short space of time.

Bristow Muldoon: If an appeals procedure is put in place, where should the appeal take place? Should it be within the commission or by ministers?

Bill Speirs: We must give that matter further consideration. For the same reason that there should be an appeals procedure, our initial thought is that it should be separated from the structures of the investigatory process. Otherwise, we will run into the difficulty of the people who are doing the investigation also being involved in judging the appeal.

Johann Lamont: I am glad that I will be able to report to the sisters that you spotted the test that had been placed for you and condemned the sexist language.

I was interested in what you said about the imbalance, as councillors would be more likely to be scrutinised than other members of public bodies. How do you think we could make public bodies more transparent and open to scrutiny?

We discussed earlier how we could guard against frivolous accusation and investigation. The danger is that the investigating officer might respond to media pressure. The investigating officer could be put under pressure to announce that there is to be an investigation—irrespective of whether there is any substance to the allegation. What guidelines do you want, to ensure that matters are investigated when there is a problem but the investigating officer does not respond to manufactured pressure?

Matt Smith: When a claim is made, the issue is who decides whether it is frivolous. The code of conduct may give guidance on that issue. As Bill Speirs said, we have not gone into detail with our affiliates on this matter yet. I would have thought that we want a preliminary stage in the process to allow a low-key inquiry before any formal procedure. That would sift out frivolous claims.

15:30

One way to make public bodies more open is to pass their responsibilities to open public bodies such as local government. McIntosh made some recommendations about passing back to the public arena the powers of some of those agencies. A classic example of that would be the water industry. Some people are of the view that water should have remained in local government and should be returned to local government.

Where it is not possible to transfer responsibilities, and where there continue to be quangos or other bodies, the rules of openness and accountability should be clear and should apply unless there are good reasons for an issue to be taken in private—for example, those affecting members of staff or commercial confidentiality. However, in all other instances there should be openness. The type of openness we expect from government, and which this Parliament is all about, should be applied across public services and public agencies.

Donald Gorrie: Who does the executing of the guilty? The local government ombudsman pointed out that he makes a judgment and passes it to the council, which then puts the judgment into effect. He thought that that was an area worth investigating.

You mentioned quangos, and raised and interesting issue. Let us say that the Scottish Trades Union Congress has a representative on a health board, that he or she steps out of line, and the commissioner presents heavy evidence against him or her. Should it be the health board or the STUC that sacks that person, or does whatever it is required to do?

Bill Speirs: My view is that it would be cleaner and easier to operate if it were the health board. People would probably think that that was the best way.

There are fewer and fewer areas in which rights of nomination exist. Normally, names are put forward but someone else—usually a minister—makes the appointment. Technically, the nominated person serves as an individual but, where there are people who have been nominated by a particular body, I believe that the nominating body should be required to remove the nominee or take such other action as may be recommended. That would put the onus on nominating bodies to ensure that difficulties do not arise in the first place.

I presume that if the nominating body did not co-operate in taking action, it would lose its right of nomination. Because it would wish to maintain its reputation and right of nomination, it would not just take appropriate action when someone stepped out of line, it would take action to ensure that individuals did not step out of line in the first place. That action could include providing adequate training in how to approach duties in public life.

Donald Gorrie: Is there any mileage in the idea of the commissioner sending a report to a council, in the case of a councillor, and the council putting the report into effect?

Matt Smith: Yes, the council should play a part. I always have some difficulty in respect of local government because it differs from other public bodies in that, ultimately, the electorate should determine whether someone should continue in office. It would have to be an extreme case for

someone who had been put in place by the electorate to be removed from their position. I have some difficulty with that issue, and have come to no particular conclusion on it. Councils, rather than a commissioner who is one or two steps removed, should have the opportunity to take the decision.

Mr Gibson: I was going to ask a question similar to the one Johann Lamont asked, about councils being continually harassed by members of the public and being able to defend themselves from all sorts of bizarre and outlandish accusations. I am aware of the case of a Labour member in north Glasgow who has been continually harassed by an individual over a long period of time. It appears that there is not a lot that he can do about it.

Do you think that MSPs should be included? Do you think that standards committees and the commission should have political balance? I served on the standards committee in Glasgow and we had a rotating chair so that the administration and opposition had the same number of members on the committee and there was never a political majority when decisions were made. I know that Bill would like to pass that question to Matt, but perhaps he can answer it himself.

Bill Speirs: That is an area in which the democratic processes of the STUC may have to resolve its precise view on the matter. In other words, we do not agree. [*Laughter.*]

The public will probably expect MSPs to be subject to the same procedures as councillors and other members of public bodies. They will not make a distinction between those groups. McIntosh argued for parity of esteem for local government councillors and MSPs. Most of the people who make submissions to the committee will argue that the scope of the bill should be extended to the Parliament.

My personal view is that, not least because things are ultimately left to the electorate, this is an area in which self-regulation can be justified. I do not want to enter into a political argument about the extent to which this Parliament is a sovereign body. However, there is no doubt that in the minds of the public it has many elements of sovereignty. There is an argument for saying that if parliamentarians cannot regulate themselves properly, it falls to the electorate to deal with that, rather than to some quasi-judicial public body. I welcomed Lord Johnston's judgment on the fox hunting legislation; he said that it was for the Parliament, and not for judges, to decide what is competent and what is not.

I know that there are other views, and I am aware that my views may not win the support of most of the public or of the STUC; I am just a paid official. Matt Smith is the elected president.

Mr Gibson: I also asked about political balance.

Bill Speirs: Again, that is not something we have considered yet. Having said that, we argued throughout the campaign for the establishment of the Parliament and in the consultative steering group for an inclusive approach, as far as that is practicable given the realities of political debate and democracy. On standards, where public confidence is important, self-regulation rather than a quasi-judicial process would encourage balance. The idea of rotating chairs is also well worth consideration.

Mr Harding: You said that MSPs and councillors should be subject to the same procedures. Do you think that we should also be subject to surcharge, or do you think that we now have the opportunity to remove that, as has happened down south?

Matt Smith: I have never favoured the idea of surcharge—a financial penalty that often goes beyond what a court would impose. That is not the way to deal with misconduct. It is wrong-headed and I would like it to be abolished. It is not a matter on which we have consulted recently, although we have had difficulties with a couple of cases in which it has been applied in the past. I see no case for surcharging in the new system. If someone has committed a terrible breach of trust, removal from office would be a more appropriate penalty than surcharge.

Mr Harding: Do you think it is fair that it applies only to councillors and council employees, rather than to people in other public sector bodies?

Matt Smith: I do not think that it should apply to anybody.

Colin Campbell: I was interested in what you said about the other committee—which will remain nameless—that wants to encourage more people to get involved in local government. Perhaps it is because I have an old, headmasterly interest in punishment that I noted your comment that—

Donald Gorrie: Flogger Campbell.

Mr Gibson: He is talking about his private life.

Colin Campbell: The members on this committee are terrible.

What kind of non-draconian punishment would deter councillors from misbehaving and be publicly perceived as an appropriate punishment? The matter is not as academic as it seems.

Bill Speirs: It certainly is not. I would have thought that the ultimate sanction of being disqualified from public office is pretty draconian for someone involved in the public policy process.

However, that should not deter people from standing for councils, as no one does so expecting to be disqualified for malpractice.

Perhaps the matter becomes more difficult when we take a step back. As far as possible, punishment should be more political than financial, with censures being passed and the public being made aware of them. There should be a requirement for any councillor who has been censured by the commission to register that in any publicity if he or she stands for office again.

It has to be said that the sanctions recommended in the consultation, such as suspending councillors from committees while allowing them to operate as councillors, hit constituents instead of the individual councillor. We are looking for political punishments for political offences. People who breach criminal law should be dealt with by criminal law. As a natural liberal, I have no difficulty with people receiving heavy punishment if they abuse public office to that extent.

Mr McMahon: Some of the sources of complaints are officers and employees of public bodies and councils. Is the current policy on so-called whistleblowers adequate, or should the bill specifically protect such employees, who might well be the best source of information about malpractice?

Bill Speirs: I do not know whether Matt has any recent experience of whistleblowing activities among his members. We should ensure that procedures put in place by the ethical standards bill interface straightforwardly with existing whistleblowing legislation rather than produce two different channels or mechanisms. However, at the moment, I could not advise the committee how that might be done. The position of employees needs to be protected, not least because they are vulnerable if the individual against whom the complaint has been directed decides to take action against them.

That issue relates to the issue of anonymity, which is raised in the consultation. There is no easy answer. Although, to guard against frivolous complaints, people should be required to produce evidence, we can understand why people sometimes wish to preserve their anonymity from the person being complained about. That could be dealt with by, for example, not acting on anonymous complaints in green ink that arrive through the post. However, we could ensure that a complaint from a named person to an investigating officer can remain anonymous.

15:45

Matt Smith: There are already procedures in a number of organisations, particularly in local government, for employees to make complaints confidentially.

The possibility that employees will use those procedures to make frivolous complaints is far less than the possibility that such complaints will be received from the general public. Employees use those procedures because they feel that information that they have has to be put into the public domain, but fear the consequences of doing so. Their complaints are different from frivolous complaints from members of the public, but I agree with Bill Speirs that ethical standards legislation should parallel legislation on whistleblowing.

The Convener: I have three questions. First, you said that you feared that there would be differences between the treatment of councillors and treatment of members of quangos and other public bodies. The local enterprise companies are not included, but I understand that there will be a standard code for them, which will be subject to the approval of Parliament. Will that code be enough?

Secondly—I am abusing the chair furiously—you said that you felt that there would be employment law problems in relation to those who are in paid employment. I understand that, but I am not sure whether you included councillors among those in paid employment.

Thirdly, on the matter of appeals, it seems from the draft that there is no appeals procedure for councillors, as there is for people on public bodies. That means that, ultimately, if everything has been taken away from them, councillors must go to the electorate. What are your views on that?

Bill Speirs: I will concentrate on the first couple of questions. When Scottish Enterprise and the LEC network were established it was our view that it was not appropriate to constitute LECs as limited companies, and we have never changed our position on that. It is argued, of course, that measures cannot be extended to LECs because they are covered by company law. Corporate governance could be revisited—the Cadbury commission was some time ago—but that issue is perhaps not within the remit of this committee.

A separate exercise on the future of Scottish Enterprise and the LECs is under way. If we stick with the present structure, we will want certain requirements of conduct to be written into the procedures for determining LEC budgets. There should, possibly, be requirements for openness and for open meetings, although probably one would find that about three minutes of meetings would be open, and the rest would be covered by commercial confidentiality.

I am not aware whether the issue of councillors as employees has been tested in the courts. I

know that there is a case relating to job-sharing and candidacy for this Parliament going through the tribunal system. Of course, at the heart of that case is the question whether being a MSP is a job, in the sense of being covered by employment legislation. I have a great deal of sympathy for the proposition of being able to job-share the position of member of Parliament. However, I am quite clear—and I think that the Scottish Trades Union Congress takes this position—that we are going down a dangerous road if, as happened in the tribunal on women-only shortlists, it is accepted that being an elected representative is a job like any other. One is getting into very odd territory there. Specific legislation should give councillors, MSPs and MPs the same rights and terms as other employees in areas such as pensions, superannuation, and health and safety, but not over unfair dismissal—otherwise some interesting cases might run for a long time, in which the electorate is sued for unfair dismissal. There might have to be a test case for councillors.

Matters are much more clear-cut for people on quangos. Positions are advertised with payment of £5,000 a year, or whatever, and people apply and go through a recruitment procedure. If it is decided that they have not behaved properly, they are removed and they lose that £5,000 a year. Knowing what good employment lawyers there are in Scotland, I suspect that a case could be taken through the employment tribunal system. It will be important that, whatever the committee decides, the draftspeople ensure that the legislation is tight enough to avoid such situations.

Matt Smith: On appeals, I would not wish to exclude councillors from the appeals mechanism if they are to be subject to suspension or loss of office. I said that I was concerned about the role of the electorate in that, but if councillors are subject to a penalty, they should have the same right of appeal as any other person.

On staffing, I wish to address the issue of employees and public office, which relates to a discussion that I had with this committee. It was certainly the view of the Scottish Trades Union Congress that the opportunity of individuals to seek elected office should be maximised, even if they were council employees. It was thought that that could happen if there was an adequate code of conduct or practice covering areas of potential difficulty. I hope that that matter will be examined in the framework document, so that employees will be given the maximum opportunity to seek office and will not be excluded, as they are at present.

Johann Lamont: I am interested in your distinction between a person who is elected and is ultimately answerable to the electorate, and a person who is not. We must deal with a lack of public confidence, for example, in cases where someone who has been elected in the past six months breaks the code but continues working for another three years before the electorate can make a judgment on them. Perhaps if someone who wants to stand for election has been guilty of a breach of contract they should be sanctioned by having to include something about that in their election address. What is said in the public domain will affect the public's attitude to such people.

If the breach of the code is very serious, do you think that people should be forced to put themselves up for election while the matter is current? If there is no immediate sanction—because ultimately councillors will be answerable to the electorate—there might be a loss of confidence. Should there be an interim debarment that would not prevent them from standing in an election, but would prevent them from participating in the council? The difficulty would be that some people would not be represented on their council.

Matt Smith: I had not thought of the proposal to force someone to seek re-election. That is an option, but it is fraught with difficulties.

We are talking up an issue that might not be as bad as we suggest. I imagine that the number of cases that are serious enough to be affected by the proposed arrangements will not be large. We are tending to look at examples where we are unhappy about what people have done, even though they have not breached major codes of conduct—perhaps we do not like decisions that have been taken and so on. There is a danger of overemphasising the outcome of the proposal. The number of opportunities for re-election will be few and far between and I do not think that we should go down that road.

Johann Lamont: I agree. I would not like the message to go out that the major thrust of this committee's concern about local government is ethical standards, simply because we have to consider this bill. We always try to send out a clear message that we are committed to local government as the front line in delivering services to people and we want to play a supportive role in that. Nevertheless, in examining a bill such as this, we have to explore those questions. You are right that, although the issue is significant, in the broader picture it is almost marginal.

Matt Smith: I should have said at the outset—I know that this is also the committee's view—that the great majority of the people who are involved in public life in Scotland would never be affected by this. We are not for a minute suggesting that there is a great swathe of issues to be addressed.

Bristow Muldoon: So far we have mainly concentrated on the standards issue. Perhaps you could give your views on the repeal of section 2A? I think that I know the views of the STUC, but I

would like to give you the opportunity to express them.

Bill Speirs: We welcome the section of the bill that repeals section 2A of the Local Government Act 1986, because of the difficulties that teachers and others have encountered in dealing with homophobic bullying in schools. We believe that people are equal, regardless of their sexual orientation. It is disappointing to find that church leaders are so preoccupied with how people love one another in a world in which people kill one another in the name of religion—that seems bizarre. It is an interesting new Scotland in which the Catholic Church and the Free Church of Scotland are issuing joint letters, but that is another matter.

The Convener: Thank you, for your evidence. You have made a very worthwhile contribution to our work.

We now move on to consider the issues raised by the bill so that we can produce a report. I suggest that members take this opportunity to let me know which issues must be flagged up.

Bristow Muldoon: I would like to raise the issue of an appeals procedure for councillors—we must give serious consideration to incorporating that into the bill. The approach to dealing with councillors and appointees to public boards must be consistent. That goes back to the question of parity of esteem.

Dr Sylvia Jackson (Stirling) (Lab): Please could you speak a little louder?

Bristow Muldoon: Of course. We should also consider extending the legislation to deal with other public bodies, such as college boards and LECs. We might want some explanation as to why that was not thought to be appropriate.

The majority of the submissions that we have received give the bill a broad welcome and our report should reflect the support for the general principles of the bill. I suspect that that will be mirrored in the written responses that we receive.

Mr Paterson: I would like to raise the issue of interim suspensions, which seems to be extremely draconian. Like councillors, we are all elected, and should know that the adverse publicity stirred up by a suspension—particularly if someone is innocent—would be very difficult. We must consider that carefully.

Mr Harding: One matter which has to be addressed but which did not come up in the evidence is hung councils. In Stirling Council for example, the balance is 11:11. If a member is suspended, that might mean that the administration cannot deliver its policies.

The other issue that I want to discuss was raised by the health boards: that they have non-executive and executive directors. The current rule applies only to those who have been appointed by the minister. The paid executive directors still take all the decisions—they are equally responsible. I do not know how that factor can be taken into account.

The other matter that I have been pursuing all along is the question of removing surcharge. I would like the Executive to do that. I think that it is totally unfair that it applies only to councils. If that can be removed down south, I do not understand why it cannot be removed up here in Scotland.

16:00

Donald Gorrie: Unfortunately, I missed some of the presentations last week. I was trying to persuade Mr Jack McConnell to give local government more money—which is not a productive use of time, despite Mr McConnell's being one of the better ministers.

Today, I felt that the ombudsman made some relevant points from his experience. The question of whether the commissioner should be appointed by the minister or by the standards commission is important. Because we are falling foul of sheriffs being appointed by people, and therefore not being independent, the whole independence thing could become quite important in the future. He made another good point about an accusation having to be named and in writing. The standards commission should not respond to garbage from the less intelligent part of the media.

As is the case with the ombudsman, the commissioner makes a determination and it is then up to the council to do something about an accusation. That is worth considering. There was also a point raised by the Scottish Trades Union Council about whether, when somebody from a quango does something wrong, it is the minister, the quango or the people who appointed the person who sack him or her.

Those are the points made by the ombudsman that I think should be considered.

Mr McMahon: I want to mention another point made by the ombudsman, about the breadth of sanctions. I accept what Keith Harding has said about the removal of surcharge, but we could investigate how to allow the people concerned a wider scope of sanction compared to those who have been found to be offenders. That was a good point.

Mr Gibson: I think that we want to clarify, where possible, the remit of the various bodies. The last thing that we want is continuous overlap, which obfuscates the entire process. I think that we need an element of protection for public servants. The

last thing that we want when the bill is passed is an avalanche of unsustainable complaints made for malicious reasons.

We need to clarify who will carry out the sentences that are passed. We will need political balance, between administration and non-administration members in local authorities. That will ensure that the public has faith in what is happening.

I agree with much of what has been said by other members, in particular with Bristow Muldoon: we need to extend the legislation to cover LECs. I would dispute what Bill Speirs said: I think that we have to include MSPs in the legislation to avoid ending up in a position in which it is a matter of "do what I say" rather than "do what I do". As Bristow said, it is also important to have an appeals procedure and, as Gil Paterson said, to consider interim suspensions.

I had not thought of hung councils. Keith Harding made a valid point about that. If we come up with other ideas, I hope that we can submit them to you over the next few days, convener, rather than just coming up with things here and now.

The Convener: Is there anything else that members wish to raise here and now?

I take it that when members go away today, they might think about things that were discussed last week or, when they read the *Official Report* for this week's meeting, they might find that they wish to add something. Please pass that on to me or to Eugene Windsor.

My proposal would be to put all those comments into a letter to Frank McAveety. Frank agreed this morning to come to our meeting on the afternoon of 17 January, which is a Monday. Richard Kerley is coming that day as well. I am sorry that that is an extra meeting, but there is a time limit on the bill, and we move into stage 1 in the new year.

Eugene will let members know the exact time for the start of the committee that afternoon. I imagine that it will be about 2 o'clock. It will be important to hear how far down the road Richard Kerley is with his deliberations. After that, Frank will be at the meeting. By then, he will have had the letter with our comments, and will be answering the points that we make to him. We will discuss with him what he sees as acceptable or not.

Please note that we have another meeting the next day. The Local Government Committee meets on Tuesday 18th and I cannot remember what we are doing that day. [*Interruption.*] I have been reminded that we are considering the Abolition of Poindings and Warrant Sales Bill. That will be another important meeting.

We may find, like other committees, that, as we proceed further with legislation, we will have to add the occasional extra committee meeting. I try to avoid that, but it sometimes becomes impossible. We need to report back on the McIntosh report probably around the middle or end of February. We have a lot of work to do.

I do not think that I have forgotten anything. Having said that, we can now go and have a glass of wine and a mince pie at half past four instead of five o'clock.

Have a nice time and enjoy your break, all of you. It would be nice if you could come across the road to the members' lounge and have a drink. It is on me.

Colin Campbell: We will definitely go over there in that case.

Mr Gibson: We should have a whip-round.

Mr Paterson: We should have a vote of thanks for the convener.

Meeting closed at 16:06.

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