

STANDARDS AND PUBLIC APPOINTMENTS COMMITTEE

Tuesday 1 November 2005

Session 2

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STANDARDS AND PUBLIC APPOINTMENTS COMMITTEE

10th Meeting 2005, Session 2

CONVENER

*Brian Adam (Aberdeen North) (SNP)

DEPUTY CONVENER

*Bill Butler (Glasgow Anniesland) (Lab)

COMMITTEE MEMBERS

*Linda Fabiani (Central Scotland) (SNP)

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

*Donald Gorrie (Central Scotland) (LD)

*Christine May (Central Fife) (Lab)

*Karen Whitefield (Airdrie and Shotts) (Lab)

COMMITTEE SUBSTITUTES

Lord James Douglas-Hamilton (Lothians) (Con)

Paul Martin (Glasgow Springburn) (Lab)

Alasdair Morgan (South of Scotland) (SNP)

*attended

CLERK TO THE COMMITTEE

Andrew Mylne

SENIOR ASSISTANT CLERK

Sarah Robertson

LOCATION

Committee Room 4

Scottish Parliament

Standards and Public Appointments Committee

Tuesday 1 November 2005

[THE CONVENER *opened the meeting at 10:59*]

Deputy Convener

The Convener (Brian Adam): Welcome to the Standards and Public Appointments Committee's 10th meeting of 2005. I invite members to switch off their mobile phones if they have not already done so. I am glad that we are all present and correct.

Item 1 is our choice of deputy convener. The Parliament has resolved that the deputy convener is to be a Labour Party member. I ask for a nomination.

Karen Whitefield (Airdrie and Shotts) (Lab): I nominate Bill Butler to be deputy convener.

The Convener: Members have no other nominations, so I congratulate Mr Butler on his appointment, subject to the committee's agreement, which I assume we have. Do members agree?

Members indicated agreement.

Bill Butler was chosen as deputy convener.

Linda Fabiani (Central Scotland) (SNP): He looks so happy.

Bill Butler (Glasgow Anniesland) (Lab): To be deputy convener is a privilege for which I thank the convener and other members.

Cross-party Groups

11:01

The Convener: Agenda item 2 is a proposal for a cross-party group on dyslexia. As usual, we have the appropriate paperwork. The proposed group would comply with the rules and regulations. Rosemary Byrne, who would be one of three joint conveners, submitted the application. We hoped that she would be present to answer questions, but she is not. Do members have any questions or concerns?

Bill Butler: The proposed group seems to conform to the cross-party group rules. On that basis, I have no outstanding concerns. I do not know about other members.

The Convener: There are no further comments so, as the committee is content and the group complies with the rules, we will approve the application. I will write to the group on the committee's behalf.

Agenda item 3 is a request for recognition of a proposed cross-party group on Malawi. Karen Gillon submitted the application. Unfortunately, she is unwell and her co-convener, Michael Matheson, cannot attend the meeting. Do members have any comments or questions?

Alex Fergusson (Galloway and Upper Nithsdale) (Con): Members will see that my name—although spelled wrongly—is attached to the proposed group. I was not aware that nobody would be able to speak on the application's behalf. Given the focus that we have placed on Malawi, the Scottish connection with the country and the fact that the group accords with all the regulations that govern cross-party groups, I feel that the committee should see fit to approve the group.

The Convener: Is that the committee's general feeling?

Members indicated agreement.

The Convener: As with the cross-party group on dyslexia, the cross-party group on Malawi has been approved and I will write to it accordingly on the committee's behalf.

That puts the number of cross-party groups at more than 60. I suspect that some of them may be struggling a little, but I hope that we will have the opportunity to discuss in the foreseeable future how we deal with the viability of such groups.

Code of Conduct

11:04

The Convener: Agenda item 4 is the review of the code of conduct. Members have received paper ST/S2/05/10/5, which I suggest we go through paragraph by paragraph.

Paragraph 1 is an introduction and is self-explanatory.

Do members have comments on paragraph 2? It is useful to have highlighted the subjects in which we might have an interest.

Do members have comments on paragraphs 3 to 6, on page 2, or on anything on page 3? The clerks have done an excellent job in teasing out the issues and highlighting how we might make things a little clearer.

In relation to page 4, we heard some comments on the status of the key principles and there has been some confusion about what is a principle and what is a rule. I think that page 4 helps to clarify that. Are members happy with paragraphs 13 and 14?

Members indicated agreement.

The Convener: The status of annex 5 to the code of conduct has been problematic and it caused some work in the first session of Parliament although, thankfully, it has had a lower profile in the current session. Nevertheless, the suggestion that we invite the Presiding Officer to give his views on how annex 5 has worked and where it ought to fit in is a useful one. Do members have comments on that or on anything else on page 4?

Bill Butler: The proposal to consult the Presiding Officer on annex 5 is eminently sensible. That is how we should proceed.

The Convener: Paragraph 19, on page 5, is not absolutely clear on the role of the commissioner. It implies that the committee cannot direct the commissioner, but that is not absolutely correct. I thought that we had the right to direct the commissioner to hold an investigation in circumstances in which he would not necessarily do so automatically, and I am not sure whether paragraph 19 makes that clear. The clerk will advise us.

Andrew Mylne (Clerk): There are provisions in the Scottish Parliamentary Standards Commissioner Act 2002 that define the basic structure of what the commissioner is able to investigate. The act includes a statutory basis for the definition of excluded complaints; what actually counts as an excluded complaint is determined at a lower level, but the basic framework is in the act.

There is a mechanism for varying the parameters of what falls to the commissioner to investigate and we suggest that that should be tidied up.

The Convener: One way to do that is to add complaints under annex 5 to the list of excluded complaints.

Andrew Mylne: Yes.

The Convener: We can cover that as we go through the detail. My concern about paragraph 19 is that it does not acknowledge that we have the capacity to direct the commissioner to deal with a complaint, but perhaps that paragraph is not the proper place to raise the matter.

Do members have any comments or are they happy with the explanation from the clerk?

Donald Gorrie (Central Scotland) (LD): Just before the meeting started, the clerk mentioned to me that the dreaded Sewel motions may impinge on the matter. They are being considered by another committee I am involved in. Is this a suitable moment for the clerk to tell us about that or is it a matter for another day?

Andrew Mylne: That matter is separate from the matter that is currently under discussion.

The Convener: The only other matter that I want to mention is on page 5. Given current circumstances, a specific mention of allowances in paragraph 24 might be appropriate. There is a reference to

"accommodation and the use and security of Parliamentary facilities".

However, a decision to include a reference to allowances is for the Scottish Parliamentary Corporate Body to make. We can deal with that as we go through.

Bill Butler: The general reference to the "services" that are provided is perhaps sufficient.

The Convener: Fair enough. As well as consulting the Presiding Officer, we will consult the corporate body.

Page 6 covers consultation of members. I was approached by a member who expressed the same concerns as the commissioner has expressed about repeat, vexatious and abusive complainers. As part of this process, we should revisit that general issue. At the very least, we should spell out to members the guidance on how to deal with such inquiries. A member might decide not to deal with a constituent any longer because of problems, only to find themselves in breach of the code. That is perhaps relevant not only to the commissioner and members; these days, it could concern staff who have to make difficult decisions about dealing with members of the public.

Donald Gorrie: That is an important point. Is it worth exploring whether members should notify the commissioner when they decide to cut off relations with a constituent? The fact that any future failure to reply was deliberate and was not the result of incompetence would then be on the record. It would have to be done in private; we would not want a blacklist along the lines of "Mr Bloggs of 10, High Street, Edinburgh is persona non grata," but such notification might provide cover for a member or a member of staff who had made a deliberate decision no longer to deal with a member of the public because they had put themselves beyond the pale.

The Convener: That is certainly an option that we should consider. Today is about identifying the issues and how we make progress on them, but your suggestion is an eminently sensible approach. If a member of the public is to be cut off, they need to be notified and told why. Informing a third party would also provide a safeguard for the member.

Bill Butler: We should explore Donald Gorrie's proposal. Perhaps we could do that when we invite the business managers to give oral evidence.

The Convener: Indeed, they may be the appropriate people to notify. In one incident, a member was accused of a breach of the code and the fact that that member had taken advice from and notified a business manager helped to give protection.

Christine May (Central Fife) (Lab): Telling someone, "I am not prepared to have anything more to do with you on any matter" is the most extreme example. For most of us, notifying constituents would happen when we believed that we had done all that we could on an issue. When we consider how to deal with the most extreme circumstances, it might be helpful to consider also specific cases in which we might say to a constituent, "Correspondence on this matter is now closed."

11:15

The Convener: Yes. The issues with which we have wrestled in the past have concerned the repeat aspect—which is what you are talking about—the vexatious aspect and the abusive aspect. It is more the last two that the rest of us have been discussing, but you are quite right about having an appropriate mechanism and guidance for dealing with constituents whose case a member does not believe can be progressed further.

Christine May: It is also about when the repeat element becomes vexatious and abusive, which it generally is.

The Convener: Are members content with how we will consult our colleagues in the Parliament?

Members indicated agreement.

The Convener: The paragraphs that follow are on the publication of directions. If there are no comments on that, let us turn to the conclusion, in paragraph 32. I am certainly happy with each of the bullet points in that paragraph, but I would like to add a further one. We have identified those folk who are most likely to have an interest and to come back to us, but there is also the matter of encouraging public participation. We need to have an element of that, especially in light of recent controversies.

When we invite public participation, some of our colleagues in the press might have some interesting views to express, and we might wish to contact the lobby directly to ask what it thinks we should be doing to be open and accountable. That might be helpful. I have spoken to someone who has taken a keen interest in some of the more recent cases that have appeared. I suggested to that journalist that it would be useful if the press expressed their views, which would be considered as part of the process. I think that we should invite public participation and, specifically, write to members of the press. I am not sure what the appropriate organisation would be to deal with that and to which to disseminate such an invitation. Do members have any other suggestions about how we might deal with things?

Karen Whitefield: It is important that we have public participation. However, I am slightly concerned that if we issue a consultation document on the matter, it will be a dry topic for many people, even for those with an interest in the subject. We perhaps need to consider how we consult members of the general public, who might think that the Parliament contributes something to life in Scotland and with whom we really should be engaging.

I do not think that there is any easy solution to the issue of public participation, and I do not think that we will be inundated with people wanting to respond to us, but I wonder whether it might be possible for the clerks to do some work to model ways in which we might better consult, or at least give people the opportunity to engage with us on a subject that is generally considered to be dry, and in which nobody has much interest until something goes wrong and somebody is complained about. We should perhaps at least try to do that, while accepting that there will not be an easy solution.

Linda Fabiani: It is difficult to know how best to consult the public. There must be agencies that work on behalf of the public, which we can ask to speak to. Listening to Karen Whitefield, I thought first of the office of the information commissioner,

which might provide a stepping stone to finding out how the public would like openness and transparency to be developed.

Christine May: It might be appropriate to consult an organisation such as Citizens Advice Scotland. However, it might also be worth testing whether our impressions of the public's expectations match their articulation of their expectations. We could then have a debate on the extent to which the expectations on either side are reasonable and can be regulated. In my short time on this committee, I have discovered that this matter is a minefield of perceptions, expectations and passionate feelings. Quite often, people who make complaints are disappointed because the resolution that they desired could not be achieved rather than being disappointed because no resolution was achieved. Even an online questionnaire might elicit some impressions, perceptions or expectations that we could work up into something that could be tested.

Alex Fergusson: As we discovered once before, if we have a completely open public consultation on the matter, we face the danger of receiving responses from only a limited number of people with a narrow viewpoint, which we then have to take as being the full public response to the consultation when, in fact, 99.999 per cent of the population have, by their lack of response, deemed either that they are not interested in the matter or that they are quite happy with the current situation. I am slightly wary of ending up in the same trap. I am trying to remember the consultation to which we received those responses.

The Convener: It was the consultation on the Scotland Act 1998 (Transitory and Transitional Provisions) (Members' Interests) Order 1999.

Alex Fergusson: That's the one.

The Convener: Although we extended the timescale for public responses, we attracted only a little more than 30 responses from a little more than 20 participants. I should also point out that, despite the wide-ranging range of interests that members might declare, the members of the public who participated in that consultation focused on only one issue.

Alex Fergusson: I am simply trying to warn the committee against falling into the same trap.

The Convener: Given that we received 30 responses to our consultation on the members' interests order while the consultation on the Smoking, Health and Social Care (Scotland) Bill attracted more than 60,000 responses, we have to wonder about the importance of the issue to the public. However, I am aware that today, of all days, there is considerable public interest in standards in public life. We need to engage with

the public, and members have made perfectly valid suggestions in that respect. Indeed, I think that we should pursue Karen Whitefield's suggestion of inviting the clerks to draw up some options about how we might engage with the public on this matter. You have heard some suggestions—

Alex Fergusson: They are very helpful.

The Convener: We could receive a paper on public participation in the review at the next meeting; after all, we are likely to agree in a moment or two that certain people have a particular interest in the subject. Consulting only the Presiding Officer, the Scottish Parliamentary Corporate Body and business managers will leave us open to the accusation that the Parliament is a self-regulating organisation that shuts the door behind it without paying heed to the public. The approach that has been suggested might have legs.

Are members content, first with the conclusion set out in paragraph 32 and with including in it an invitation to the press corps to take part in the review and, secondly with the suggestion that the clerks draw up a paper delineating the options for public participation?

Members indicated agreement.

The Convener: We move to agenda item 5. Committee members have before them a paper—"Review of the Code of Conduct: Direction under the Scottish Parliamentary Standards Commissioner Act"—that contains details of a direction that we issued to the commissioner. The circumstances that led to that direction are there, as is an account of our experience since we made the change.

The question is whether the potential benefits of giving complainants an opportunity to comment on the commissioner's findings before a report has been finalised are outweighed by the need to protect the confidentiality of the process at the early stages so that the committee's consideration of the commissioner's report is not prejudiced.

When last we debated the issue, we came down on the side of openness and participation. However, it is not difficult, having read a report by the commissioner, to work out what its conclusions and recommendations will be. In practice, a report's findings have appeared before the committee has had a chance to read them. In fact, we do not get to see a report until the commissioner sends it to us.

Paragraphs 12 and 13, "Complaints about handling of investigation", deal with a secondary aspect of the direction. One could argue that that could be a separate and distinct issue, but I do not think that it is important enough to be retained.

Therefore, the question is whether we revoke the direction or continue with it. If we choose to continue with it, I suggest that we include it in the code of conduct. However, because it has worked in practice, we do not need to take it to the Parliament.

I am open to members' views.

Linda Fabiani: I am a comparatively new member of the committee who was not here when the change was made. Reading the paper has given me my first broad understanding of what has been going on. What struck me immediately were the serious breaches in confidentiality, although not all complainants would breach confidentiality. However, sometimes complaints are made by people who are seeking publicity; that is an important issue. It seems to me that to protect confidentiality we should revoke the direction.

Donald Gorrie: I was one of the majority who voted for the procedure that we are reconsidering, although I understand the arguments for change. I am concerned, however, that there should still be a mechanism whereby the basic facts could at least be agreed between the commissioner and the participants on either side of a complaint. It would be unfortunate if, having gone through the whole procedure, we made a decision, but somebody managed to demonstrate that the commissioner had got one of his facts wrong. I suppose that that is unlikely, but we should have some sort of safeguard against the possibility.

The convener is correct: if a full draft report, without the commissioner's conclusions, is sent to the complainant, it will not require rocket science to work out what those conclusions will be. I am amenable to the new argument, but I wonder whether there is a way of ensuring correspondence between the commissioner and the complainant to establish basic facts. Perhaps that happens anyway.

11:30

The Convener: If we followed Donald Gorrie's suggestion, we would, in effect, be asking the commissioner to produce a summary. A summary would also give the commissioner's view, even if it did not give his recommendations. I do not see how we can get round that.

It is unfortunate that since we issued our direction—for all the reasons that Donald Gorrie supported—it has been used so often to create press stories. A climate has been created.

Our predecessors in the first session of the Parliament went out of their way to make the process independent and to make it open at an appropriate stage, which was meant to be when no one could bring to bear any unwarranted

influence. The people who chose not to respect the confidentiality of the draft report have destroyed the case for openness. I do not see how we can square that circle, but I want to consider any practical suggestions. I will bring in Alex Fergusson, who also voted for the direction.

Alex Fergusson: I did—and I believe that we voted for it for absolutely the right reason, which was to confer on a complainer the right to examine what was said. However, with rights come responsibilities and, with the benefit of hindsight, it is clear to me—it gives me no pleasure to say it—that responsibilities are not being accepted by those on whom we conferred that right, which is being abused. I am afraid that we have no choice but to revoke the direction.

Karen Whitefield: As Alex Fergusson and Donald Gorrie did, I voted for the new direction because I, too, thought that it was the right thing to do. I believed that the direction was about equity—about treating people fairly and justly.

Alex Fergusson has just spoken about responsibilities. Sanctions can be applied to parties to a complaint if they disclose a report. If an MSP who was being complained about were to disclose a report before its publication, action could be taken against that MSP. It would not be in an MSP's interest to conduct himself or herself in that way. However, no sanctions can be imposed on a complainer who chooses to ignore the responsibilities that come with the benefit of seeing the report. Unfortunately, in the vast majority of cases in which the direction has been used, it has been abused. Complainers have gone to the media and disclosed the contents of reports long before the reports have come to the committee. That is unacceptable, so we have no option but to reverse the direction.

Christine May: My experience is that information will be leaked if it is made accessible before its publication. That is the nature of public life these days. We have a clear choice. We could continue in the sure knowledge that leaks will continue. They will not always happen but in many cases they will. Alternatively, we could reconsider the matter, which seems to be the view of most members. We should seriously consider withdrawing the direction.

If there is to be an appeal, we need to discuss separately whether the complainer should get sight of the report so that they can appeal—am I misreading the provision?

The Convener: There is no appeal. The circumstances to which you refer, in which it might be appropriate for the complainer to get sight of the report, are those in which we choose not to accept the commissioner's report and to hold our own inquiry.

Christine May: I can see a clear and justifiable argument for that, but my view is that the direction has not worked as it was meant to work. Karen Whitefield's exposition of the dangers for an MSP of leaking a report and the sanctions that apply, as opposed to the sanctions that would apply to anyone else, clearly illustrated that the situation is unfair for MSPs.

The Convener: None of those points addresses the issue that Mr Gorrie raised, which is that we must be sure that the complainer's view has been heard and properly understood by the commissioner, and fairly put by the commissioner in his report. Anyone who suggests that the current process does not allow that to happen is in danger of undermining the independence and integrity not only of the current post holder, but of any post holder.

There is currently a mechanism for dealing fairly with such issues; the complainer brings the complaint, but that is not the last time the complainer engages with the commissioner. The commissioner will almost certainly interview the complainer. If there are discrepancies between the evidence given by the complainer and that given by the MSP, the commissioner has to make a judgment, and part of the process may well be for him to go out to seek more supporting and corroborative evidence elsewhere. The question is whether that goes far enough. The committee did not think so—however long ago it was—when we chose to disclose the draft report without the recommendations; that is, the commissioner's assessment of whether there had been a breach of the members' interest order or the code of conduct.

To suggest that the evidence-gathering process is unfair is probably to go too far, but that is where the dichotomy lies. This is not about mediation or arbitration between two parties; it is about judgments on whether the code of conduct and the members' interests order have been breached. As long as the evidence-gathering process maintains its integrity, we need not be too concerned.

Linda Fabiani: I was interested in Karen Whitefield's comments. Everyone who is part of the process—the complainer or the person who is being complained against—is entitled to confidentiality; it must also be perceived that there is confidentiality. The direction muddies the waters by spreading the ability to leak. If there were to be a leak, I would be happier to know that someone on the committee or on the commissioner's side had leaked and breached confidentiality. Narrowing down who could be responsible for a leak invokes more respect for all parties and instils more confidence that the system can work properly.

The Convener: Because the potential existed for leaks, I chose—as convener—to stop the practice of the committee being advised when a complaint against a named member reached the point of commissioner starting his inquiry at stage 2. That is why we now know about a complaint against a member only once the commissioner has completed his report. Therefore, we cannot influence it at that point, other than through our involvement, and the matter then becomes public. I would try to protect the process there. It is not just about protecting MSPs' interests—it is also about protecting the public interest. It is not necessarily in the public interest that material be leaked prior to a decision by any party.

Bill Butler: I am one of the gang of four who voted for the current procedure. I think that it is absolutely apparent from what colleagues around the table have said, and from the paper, which sets out clearly the experience of that decision, that we need to revoke the direction in its entirety. It simply has not worked for the public or for the Parliament. We should revert to the previous procedure—that is all I have to say.

Donald Gorrie: I agree with my three colleagues. I have no concern about errors being made by the current commissioner in ascertaining the facts. I had some concerns—as did some of my colleagues—when the former acting commissioner was dealing with an extremely complicated case. Some of us felt that he did not ask the right questions and did not clarify the issue as well as he might have done. However, the current commissioner has a good track record. Least harm will be done by changing our position as per the suggestion in the paper that is before us.

The Convener: I take it that members are content to reverse the policy. That decision will take effect immediately.

Christine May: Are we required to make a separate decision on paragraph 4(b) of the direction?

The Convener: We can choose to do that. In my opinion, however, it would not make any real difference; the commissioner can make that choice in any case and does not need our direction. I am in members' hands, but in my opinion we do not need to do that.

Christine May: I accept your guidance.

The Convener: Is that agreed?

Members indicated agreement.

Scottish Commissioner for Human Rights Bill

11:43

The Convener: We move to our final item, on the call for evidence on the Scottish Commissioner for Human Rights Bill. We have received a paper about the call for evidence and a letter from the convener of the Justice 1 Committee, seeking our views on the Scottish Commissioner for Human Rights Bill. At this stage, we are considering the general principles of the bill rather than its details. Although some of the formal provisions in the new bill in respect of appointments, terms and conditions, and reports to Parliament are similar to those that apply to the standards commissioner, it is worth keeping in mind the fact that the two posts are very different in purpose and responsibility. Other existing commissioner and ombudsman posts might be more relevant as comparators than our commissioner would be.

Members have copies of a draft response in annex B. Are there any views on the draft?

Bill Butler: The draft response is comprehensive and to the point. If we were to agree the draft response, we would obviously want to add, as has been suggested, the penultimate paragraph before the summary on page 6, to say that we have revoked the policy that we have just revoked. On that basis, I think that the draft response meets its purpose and that we should agree it.

Donald Gorrie: I agree. It could be argued that the previous debate illustrates the value of having some things set out in directions that the committee can change in the light of experience without going through a long parliamentary or other procedure. We have said the right thing, but we could perhaps underline that point, given our experience.

The Convener: Are members content with Mr Gorrie's suggestion?

Members *indicated agreement.*

The Convener: The clerks will take that on board and I shall sign the letter when it appears before me.

I arranged to have a paper circulated on my visit to Serbia, but I cannot remember whether it is among members' papers today.

Christine May: Yes, it is. The paper was interesting.

The Convener: It is really just for information, to show that we did go and do what we said we would do. It is not there for comment.

Our next meeting is likely to be on 29 November. We have a meeting pencilled in for 15 November, but there is no indication at this stage that we will require that meeting.

Linda Fabiani: I give my apologies in advance for my being unable to attend the meeting on 29 November.

The Convener: Thank you. I declare the meeting closed and thank members for attending.

Meeting closed at 11:46.

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