

STANDARDS AND PUBLIC APPOINTMENTS COMMITTEE

Tuesday 22 March 2005

Session 2

£5.00

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STANDARDS AND PUBLIC APPOINTMENTS COMMITTEE

3rd Meeting 2005, Session 2

CONVENER

*Brian Adam (Aberdeen North) (SNP)

DEPUTY CONVENER

*Mr Kenneth Macintosh (Eastwood) (Lab)

COMMITTEE MEMBERS

*Bill Butler (Glasgow Anniesland) (Lab)

*Linda Fabiani (Central Scotland) (SNP)

*Alex Fergusson (Galloway and Upper Nithsdale) (Con)

*Donald Gorrie (Central Scotland) (LD)

*Karen Whitefield (Airdrie and Shotts) (Lab)

COMMITTEE SUBSTITUTES

Lord James Douglas-Hamilton (Lothians) (Con)

Marilyn Livingstone (Kirkcaldy) (Lab)

Alasdair Morgan (South of Scotland) (SNP)

*attended

THE FOLLOWING ALSO ATTENDED:

Bristow Muldoon (Livingston) (Lab)

THE FOLLOWING GAVE EVIDENCE:

Dr Jim Dyer (Scottish Parliamentary Standards Commissioner)

CLERK TO THE COMMITTEE

Jennifer Smart

SENIOR ASSISTANT CLERK

Sarah Robertson

LOCATION

Committee Room 3

Scottish Parliament

Standards and Public Appointments Committee

Tuesday 22 March 2005

[THE CONVENER *opened the meeting at 11:21*]

Cross-party Group

The Convener (Brian Adam): Good morning. I welcome everyone to the committee's third meeting in 2005 and remind members that all mobile phones should be switched off.

Before we discuss item 1, I acknowledge the work that has been done by Catherine Scott, our legal adviser, who has moved on to greater things, and I welcome Mark Richards, our new legal adviser. I also thank Franck David for his work as part of the committee's clerking team and I welcome Ross Dickson to his new role in the clerking team.

I welcome Bristow Muldoon for item 1. I hope that we will see more of our cross-party groups coming together and being renamed. Members have the committee paper before them. Do you want to say anything to the committee, Bristow?

Bristow Muldoon (Livingston) (Lab): I will be brief. Our reasons for wanting to make this move are set out in the paper. There is a recognition that the issues that the cross-party group on strategic rail services for Scotland previously dealt with overlapped considerably with issues regarding other forms of transport and the work of another cross-party group. We want to look at sustainable transport systems in the broadest sense, as do many members of the current cross-party group on cycling, who would join the new cross-party group if it was approved by the committee. Unless members have any questions, I propose that the committee approves the move that I have set out in the paper that we have submitted.

The Convener: Do any members wish to ask questions?

Mr Kenneth Macintosh (Eastwood) (Lab): I endorse this sensible move. There are many cross-party groups and we are all over-extended. In the previous session, I was a member of the cross-party group on cycling but I could not find the time to support it. I thoroughly approve of this move.

The Convener: Can Bristow Muldoon give us some idea of how the cross-party group on cycling might be integrated into the new group?

Bristow Muldoon: There have been informal discussions between myself, Karen Whitefield MSP, who is the convener of the cross-party group on strategic rail services in Scotland, and Mark Ruskell, who is the current convener of the cross-party group on cycling. Mark Ruskell supports a move in this direction. At the previous meeting of the cross-party group on strategic rail services in Scotland, we agreed a new set of office bearers; however, we would be comfortable about revisiting that to ensure that former members of the cross-party group on cycling could become office bearers of the new cross-party group if it was approved. We would also welcome members of the Parliament and others who have attended the CPG on cycling to the new group, and we would endeavour to ensure that cycling issues were addressed as part of the new group's programme of work.

The Convener: I am sure that I speak for the committee in welcoming this move. It will have our approval, and we will write to you formally to say so. Thank you for coming along today.

Bristow Muldoon: Thank you.

Complaints

11:24

The Convener: Item 2 concerns our complaints process. I welcome Dr Jim Dyer, the Scottish parliamentary standards commissioner. In Dr Dyer's first annual report, which he published last June, he raised, among other things, the issue of certain actions on the part of some complainers that could be deemed to be undesirable. As we are conducting a review of the code of conduct for MSPs, this is perhaps a good time to consider whether there is a need for a procedure for dealing with such complaints over and above stage 1 of the current complaints procedure.

Today is an information-gathering exercise. I remind members that it might be a good idea not to refer to any individual cases or make comments that might cause individuals to be identified.

Dr Dyer, you have submitted your views in writing. We are delighted to have them. It might be easiest if we went straight to the question-and-answer session. I know that members have some fairly open questions that will allow you to supplement what you have said in your submission. Further, we will give you the opportunity to speak at the end if there is anything else that you want to say to us.

Donald Gorrie (Central Scotland) (LD): Dr Dyer, we have read your paper with interest. You perceive there to be a problem and we would like to identify the scale and nature of that problem.

We all have some experience of dealing with unreasonable people. Could you elaborate on your experience in that regard? Do you think that the volume of work that is generated by the unreasonable people is unreasonable and that, therefore, something must be done about it, or would you accept that that sort of thing, which wastes a bit of time, goes with the territory and must simply be tolerated? Why do you think that the matter is sufficiently important for us to have to consider changing the rules?

Dr Jim Dyer (Scottish Parliamentary Standards Commissioner): I am pleased to be giving evidence to the committee on this subject. The committee knows that I have felt for some time that this matter requires attention.

The problem that you mention is not a large problem numerically but it can tie up time. The essence of the approach that I have suggested is to ensure that the process is protected, so that it is available for its proper purpose, which is the serious issue of dealing with complaints against members of the Parliament, and also so that it does not fall into disrepute. If the process were

taken up too much by what we might regard as trivial or tit-for-tat complaints, it might not have the public respect that it needs if it is to function as well as it should.

Even if the proposals are adopted, there will still be some difficult action by complainers, as there would be in any system. However, any complaints system finds that, in order to keep the system free to fulfil its proper purpose, it has to adopt such proposals in order to manage the small number of people who act in a difficult fashion.

Donald Gorrie: If I were being slightly devil's advocate-ish, I could argue that the Parliament has appointed you as an independent commissioner and that, therefore, you should get on with it and exercise your own judgment with regard to what is reasonable, what is trivial and so on, and that it would be wrong for us to interfere in that process.

Dr Dyer: With regard to the suggested ways of implementing a policy, there are two choices. One would be to leave matters to my discretion and the other would be to involve the committee. I am interested in discussing whether the committee would be interested in being involved in that way.

Going back a bit, Parliament set up my role and made provision for it in the Scottish Parliamentary Standards Commissioner Act 2002, but the act does not include the mechanism that other pieces of legislation provide for screening out complaints that might be regarded as frivolous or vexatious. It provides three tests for assessing the relevance and substance of complaints, but I think that there is also a need for measures at a more basic level to screen out right at the start complaints that are unacceptable because they are repetitious, frivolous, vexatious or involve unacceptable conduct in some other way.

11:30

The Convener: On that point, if the act is silent, does that not give you discretion to act in precisely the way that you describe?

Dr Dyer: I would feel more comfortable if we had a recognised procedure. Individuals might be aggrieved at actions that I might take in relation to their conduct or their complaints, and it would be helpful if I was able to point to an agreed procedure that authorised such actions. Occasionally, I have had to act on my own initiative, but one is always potentially open to challenge in doing so. I argue that it would be desirable to have an agreed policy on the matter. Almost every other complaints scheme has such a policy, whether it is provided for in statute or is extra-statutory.

Linda Fabiani (Central Scotland) (SNP): I am thinking along the same lines as the convener. To me, someone who is publicly appointed, as you were, has to operate with a degree of discretion if they are to be seen as independent. I wonder why you think that you need something prescriptive to which you can point, rather than acting in a discretionary way and having the back-up of the committee if it comes to that.

Dr Dyer: I am simply asking for a policy that would be agreed by the committee, in the same way that the committee took action last year to protect itself from excessive lobbying by complainers. The committee adopted a policy on that, which will find its way into standing orders or the code of conduct. I am suggesting a similar policy to protect my part of the process, which could also involve an amendment to standing orders or the code of conduct.

You said that I can simply act with discretion. That is also true of the other commissioners, but, to take the Scottish information commissioner as an example, there is provision in the Freedom of Information (Scotland) Act 2002 for screening out vexatious complaints. That provision is missing from the legislation that set up my post; there has not been consistency on such things in legislation. I seek to remedy that by having an agreed policy that may or may not involve changes to either the code of conduct or standing orders.

Linda Fabiani: How do you envisage that system working? Are you saying that if there was a cast-iron, prescriptive provision in the legislation and you told someone that their complaint was vexatious, they would have no recourse at all because of that provision?

Dr Dyer: It is not in the legislation.

Linda Fabiani: No, but if it was—

Dr Dyer: I suggest that it might have been better if it had been. If the legislation is amended at some point in the future, perhaps attention could be given to the matter. In the meantime, my preferred solution is that certain types of complaints, or complaints that are associated with certain unacceptable actions by complainers, could be designated as excluded complaints. That solution would use the existing legislation, in that section 3(2) of the Scottish Parliamentary Standards Commissioner Act 2002 says that I shall not investigate excluded complaints unless I am directed to do so by the committee. If I encountered a complaint that appeared unacceptable, I could refer it to the committee, recommending that it be regarded as an excluded complaint and asking the committee for confirmation that I should not investigate it. It would be possible to do that within the existing legislation, using its provisions rather neatly and

involving the committee in the decision not to take on, or not to continue with, a particular complaint.

If the committee does not favour that idea, does not want to be involved and wants to leave matters to my discretion—I am happy to act on my discretion—it could simply issue a direction saying that in cases that involve unacceptable conduct by complainers, such as hostile or threatening behaviour, I have certain options, such as to not accept a complaint or to stop investigating a complaint after issuing a warning.

Linda Fabiani: Do you feel that you are not able to do that at the moment?

Dr Dyer: Well, I can do that just now, but somebody could challenge me by saying, “Where in section 10 of the code of conduct for MSPs or in legislation is the provision for you to do that?”

The Convener: Have you had any such challenge?

Dr Dyer: I have not had any such challenge to date, but I have been holding off from adopting such a policy. I imagine that challenges could be made—indeed, it is likely that they will be made in future—and some complainers are extremely determined individuals.

Karen Whitefield (Airdrie and Shotts) (Lab): In response to a question from my colleague Donald Gorrie, you said that, although the problem is not considerable in numerical terms, it takes up a considerable amount of your time. How much of your overall time is spent dealing with such complaints?

Dr Dyer: I cannot put a figure on the amount of time that they take up. In section 3.2 of my paper, I tried to indicate, without giving too much detail, the sort of issues that have arisen, including threats that have not been carried out to date, but which might be carried out in similar situations in future. For example, I said that two complainants

“have taken their concerns to several Members in turn and complained progressively about each after the previous complaint was deemed inadmissible.”

One reaches a point at which one wishes to say to the complainer, “Look, I will not consider any further complaints of a similar nature.”

Another complainant

“threatened to go on providing complaints if matters were not resolved to his satisfaction.”

People use the ability to keep coming back with complaints as a lever to get one to act in the way that they wish.

Somebody else suggested

“that there were other local residents who would send in further complaints on the same matter if his complaint was not handled as he wished.”

Although that has not happened to date, it might have done, and similar things could happen in future.

Another complainer

"couched his complaint in very derogatory and offensive terms."

Although I continued that complaint up to the point of assessing admissibility, there may have been grounds for saying, "Look, if you phrase your complaint in these very offensive terms, it will not be dealt with."

I went on to give a further example of a dissatisfied complainer who

"has threatened to hand his complaint on to a friend so that it will come back as a new complaint."

I would have had no mechanism under the provisions to stop that. I would have had to act arbitrarily by saying that I would not accept the same complaint from someone else.

The Convener: Will you elaborate on that point? Are you saying that, if someone else had come back with the same complaint, you would have had to look at it again?

Dr Dyer: Yes.

The Convener: Would that have been on the basis that the complaint was not identical because it came from a different complainer, or on the basis that it was not an identical complaint—full stop? There are various ways in which the word "same" can be interpreted: it can mean identical, similar or related. Would it be helpful if you were to take a robust view of such complaints and of the way in which you deal with them? You could use a wider definition of "same" than "identical".

Dr Dyer: On identical complaints, I have no formal provision at the moment for excluding a complaint on the basis that is identical to a previous one—I can only look again at its admissibility.

The Convener: Presumably the Scottish Parliamentary Standards Commissioner Act 2002 is silent on that matter. Does any part of the act say that you cannot deal with a complaint as I have just described?

Dr Dyer: No. Equally, there is no part that says that I can do so.

The Convener: If it is silent on the matter, surely that gives you discretion? Perhaps the committee might want to give further thought to the issue.

Dr Dyer: It would be helpful if the committee saw fit to agree a policy with me. As I said, the committee found it necessary last year to draw up a policy to protect itself from excessive lobbying by complainers. I am suggesting doing the same, but

seeking the committee's co-operation in the process. I have suggested a particular way of doing that, using the existing legislation. I gathered previously that it might be the committee's wish to be involved in the process, rather than to leave matters entirely to me.

The Convener: The committee has some sympathy with your views. We are just trying to tease out how what you propose might best be achieved by getting to the nub of some of our questions.

I was rude and interrupted Karen Whitefield—please continue.

Karen Whitefield: On trivial, tit-for-tat, abusive and derogatory complaints, sometimes the individuals who make such complaints have reached the end of a long period of complaining, and because they feel that they have not been listened to, their complaint can sometimes appear trivial or tit for tat. Sometimes people are so frustrated that the language they use becomes abusive. However, in such a complaint, there might be a genuine kernel of a problem. If we have a procedure that has no final arena for considering complaints and which says, "That complaint falls into one of these categories, so we will ignore it," is there a risk that we will prevent people's complaints from being properly and thoroughly investigated?

Dr Dyer: That is a good point that must be examined seriously. People will notice that I headed my paper "Unacceptable Actions by Complainers" rather than "Frivolous, Vexatious and Repeat Complaints". In doing that, I followed the Scottish public services ombudsman's well-recognised policy, which has the same heading. Its purpose is to avoid stigmatising people by calling them, for example, vexatious complainers. I am looking at actual conduct in a particular situation, which may or may not be acceptable, rather than applying a label to a person, which is undesirable.

I state in my paper:

"Conduct should not be regarded as unacceptable simply because it is forceful or determined."

A strong degree of persistence might be a necessary attribute of a complainer if they are to get through a whole complaints process. In the same way, people who complain repeatedly should not be barred simply because they complain repeatedly. They should be barred if their complaints are exactly the same, but people may acquire experience in complaining and in the issues that they are complaining about, and may raise valid issues in repeat complaints, perhaps about different members. The issues need to be examined carefully.

I aim to act carefully and to give people every chance to have their complaint considered but, however I act, the risk that you point to would be smaller if there were an agreed and published policy, rather than if I were simply to act entirely at my own discretion.

Karen Whitefield: If somebody who comes along to my surgery is abusive and derogatory, I suggest to them that they couch their approach in a different way. If they choose not to do that, I suggest to them that they can still communicate with me, but in writing, rather than by coming along to my surgeries, because I consider their presence to be menacing. Is there anything to stop you writing to an individual who has couched their complaint in an abusive and derogatory way, saying, "I will not be able to consider your complaint unless you change your approach"? You would not be saying that you cannot consider their complaint at stage 1; you would just be asking them to consider how they are going about pursuing it. Sometimes people can be abusive, not because they mean it, but because they are frustrated, and if they are forced to think about that, sometimes they change their behaviour. That does not mean to say that their complaint is any less valid; it just forces them to think about how they are behaving.

11:45

Dr Dyer: You could argue that there is nothing to stop me from taking that approach now, but the complainer could point to section 3 of the 2002 act and the three tests of admissibility. Section 3 says that the function of the commissioner is to investigate complaints. One could argue the point, but the complainer might look at that provision and say that I should take on every complaint and consider its admissibility. I would rather agree with the committee a policy that I could publish and that was open to all. People would then be able to judge whether I applied that policy consistently. The policy, which would be available right at the start of the process, would say that certain things would happen if people behaved in an unacceptable fashion or presented unacceptable complaints.

Karen Whitefield: At the moment, you are not saying that you will not investigate such complaints; you are just asking the complainer to change the manner in which they bring the complaint to you so that it is not abusive or derogatory.

Dr Dyer: I can remember one occasion on which, in the absence of a policy, I was obliged to say that I would not take on any further complaints.

Linda Fabiani: You said that the Freedom of Information (Scotland) Act 2002 contains the provisions that you described. Is the public services ombudsman also able to rely on such provisions?

Dr Dyer: I cannot tell you that offhand. I know that the public services ombudsman has a published policy, which I used extensively when I was framing the policy that I am suggesting. I would need to look up the legislation.

The Convener: We could examine that.

Mr Macintosh: I want to expand on the questions that Karen Whitefield asked you. I cannot speak on behalf of other members but I have every sympathy with your position if, as you say, the serious matters that you are expected to deal with are being obscured or if the balance of your workload is being tipped the wrong way and you are spending too much time on matters that are unlikely to go very far and are, in your opinion, not worthy of the same attention or of your time. You certainly have my sympathy because you have to get that balance right.

Although a couple of questions have been asked—I know that the discussion is made more difficult because we cannot talk about specific cases—I cannot quite capture the idea of how much of your time is spent on such matters. How much time do you spend sifting initial complaints, dealing with stage 1 complaints and dealing with stage 2 complaints? If you were able to implement this more robust policy, what impact would that have on your time?

Dr Dyer: It is very difficult to give a clear answer to that. The workload fluctuates quite a lot. Obviously, the degree to which such matters take up time and take time away from work on other complaints is felt most when I am particularly busy, as I am at present. I am really working full time at the moment and have been since the middle of January. Therefore, I feel more strongly about any complaints that have the characteristics that we are talking about than I do when things are a bit quieter, when I do not feel the impact of such complaints quite so much.

Despite that fluctuation, there is still a case for having a policy that could be operated consistently, irrespective of the workload. Normally, more than half my time is taken up with sifting complaints at stage 1. That is not the case at present because I am dealing with a number of stage 2 complaints. My workload varies quite a lot, however the kind of complaint that we are talking about can take up quite a bit of time in correspondence, phone calls and so on.

The Convener: Mr Butler wants to ask about a related matter and how it impacts on your workload.

Bill Butler (Glasgow Anniesland) (Lab): Dr Dyer, in response to Donald Gorrie, you said that the problem was not with the large numbers of complaints but with the time that they tie up. In response to Ken Macintosh, you said that the time that you spend on complaints fluctuates with the type and number of cases and so on. I suppose that you are saying that if we could agree on a procedure with you, that would help to prevent the build-up of cases. However, given that discretion and individual judgment are built into the process—you are the person exercising that individual judgment—it is difficult to understand how one agreed procedure could cover all circumstances in all cases.

All complaints have to be considered for admissibility under section 6 of the Scottish Parliamentary Standards Commissioner Act 2002. Would it be helpful if the stage 1 reports were shorter—simply saying whether a complaint was admissible and, if not, which provisions of the act meant that you were not proceeding to stage 2?

Would it be helpful if you did not have to use the present labelling of complaints? You have said—correctly—that such labelling can be inappropriate and rather worrying. Would it be possible to short-circuit the process? You could simply say, “That complaint is inadmissible, this is the reason why, and that’s that.” In that way, we could have an agreed procedure that met the terms of the act. That would allow us to get round the blockage caused by cases that may be repetitious, frivolous or inappropriate.

Dr Dyer: I understand the point. In the absence of a policy, what you describe is, to some extent, what I have had to do to date. For some complaints, I have been able to decide very quickly on admissibility. At the same time as I have told a member about a complaint, I have been able to tell the member that I consider the complaint inadmissible.

However, that does not apply to all situations, because a repeat complaint might pass the test of admissibility. It might be relevant, it might involve a breach and it might have substance, but it might be so similar to a previous complaint that it is, in effect, the same. I have no formal method of screening out that complaint.

Another disadvantage to your suggestion is that I need to take the complaint into the system in order to consider it at stage 1. I need to notify the member and seek a response, unless a complaint is obviously inadmissible from the start. That is not the usual situation; usually, the admissibility has to be assessed.

I would like there to be a policy so that—in the small number of cases that we are talking about—I

could screen out certain types of complaint at the start, without taking them into the formal system.

Bill Butler: I understand that. The number of cases is small and you have to take them to stage 1 on admissibility. Would it not be quicker to say, “This complaint meets the criteria for stage 1, but only in narrow terms. Having looked briefly at it, I can see that it is repetitious and therefore inadmissible”? Bob’s your uncle, to use a technical term.

Dr Dyer: One of the points that I am making is that the admissibility test would not necessarily screen out the kind of problems that we are talking about. There is nothing in the admissibility test about screening out a repeat complaint.

Bill Butler: Exactly—I take that point. However, unless I have misunderstood you, you are saying that such cases are very few. If you take a complaint to stage 1, make a brief report that meets all of the demands of the legislation, and are able to say, quickly, that the complaint has been considered and is inadmissible because a particular test has not been met, would that not clear the way for you to use your judgment and exercise your discretion, as the act demands, on complaints that have more substance? Would that not be the much more effective and commonsense way to proceed, rather than for us all to try to agree a procedure that covers all circumstances? I know of no policy or procedure that would cover all circumstances. That is the problem. Do you see where I am coming from?

Dr Dyer: I am sure that the Parliament has many policies and procedures that do not cover every conceivable circumstance, but that is not a reason for not trying to anticipate circumstances that might arise. Your argument works as long as the complaint is inadmissible, but there is nothing to make a repeat complaint or a complaint that is couched in offensive and derogatory language inadmissible. Admissibility is to do with whether there is a potential breach of the code of conduct by the member, whether certain procedural requirements are met and whether the complaint has sufficient substance to warrant further investigation. Those criteria might all be fulfilled by complaints that could still be regarded as unacceptable.

Bill Butler: That is interesting. I am glad that we have had that wee discussion.

Donald Gorrie: Why would complaints be unacceptable? I fail to get that point.

Dr Dyer: For example, if somebody sent in a complaint but was dissatisfied with the result, they could get their neighbour to send in the same complaint and, if it had been admissible the first time, there would be no reason why it would not be admissible the second time. Similarly, a

complaint could be phrased in offensive and derogatory language such that I would feel that it was not appropriate for me to take it on unless it was couched in more appropriate language, on the grounds that I treat all complainers with courtesy and expect them to treat me and others who are involved in the complaints process with a similar degree of courtesy. There is nothing in the admissibility tests that would screen out such complaints.

The Convener: To take Donald Gorrie's point and one that you made earlier, we want to have a commonsense approach to complaints, as the 2002 act is silent on dealing with repetitious complaints. If the commissioner has investigated the substance of a complaint, the fact that a different complainer makes the same, a similar or a related complaint is clearly a waste of the commissioner's time and any investigation will not arrive at a different conclusion, as the same person will undertake the investigation.

Dr Dyer: Quite so, so why not say so plainly and openly in a policy that people can read?

The Convener: That is the substance of our discussion. The question is whether the fact that the 2002 act is silent on that point allows you the discretion to deal with it as you might wish to do and as you might wish to be given guidance to do. The committee will have to decide whether we need to change the legislation, issue a direction or change the standing orders and consider whether any of those are possible. However, I suggest to you that you have that discretion because the act is silent. I might be misreading it, but I do not think that I am. The committee is saying that, until we have deliberated on the matter, we wish you to deal with complaints in precisely that way. That is not to pre-empt the outcome of today's discussion, but I think that it is fair to say it.

Do I have the committee's agreement to that?

Members indicated agreement.

Mr Macintosh: Dr Dyer, is it your opinion that you can currently reject unacceptable complaints? I know that you would like an explicit statement of our support for that approach—I have no hesitation in giving you my explicit personal support—but we must be careful about the relationship and whether the committee should give you such guidance all the time. Putting aside today's discussion, do you think that you are currently in a position to decide to reject unacceptable complaints without an explicit statement of approval for that from the committee?

12:00

Dr Dyer: Circumstances occasionally demand that I do so and I have had to take such action at

my own discretion. However, I would feel more comfortable if I could point people to a policy that was open and above board and which they could read and understand. I want to be able to say that the policy has been agreed with the committee.

In the same way that the committee wished to be involved in my information strategy, my media strategy and my voluntary code of conduct, I thought that the committee would wish to be involved in this issue, which also affects the committee. If I accept unacceptable complaints into the complaints process, the committee might find that it needs to deal with them after stage 2.

Mr Macintosh: I noted down that you said that you would feel more comfortable if you had a more explicit statement from the committee. You said that you would prefer to have a policy that was agreed and published, so that there could be no doubt. However, I think that it is clear that you could take decisions without such a policy.

My own reading of the unacceptable and repeat complaints situation is that if you have investigated an issue already, you will already have concluded whether a fracture of the rules took place when you established what happened. Therefore, if somebody makes a similar complaint, given that you need to accept a complaint only if it can be established that something took place, you will not need to accept the complaint because you will already have established that nothing took place. The code of conduct already contains a fairly explicit statement that gives you the grounds that you need. My interpretation of the situation is that you have clear grounds in writing to reject repeat complaints. The interesting thing—

Dr Dyer: If I may, I will interrupt you there. We all understand that there can be nuances. The same actions can affect different people and different people can make complaints about the same set of actions. The issue might need further thought.

Mr Macintosh: I totally agree. The whole reason why we avoided explicitly stipulating all the different varieties of grounds on which a complaint might be rejected was that we want you to make that judgment. These are difficult decisions, but we want you, as a robust and independently minded person, to be able to judge whether a complaint has come from someone who is just abusing the system—for instance, by repeatedly wasting your time simply because they did not like the outcome of a previous complaint—or whether it is a genuine complaint that should be investigated further. That is a difficult decision to make, but that is why you are there.

Dr Dyer: I do not shirk from making difficult decisions.

Mr Macintosh: I am not saying that you do.

Dr Dyer: In this context, if I have to make a difficult decision, that is what I do. However, I am saying that I am always open to challenge in doing so. In such circumstances, one likes to feel that one has as much back-up as possible.

Mr Macintosh: I would also like to say—

The Convener: Given that the question that I asked the committee about how you handle repeat complaints will now be a matter of public record, does that offer you some comfort?

Dr Dyer: It offers comfort up to a point, but I still want to present the argument to the committee that it would be desirable for us to have an agreed policy that is open to all and to which complainers could refer from the start. For example, if the policy was on my website, it would be obvious to people that the policy was applied fairly and consistently. That is desirable. I also desire to be able to say that the policy was agreed to by the committee.

The Convener: You will certainly be able to point to the committee's view on how the repetitious stuff should be dealt with. Notwithstanding that, we will definitely take away and consider the views that you have brought to the committee today. We will actively consider your proposal along with any other advice that we may receive on the matter. However, it will now be a matter of public record where the committee stands on that issue. There was no dissent whatever within the committee on the issue.

I apologise for rudely interrupting Mr Macintosh.

Mr Macintosh: It was a helpful interruption.

I echo the point that the convener has made. In my mind, there is no doubt that we expect you to investigate all complaints and to treat them all seriously until you have established their authenticity and where you should take them. However, you also have a duty to your own office and to the Parliament not to pursue trivial issues. That is part of your obligations. If you should need a justification, it is already there—I would have hoped that that was explicit.

I refer back to a question that I asked earlier, which you answered to a large extent. You are going through a particularly difficult period at the moment. Although the initial sift and the stage 1 deliberations should not, and do not, take as long as stage 2, they really get in the way when you have a huge number of complaints or a large number of serious issues to consider. You have now been in office for two years. I might just be thinking this because of my own sensitivities, but it would not be surprising if there were a peak a couple of months before an election. Perhaps I am being cynical, but I suspect that there will be

peaks and troughs in the levels of complaints that you receive.

We have already said that we are going to examine the matter of vexatious, frivolous and repetitious complaints under our review into the code of conduct. Today, you have asked us to make a more explicit and urgent recommendation now. Would you be happy to tough it out over the current period, assuming that, after some time, we will have a better view about how difficult your workload will be to manage? Rather than for us to make an explicit statement today or at our next meeting, would it not be preferable, or at least possible, for us to consider this matter over a slightly longer period, so that we get a better view of whether you are experiencing a particular difficulty now or whether it is a serious and long-term problem?

Dr Dyer: People should not misunderstand the situation. They might think that I am raising the issue now because of current workload pressures. In fact, I first raised it with the committee early in 2004. I e-mailed suggestions in March 2004 and wrote to the committee in May 2004, at the clerk's request, with some substantive proposals. I am not raising the issue because of the current heavy workload, and it would be wrong of me to do so—it would be wrong to have a policy under which the approach depended on workload. If I was particularly busy at a given moment and chose not to consider a complaint that seemed a bit trivial, that would be quite wrong. Any approach must be applied entirely consistently, independently of workload. The only fair way to do things is on the basis that everybody deserves consideration of their complaint that is fair and as full as is appropriate.

I would like to clarify with the committee what is done now. One suggestion is that I act on my own discretion. I would still want to have a written policy, perhaps using some of the stuff that I have written and submitted to the committee. There would then be the question whether the committee wished to agree that policy formally.

Another solution that I have suggested is to deal with the matter more formally by agreeing that certain kinds of complaint and complaints associated with certain kinds of actions should be designated as excluded complaints. The 2002 act provides for that. I am prevented from investigating excluded complaints unless I am directed to do so by the committee. That would allow a sort of appeal for people. If I said that I was not taking on a complaint or was not going to continue to act on the complaint, the committee could play a role; it would decide whether to direct me to investigate the matter. That would put the whole thing on a more formal basis.

For something as important as this, I would prefer the latter approach, rather than having me use my own individual judgment and policy. It is a matter for the committee. Am I right in thinking that those are the options that the committee is considering?

The Convener: Those are certainly among the options that we will have to consider. We will also have to consider whether the options that you are offering us are compatible with the 2002 act. We will get advice on that.

Perhaps I should offer a counterpoint to your view. You have rightly highlighted that we have taken an interest—indeed, have actively participated—in the establishment of your office and in some of the detailed work that you have carried out, and we are delighted to engage with you again today. However, the public might not want us to involve ourselves too closely in decisions about a complaint's admissibility, especially in the early stages of that process. After all, if one were being cynical, one might take the view that it is in the interests of the MSPs concerned to kill off the matter as early as possible. If we were involved in that process, we might be to some extent interfering with your office's independence and the public perception might be that we are too closely involved in the process. Your suggestion is certainly an option, but it has its downsides as well as its upsides.

Dr Dyer: I understand the argument that building in some sort of appeal has the downside of potentially undermining my independent role in assessing the admissibility of complaints. Indeed, that is why I included the other option. The committee could consider issuing a direction that simply empowers me to treat certain complaints and actions in certain ways. However, in that case, there would be no appeal, because the committee would have no mechanism for directing me to act in a particular way on a particular complaint. The act prohibits such actions, except in cases such as excluded complaints where they are specifically allowed.

That said, such an approach would meet the criticism that the committee should not be involved in directing me to act in a particular way on a particular complaint. I accept that point, if the committee feels it important not to undermine my independence in that regard. Obviously, I believe the independence of my role to be extremely important, and I am quite happy to act in an independent fashion and to make decisions on my own. However, I would still prefer the committee to issue a direction. After all, it has issued directions on other aspects of the complaints process such as tape-recording interviews. For example, the committee could issue a direction that empowered me to act in a particular fashion not just on a

specific complaint but on any complaint that was associated with unacceptable actions.

The Convener: You rightly point out that, following the passing of the 2002 act and your appointment as standards commissioner, the Parliament has set up a series of commissioners and ombudsmen with successive legislation that has taken cognisance of the very point that you have raised. I believe that that should give you comfort when it comes to any challenge to your office or any decision that you might make. However, the arrangements for those other commissioners and ombudsmen form part of the primary legislation itself. One of the options before us is to take the same route, but that is a fairly substantial way of dealing with what is not necessarily a major problem of scale.

Dr Dyer: For the sake of clarity, I am not suggesting that primary legislation should be introduced to deal only with this matter, although it might become necessary in future.

The Convener: But our legal advice might be that, in order to achieve the objective and given the fact that the 2002 act is silent on this matter, primary legislation is the only way of sorting out this matter short of your exercising discretion. Of course, we might not receive such advice but, if we did, taking such action would be a fairly serious matter. If the committee decides to do so, I as convener will certainly not shirk from it. However, we have already promoted one piece of legislation, and I do not know whether there is enough parliamentary time to promote another.

12:15

Donald Gorrie: I would be open to persuasion about giving you something to help you to deal with complaints when it is a question of the nature, quality or substance of the complaint, to stiffen your sinews a bit. I am a bit more concerned about the second aspect of your paper, on cases where the complaint may be okay but the behaviour of the complainant may not be okay. I think that you have to put up with that and I believe that Karen Whitefield's suggestion is quite legitimate. It is quite legitimate to say, "I will not meet you or take your telephone calls, because you are a rude person, but I will deal with you on paper." The fact that a person who may have a valid complaint acts in an improper way does not make his complaint invalid, so I am not happy to deal with both those issues in the same way.

Dr Dyer: Sometimes members act in the way that Karen Whitefield described, saying, "Right, I'm going to accept only one form of communication from you," or, "You can write to me, but you're not allowed to visit the office." Sometimes, however, members say, "I'm not going to have any further

contact with you at all.” For example, if people have acted in a threatening manner in the office or have made threats to the member’s staff, sometimes I get a complaint that the person is not being represented by the member. I think that the same sort of thing should apply to me. In extreme circumstances, I should be able to cease to act on a complaint relating to very unacceptable behaviour.

Returning to what the convener said about primary legislation, I am not for a moment suggesting that primary legislation should be embarked on in order to solve only this problem. I think that it could, if the committee saw fit, be dealt with by a direction. The committee has, of course, issued directions on things on which the act is silent. For example, the act is entirely silent on letting the complainer see a copy of the draft report. It requires that the member but not the complainer sees a copy of my draft report. The committee felt that it was right that the complainer, too, should see a copy of the draft report, and it issued a direction on that without seeking to change primary legislation. By analogy, one would think that the same sort of thing could apply in this case.

The Convener: We shall certainly take advice on that specific point.

Mr Macintosh: I return to the question that I asked about the urgency of the situation. I totally accept that you brought the issue up more than a year ago, but we are going to look at the matter as part of our review of the code of conduct anyway. There are clearly difficult issues involved, and I do not think that you can be in any doubt about the committee’s view that we wish to give you the support that you seek. The question is whether you get that support formally in a policy statement or direction, and that is a tricky question, because the more we give you directions, the more the relationship between us changes. The idea of an independent commissioner was that it would be an independent person who made independent judgments.

The strength of your judgment is in that independence. If you say, “I’ve rejected your complaint because of a bit of paper that the committee gave me,” that does not carry the same authority or weight. These are tricky issues, and in many ways they are issues that should be considered not as one-offs but as part of our relationship generally and as part of a bigger picture. How urgent is the matter for you? We obviously have to consider it, but are you looking for a decision right now—not necessarily today, but perhaps at the next meeting—or are you content with the fact that we will be considering the matter anyway? You have already had a statement of our intent from today’s public

discussion, but we will be able to consider the matter more generally as part of our review of the code of conduct.

Dr Dyer: The matter is important, rather than immediately urgent. As you said, I thought that it was important a year ago and it is no less important now. That is not to say that there needs to be a decision by next Friday, or whenever, but I would not like to see it long delayed. What I am saying, very politely, is that if I do not have the backing of the committee, I could be left in a more vulnerable situation should any actions be challenged, and that is a situation that I am seeking to address in making this approach to the committee.

I imagine that the review of the code of conduct will take some considerable time, so the replacement of the Scotland Act 1998 (Transitory and Transitional Provisions) (Members’ Interests) Order 1999 will have to happen first. That is a matter for the committee, but that is just my guess. Finalising a review of the code of conduct is some way off and I would be reluctant to see the matter wait that length of time. I therefore invite the committee to consider doing something in the more immediate future to tackle the issue.

The Convener: Thank you for coming today. You have answered a wide-ranging series of questions on the issue. Is there anything further that you want to add that we have not covered?

Dr Dyer: I do not think so. We have covered it all.

The Convener: It may well be that we will put some technical questions to you in writing, about the number of complaints and so on. I can assure you that the committee has some sympathy for the position in which you find yourself. I hope that we have given you some comfort with regard to that, but we cannot guarantee you an earlier resolution than the timescale that you have referred to.

You are right to say that the committee has dealt with the members’ interests order and that parliamentary procedures have to be completed on that. We are in the early stages of dealing with the code of conduct, and today’s meeting is part of that discussion. I speak on behalf of the committee when I say that we will be discussing that and will probably take a view on this aspect of the code at an early stage. That discussion will be in the *Official Report*, so that should also offer you the same kind of comfort that we have given you about repetitious complaints.

My recollection of the tone of the questioning is that on only one aspect of your concerns were any objections or concerns raised by members, and Donald Gorrie was quite right to emphasise the fact that someone being objectionable in how they make a complaint does not negate the quality of

the complaint. I do not think that you were suggesting that.

Dr Dyer: My policy would be that every effort would be made to continue to act with people whose conduct is difficult, and only in rather extreme circumstances would one wish to withdraw from that process.

The Convener: We accept that that is the case. The committee gave you an explicit view on that. I suspect that committee members are broadly sympathetic on almost everything that you have said, and I was only highlighting the specific minor concern that was raised.

On behalf of the committee, I thank you very much for your attendance. That completes our consideration of the issue today. I thank members for attending.

Meeting closed at 12:23.

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