STANDARDS COMMITTEE

Wednesday 8 March 2000
(*Morning*)

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STANDARDS COMMITTEE
5th Meeting 2000, Session 1

CONVENER

*Mr Mike Rumbles (West Aberdeenshire and Kincardine) (LD)

DEPUTY CONVENER

*Tricia Marwick (Mid Scotland and Fife) (SNP)

COMMITTEE MEMBERS

*Lord James Douglas-Hamilton (Lothians) (Con)
Patricia Ferguson (Glasgow Maryhill) (Lab)
Karen Gillon (Clydesdale) (Lab)
Mr Adam Ingram (South of Scotland) (SNP)
*Des McNulty (Clydebank and Milngavie) (Lab)

*attended

WITNESSES

Philip Aylett (Secretariat, Committee on Standards in Public Life)
Professor Alice Brown (Committee on Standards in Public Life)
Malcolm Mackay (Mackay Simon WS)
Professor Colin Munro (Edinburgh University Law School)
Christine Salmon (Secretariat, Committee on Standards in Public Life)

CLERK TEAM LEADER

Vanessa Glynn

ASSISTANT CLERK

Alastair Goudie

LOCATION

Committee Room 2

Scottish Parliament

Standards Committee

Wednesday 8 March 2000

(*Morning*)

[THE CONVENER *opened the meeting at 09:34*]

The Convener (Mr Mike Rumbles): Good morning. I welcome everyone to the fifth meeting this year of the Standards Committee. I extend a special welcome to our witnesses, some of whom have travelled from London and all of whom have taken time out of their busy schedules to be with us today. I have received apologies from Adam Ingram, Patricia Ferguson and Karen Gillon.

Investigation of Complaints

The Convener: Our first agenda item is an evidence session on models for investigation of complaints, which follows from the adoption of the code of conduct and interim procedures for complaints as set out in the Standards Committee's "3rd Report 1999: Interim Complaints Procedure". At its meeting on 26 January, the committee agreed to carry out a detailed analysis of the various models for investigation of complaints; those models are summarised in the issues paper that was published in advance of this meeting.

As part of the process, we will take evidence from a number of witnesses who have experience in relevant disciplines. I am pleased to welcome Professor Colin Munro from the University of Edinburgh law school; Professor Alice Brown, vice-principal of the University of Edinburgh, a member of the Neill Committee on Standards in Public Life and a former member of the consultative steering group; Christine Salmon, assistant clerk to the Neill committee; and Philip Aylett, press secretary to the Neill committee. We will be joined shortly by Malcolm Mackay, who is a partner in the firm of Mackay Simon, specialists in employment law.

I invite Professor Munro to make some opening remarks, after which Tricia Marwick will lead the questioning.

Professor Colin Munro (Edinburgh University Law School): Good morning. I have just circulated a paper that might be helpful, which contains a mixture of legal opinions and views. It might also be helpful if I spend a minute or two talking about the paper's contents before answering any of the committee's questions.

The paper is in the form of answers to questions that the committee might wish to follow up. The first question asks whether I would endorse the minimum requirements of fairness as identified by the Joint Committee on Parliamentary Privilege, otherwise known as the Nicholls committee. The committee is no doubt aware of the desiderata of fair treatment that were identified by the Nicholls committee and, more recently, endorsed by the Neill committee.

Broadly speaking, those requirements are based on an interpretation of the requirements of the European convention on human rights. In some respects, they go beyond what domestic law would otherwise have required, but the committees thought that it was at least prudent to conform to the imagined requirements of the ECHR. Precisely what the convention requires is not always easy to say, as the convention articles are broadly framed and open to various interpretations. Furthermore, ECHR law is a dynamic system, which means that the courts are not bound by earlier precedents and that interpretation of the same provision might change from one occasion to the next, several years later.

For serious cases at least, I broadly endorse the requirements that were identified by the Nicholls committee and the Neill committee. Although it is difficult to think of any other requirements that could be added—the list is already quite extensive—it could be argued that the committees do not specifically ask for a right of appeal, which the Standards Committee will no doubt wish to think about. The requirements specified by the Nicholls committee do not mention specifically that reasons should be given for any decisions, although that might be thought to be good practice in any event. Otherwise, fulfilling the requirements would be a matter of prudence, to comply with the full requirements of the law. The Nicholls committee said that those requirements were appropriate for especially serious cases, which implies that in less serious—or uncontested—cases, the requirements might not apply in such full form.

Is it necessary or desirable that the functions of investigation and decision making should be separated? What lies behind that question could be a feeling that if an officer—such as the Parliamentary Commissioner for Standards at Westminster—were to be involved, a clearer separation of roles may be required. Under ECHR law, it would not be necessary for the functions of investigation and decision making to be separated. In many continental legal systems, which are more inquisitorial in nature, it is common for courts and tribunals to be involved in both the investigation and the eventual decision.

Clear separation between the complainant or

prosecutor and the investigating body would be the only clear requirement. That should not usually be a problem, although it is conceivable that it could be, if the complaint were made by one MSP—who figured in the proceedings in some way—against another MSP.

The question whether the committee and/or the Parliament should be the decision maker could be interpreted in different ways. If, by that question, I were being invited to express a view on the broad question whether a decision should be taken within the Parliament or the committee, or should involve outside elements, my answer would be that that is a matter of judgment for the committee. I have considerable sympathy with the views expressed by some members at the committee's meeting in January, who hoped to avoid an elaborate and expensive system that would involve other personnel. Equally, as members will be aware, external pressures may push the committee down that path. Our experience of self-regulation over recent years is that the public tend to be sceptical about the ability of bodies to police themselves without any outside intervention. An element of outside intervention may, therefore, be desirable in the most serious and contested cases, if not necessarily in other less serious—perhaps uncontested—cases.

An interesting hypothetical question that was put to me concerned what might be done if a member failed to co-operate with the committee or the investigating body. The committee and Parliament would certainly not be powerless in such a case, because a member who failed to co-operate would be in breach of the recently approved code of conduct. The general principles and some of the details of the code of conduct make it clear that such co-operation is part of members' public duty. Sanctions could be imposed or, if a different breach of rules were being considered, the lack of co-operation could aggravate the view that was taken of the breach.

A gap may exist—I do not know whether it has been noticed—when it comes to failure to co-operate on the part of a non-member, or a member of the public. My reading of the sections on the powers of the Parliament and the committee to call witnesses is that those powers are not total, but are delimited to matters that are within the competence of the Scottish Executive, whereas I tend to the view that matters that are dealt with by the Standards Committee are not matters that are within the competence of the Scottish Executive. That seems to be an important distinction. Whether through a failure of thought or drafting, or for some other reason, it is not clear that the Standards Committee has the power to require the attendance of non-members, as the law stands. The committee may invite the presence of non-members and hope for their co-operation in that respect, but that is different from having a legal power to require their attendance.

09:45

On the procedures to be followed, the need for a formal appeal process is primarily a matter of judgment. Current legal requirements do not insist on the presence of an appeal process. The Nicholls committee floated, or gave some credence to, the view that the report to the House of Commons from the Committee on Standards and Privileges functioned as a kind of appeal process—perhaps a rather second-rate one, but an appeal process none the less.

The Standards Committee might wish to consider whether its reporting to Parliament—depending on the form of such reporting and on Parliament's ability to vary or disagree with the committee's recommendations—could, in the same way, be presented as a kind of appeal process, although perhaps it is not what people normally think of as an appeal process. Provision of an appeal process is perhaps more a matter of general expectation than of law. If a more explicit process were to be provided, I would tend towards the view that was taken recently by the Neill committee. Its view was that the appropriate stage for such a process, which would not involve a rehearing, would be after the investigation and the committee's basic decision.

There is no doubt that the Standards Committee may take action against, pursue an investigation into, or consider the position of a member who has also been subject to criminal charges. The Scotland Act 1998 envisages two specific aspects for criminal charges, although it is conceivable that MSPs could be accused of other crimes that may also involve questions of internal discipline. In any of those situations, there would be no difficulty in the Standards Committee deciding to pursue the matter as an alternative or addition to the ordinary courts. Indeed, that would be expected in the terms of the Scotland Act 1998. It is something of a contrast with Westminster that although the ordinary courts could be involved in considering criminal offences, such occasions are likely to be very rare. Even when a case could theoretically—or possibly—be dealt with in that way, questions remain about whether it would be proceeded against, because prosecution authorities do not adopt a policy of total prosecution, but take decisions based on sufficiency of evidence and the public interest.

Would a member who had been the subject of consideration in the Standards Committee and had been subject to sanctions have the right of appeal against the committee's, or Parliament's, decision? Legally, the answer is that rights of appeal exist only so far as the law confers them. In

many cases, there are rights of appeal from courts and tribunals, but sometimes those rights are restricted, for example to matters of sentence rather than matters of substance. In some cases, there are no rights of appeal, and if no rights of appeal are found in the law, the law will not invent them.

There is no legal requirement for an appeal unless it is found in legislation or provision is made for it, either in legislation or in the procedures on which this committee decides.

Judicial review is a different matter, although in the public mind it is sometimes confused with appeal. A judicial review allows persons to challenge the actions of public bodies as unlawful on the ground that they might have acted illegally, irrationally or with procedural impropriety. Unlike the Westminster Parliament, the Scottish Parliament, as a creature of statute, is subject to judicial review and would be subject to challenge under the Human Rights Act 1998 as a public authority—which effectively introduces a new heading of judicial review on the ground of illegality.

That said, there is also some protection for the Scottish Parliament in the fact that section 40 of the Scotland Act 1998 attempts to restrict the circumstances and the remedies that are available in connection with proceedings that might be brought against it. There are various rather unclear questions surrounding that, and the recent case of Lord Watson's bill has not entirely clarified—it has, perhaps, confused—the situation in that regard. However, as that case indicates, judicial review, or a similar action to test the lawfulness of an action of the Parliament or its committees, is at least a possibility. A declaratory judgment by the court is not ruled out by the Scotland Act 1998, although certain other remedies are. The precise effect of that declaratory judgment is also unclear.

The Convener: I am conscious of the time and the fact that we have a lot of witnesses to hear from. I am keen that members of the committee should be able to question you on the interesting points that you have made, as we may need further clarification.

Professor Munro: In that case, I shall leave it there.

Tricia Marwick (Mid Scotland and Fife) (SNP): Good morning. Thanks for giving up your time to help us today as we grapple with some of the problems of establishing our procedures. I want to ask about the powers in the Scotland Act 1998 whereby serious allegations, in particular relating to advocacy and the like, are criminal matters. We understand that cases in which there is a suspicion that criminal acts have been committed would be referred away from the Standards Committee and would not be for us to consider, but you are saying that there is a possibility that such cases might not go to prosecution. Where would that leave the Standards Committee if it had to investigate what appeared to be a breach of the advocacy rules?

Professor Munro: As with many other bodies, it would be seen as proper and prudent to wait until it was clear whether there was going to be a prosecution. A lot would then depend on the result. If the result of prosecution was a conviction, this committee might subsequently consider the MSP's conduct.

I am alerting you to the fact that the position might not be so clear cut. For one thing, there may be an acquittal. The fact that there was an acquittal, perhaps for technical or procedural reasons rather than on the grounds of substance, or because the precise legal terms of the offence were not made out, might not mean that some charge here would be inappropriate. All that I am suggesting is that, with or without a prosecution—and sometimes there would be none—this committee will still have the task of considering the position.

Tricia Marwick: Thank you. I would like to move on to another point that you mentioned, which is the right of appeal. You suggested that an appeal could be made to the Parliament, which could act as the body of appeal. For that to happen, the final decision on a member would have to have been made by the Standards Committee rather than the Parliament. Is one option for the Standards Committee to act as a final decision-making body, which would leave the Parliament as the appeal body? Would you support that model?

Professor Munro: Yes. In a sense, that is what is envisaged in the standing orders, if not in the Scotland Act 1998. There was some discussion of that model in an earlier meeting of this committee. Subject to any changes that you decide to make, that is the model that exists at the moment. There is not necessarily anything unlawful about, or wrong with, that model provided that the proper procedures are followed.

Tricia Marwick: Is there an alternative model that might be more satisfactory?

Professor Munro: One obviously thinks of Westminster, although we are conscious that there are many differences between Westminster and the Scottish Parliament—differences in the number of members, in the background and in the legal position. Although there may be merits in involving some independent or outside officer at some stage—which is the path that was encouraged originally by the Nolan committee, and which the House of Commons has gone

down—it need not be assumed that that is the right model for a smaller legislature in which, perhaps because the rules are wider if not clearer and have a deterrent effect, there are few cases of complaint against members. In any case, those cases might tend, as they have done so far, towards the trivial rather than towards the serious.

Tricia Marwick: Does anybody else have any questions on this point?

Des McNulty (Clydebank and Milngavie) (Lab): You said that there is no requirement to have an appeal process. If the procedures are followed correctly, there should not be an appeal process. Appeal processes tend to concentrate on procedural irregularities rather than on the substance of a case.

In considering the separation of investigation and decision-making, it is possible to form two interpretations of the Standards Committee. First, the Standards Committee could be viewed as a decision-making body whose decisions are ratified by the Parliament. According to that interpretation, the Standards Committee is an adjudicator, and there is a risk that, if it is also the prosecutor, there is no separation of function. Secondly, the Standards Committee could be viewed essentially as an investigative body that, when it has completed a process of investigation, makes a recommendation to the Parliament. The Parliament would then be regarded as the decision-maker.

Are we over-elaborating here? On the one hand we are getting into a fankle about possible appeals although there may be no necessity for an appeal; on the other we are talking about separating investigation from adjudication, assuming that that is a problem in the Standards Committee although, in fact, adjudication is a matter for the Parliament ultimately and our role should be viewed as primarily investigative. We are not operating in the Westminster context.

Professor Munro: I am not sure that there is a great difference in principle between the Westminster context and that of the Scottish Parliament. You touched on several points. It is desirable to avoid a re-hearing of the facts and the substance of a case; the primary question concerns where the key decision is being made. I am sympathetic to the view that the key decision should be made by this committee rather than by the Parliament as a plenary body that, in many ways, is unsuited to that task.

That is not to say that the Parliament should not express its view, even if its view varies. That sometimes happens in the House of Commons, where the view of the Select Committee on Standards and Privileges is generally, but not invariably, rubber-stamped but the House retains the power to decide otherwise. That seems to retain a reasonable relationship between the specialist smaller body and the larger plenary body.

The Convener: On that point, Professor Munro, standing orders make it quite clear that Parliament makes the decision on the recommendation of this committee. I seek clarification from you. Are you saying that we would recommend a decision to Parliament, which would then make the decision, but that, in effect, the decision would already have been made? Does that cause a problem in law?

Professor Munro: I do not think that it causes a problem in law. After all—to move away from that immediate area—there are many other respects in which the work of the Scottish Parliament would be rendered impossible were a great deal of the work not done in committees.

10:00

Tricia Marwick: Could the withdrawal of rights and privileges be a breach of an individual's rights under ECHR or can we proceed on that basis?

Professor Munro: The principal threat from ECHR—if I may put it that way—is with regard to article 6 on fair procedures and the need for a fair hearing and some of that article's implications. It is not inconceivable that complaints could be made under other articles. However, when Martin McGuinness, who was in the particular circumstance of not having taken the oath or his seat in the House of Commons, complained against the decision of the Speaker on behalf of the House to bar him from various facilities in the House of Commons, the decision was upheld in the domestic court and dismissed pretty summarily by the European Court of Human Rights. He argued that the decision contravened various other articles, including the right to the freedom of speech. However, given the strictly limited penalties conceived of in the Scotland Act 1998, that situation would not arise here. Some of those penalties have financial consequences, but at least in so far as they are clearly envisaged and authorised by the Scotland Act 1998, they are relatively limited in their effect. In my judgment, the other articles of the ECHR would not prevent the Parliament or this committee dealing with people, provided that the procedures comply with article 6.

Tricia Marwick: I have one final point on ECHR. Does ECHR, as a private law, apply to the processes of the Standards Committee, which could be described as being in the realm of public law?

Professor Munro: Yes. I am afraid that there is no escape there. As in cases involving temporary sheriffs—and all sorts of other cases—there is no distinction between public and private law. At any

rate, the Parliament is a public authority, which means that individuals who regard themselves as victims can bring proceedings against it under the Human Rights Act 1998. In so far as a distinction between public and private exists, it is one that does not go in the committee's favour in this respect; it puts you clearly in the vulnerable camp.

Lord James Douglas-Hamilton (Lothians) (Con): Professor Munro will be aware of the recent case in which Lord Rodger said that the proceedings of this committee or of the Parliament could be subject to judicial review. Would it be safer for the Standards Committee to have an independent element? More important, would that increase public confidence?

Professor Munro: The burden of my evidence has been that an independent element is not legally required. Whether such an element would increase public confidence is a question of judgment, which I would probably answer in the affirmative, not so much because of anything to do with this Parliament, but more because of the background of the Westminster Parliament in the 1980s and 1990s and because of more general concerns, for example about self-regulation in the medical professions.

Lord James Douglas-Hamilton: With respect, you have not answered my question. I am aware that an independent element is not legally required, but would it be safer? If the committee took full and proper account of the need for an independent element, would it mean that our decisions would be less likely to be legally challenged?

Professor Munro: If I may say so, the risk of legal challenge would arise only if your decisions were tainted by a lack of independence.

Lord James Douglas-Hamilton: You are saying that if the committee is seen to act independently in its decisions, provided that they are impartial, fair and follow the rules, those decisions will be safe. I am asking whether an independent element would be an advantage in that process.

Professor Munro: It would be an advantage—even necessary—in cases where someone might doubt whether the committee was properly independent.

Lord James Douglas-Hamilton: What would be your preferred option?

Professor Munro: It would be for the Standards Committee to deal with the majority of cases and to follow the lines of the recent report of the Neill committee. In serious and contested cases it might be desirable to refer the investigation and recommendation to a different body, chaired by an independent person—probably a lawyer. A tribunal might be formed with two MSPs—perhaps members of the Standards Committee. I would not favour the creation of a full-time parliamentary commissioner for standards, because I think it would be an excessive reaction to the problem, even given the public perception of self-regulation.

The Neill committee has noticed that the involvement of a parliamentary commissioner can be problematic in certain circumstances. If such a person is involved in giving advice to members—there will a need for advice in relation to the many rules in the code of conduct, particularly those on financial interests—their position might be compromised in later cases, because of the advice that they had already given. That is a possible threat to independence and impartiality.

Lord James Douglas-Hamilton: If an independent person were appointed, how could that problem be avoided? What type of role would you suggest?

Professor Munro: It could be avoided by the commissioner not having an advice-giving role, but being involved only in the retrospective role of investigating complaints. There is also a managerial decision to be taken about the relation between the clerks, who currently give advice, and a parliamentary commissioner, if such a person were to be appointed.

Lord James Douglas-Hamilton: You said that in serious cases you would recommend reference to an independent body. Would not that solution be more bureaucratic than having either a standards commissioner or a parliamentary commissioner?

Professor Munro: I would hope and expect that such cases would be rare, thus making the process not too burdensome. There might be accusations that unnecessary expense or elaboration is involved in other models.

Lord James Douglas-Hamilton: Why would an independent body be better than a commissioner?

Professor Munro: An independent body would be ad hoc and occasional. It would be unconnected with the general proceedings of the Parliament. The body would not have been involved in any advisory or other roles.

Lord James Douglas-Hamilton: Are you recommending that an independent body be appointed only when a serious case arises?

Professor Munro: Yes.

Lord James Douglas-Hamilton: You suggested that if a case went from the Standards Committee to the Parliament as part of an appeal process, there would be a case for the members of the Standards Committee not voting on the subject. You said that the Nicholls committee

recommended

"that members of the Commons committee on Standards and Privileges should not vote when the matter is brought to the House".

Are there precedents for that?

Professor Munro: I am sure that there are in many organisations, although it may not have been the practice in the House of Commons. A kind of precedent was set by the only other case—apart from the McGuinness case—that involved a legislature or representative body under ECHR law. The case involved the Maltese House of Representatives which, exercising a power rather along the lines of contempt of Parliament, decided to fine the editor of a satirical magazine who had made critical comments about two members of the House.

The decision to fine was held to be unlawful under the ECHR. The case gives the authority for saying that bodies such as legislatures may be subject to article 6 of the ECHR even if the charge is not an ordinary criminal charge but a quasi-criminal charge. It also underlines the desirability of separation, because one of the things to which the European Court of Human Rights took strongest exception was the fact that the two members who had been attacked in the article participated in the debate in the Maltese House of Representatives.

Lord James Douglas-Hamilton: The idea has been floated that members of this committee should not vote when the issue comes before the Parliament. Are you saying that a rule should be formulated for members of this committee, which would apply in all cases, or should the committee weigh each case on its merits? Alternatively, is it your view that members of the committee should be allowed to vote on issues that are referred by the Standards Committee to the Parliament, as they do at present? If members were not allowed to vote on such issues, that would represent a radical departure from current practice.

Professor Munro: I would want to distinguish between general matters, such as the formulation of rules and the code of conduct, and matters affecting individuals. Only in cases of the latter sort would I suggest an inhibition on the involvement of members of this committee. In such cases I agree with the Nicholls committee that it is preferable, desirable and—to use a word that Lord James used earlier—safer for members of the Standards Committee not to be involved.

Although the law does not require that there should be an appeal, if there is one it asks for a separation between the body that took the initial decision and the appellate body. For that reason, the involvement of members of this committee at the second stage is undesirable—certainly to the extent of voting. The Nicholls committee envisaged members being able to speak in the debate to explain or defend the decision that the committee had come to, but not being able to vote.

Tricia Marwick: In the late summer and early autumn of last year, this committee was involved in an investigation in which all the evidence was taken in public. Do you think that, as a general principle, such investigations should be held in public, or should they be held in private?

Professor Munro: As a general principle, the ECHR will almost certainly require that evidence and decisions in such cases should be taken in public hearings. The term "public hearing" is used in article 6 of the ECHR. There is an exception: where in the interests of justice or for reasons of morals or national security, public hearings would be undesirable. Although I think that the unfinished action taken by *The Scotsman* was misconceived—to the extent that this committee and the Parliament clearly have the power to meet in private when they choose—when dealing with the kind of case that we are discussing, the committee is stuck with the requirement of the ECHR that hearings should be held in public.

Tricia Marwick: I remember that during the Maxwell affair in London there was great debate about whether hearings should be held in public or in private and whether a public hearing might impact on any future court cases. There was a time when the case seemed to be going round in circles. Can you conceive of circumstances in which the decision of the Standards Committee to hold an inquiry in public could prejudice future actions in the courts? Would that be a reason for not holding a hearing in public?

Professor Munro: Or perhaps a reason for not proceeding at that time. That is possibly the better way of looking at it.

That question goes into areas of the law of evidence with which I am less familiar. There could be circumstances such as you outline: rights not to incriminate oneself could apply if criminal proceedings were still being contemplated against a witness, for example, rather than a member. That complication could occasionally arise. My view is that, in those circumstances, it would simply be necessary to wait until proceedings in the ordinary courts were concluded one way or the other.

10:15

The Convener: I have one question that arises from your presentation. You referred to the powers to require witnesses to appear before parliamentary committees. What you said is contrary to the advice I received from lawyers during our investigation into the so-called

lobbygate affair. Can you expand on how you are interpreting the rule? It is quite a dramatic change to the legal advice we have so far received.

Professor Munro: I will try to. The committee's—or the Parliament's—legal powers to require witnesses or documents come under sections 23 to 26 of the Scotland Act 1998. The later sections are supplementary. The definition of the power is in section 23, which provides:

"The Parliament may require any person—

(a) to attend its proceedings for the purpose of giving evidence, or

(b) to produce documents . . .

concerning any subject for which any member of the Scottish Executive has general responsibility."

I would not see the Parliament as a creature of the Executive and I would not say that the Executive has responsibility for the Parliament. That is a distinction which I am sure the convener and other members may have wished to make already on various occasions.

My view is that the legal point is at least disputable, and I would have serious doubts about whether that limited formulation gives this committee the powers to require non-members to attend in relation to this committee's business, which is closely concerned with parliamentarians. I make a distinction as regards other committees, which deal with, for example, Executive bills.

The code of conduct asserts a more general power to summon witnesses, including non-members, but the code of conduct is not law. If there is no legal authority for the statement in the code of conduct, there seems to me to be something of a gap.

The Convener: Were the Scottish Parliament to produce its own act to make that clear, to remove doubt from this area, would that be a route to go down? You are saying that, in your view, section 23 of the 1998 act is not clear.

Professor Munro: It is highly disputable and I am not sure that the doubt could be removed by the Scottish Parliament rather than by the Westminster Parliament.

The Convener: Thank you very much, Professor Munro. That was very helpful for the work and deliberations of this committee.

I now call Malcolm Mackay, a partner in the leading employment law firm of Mackay Simon. You are welcome to make some opening remarks, Mr Mackay, and I will then invite Des McNulty to open the questioning.

Malcolm Mackay (Mackay Simon WS): Good morning, convener and members. I thought it would be helpful to produce something in writing to use as the basis for my opening remarks. I hope that that will restrict the scope of my opening remarks and leave sufficient time for questions.

I am an employment lawyer. Generally, I work within the realms of statute as opposed to common law. However, I started my paper by examining some issues of common law which may be pertinent to your deliberations. Having said that, I hope not to turn this into a legalistic debate. That would be entirely wrong, not least because of the nature of the proceedings that we are discussing.

I have outlined some thoughts on the general point of natural justice. As members will be aware, the principles of natural justice, generally speaking, are taken into account and applied not only in the courts, but in the statutory framework of employment tribunals and the appeals process that follows therefrom. Following the principles of natural justice, the individual has the right to be heard by an unbiased tribunal, to be given notice of any charges of misconduct, and to be heard in answer to those charges. Those are the basic principles that we must bear in mind throughout.

On the right to be heard by an unbiased tribunal, it is clear that any adjudicator must not have a direct financial or proprietary interest in the outcome of the proceedings, nor must he reasonably be suspected or show a real likelihood of bias. That is one of the cornerstones of natural justice that we must bear in mind throughout the proceedings.

It is often useful to consider this kind of issue through the eyes of a member of the public. That is why the principles should be kept as clear and straightforward as possible. Would a member of the public, looking at the situation as a whole, reasonably suspect that a member of the adjudicating body would be biased? Likelihood of bias can be determined in a number of ways, as I have set out in my paper. Influencing factors could include membership of an organisation or authority that is a party to the proceedings, partisanship expressed in extra-judicial pronouncements, appearing as a witness for a party to the proceedings, personal animosity or friendship towards a party, family relationship with a party, and professional or commercial relationships with a party.

It is not enough to inform the individual in question of the facts surrounding the allegations; the charges of misconduct must be specified clearly. In addition, as reflected in article 6 of the ECHR, the individual must be given a reasonable amount of time in which to prepare his or her case.

When the matter is of a serious nature, and particularly where the individual is faced with possible loss of livelihood or reputation, it is

essential that there be a personal hearing. There may also be a right to legal representation in that hearing. At present, no individual has any universal right to legal representation in internal proceedings, but that may have to be considered where damage to reputation may result. I have set out some general principles regarding the conduct of the hearing on page 4 of my document.

One of the most important aspects of the matter is proper investigation. This is where my instincts as an employment lawyer kick in. The situations that we are dealing with may be rather different from employment cases, but some important principles are the same. In employment matters, a general proposition is that three stages must be gone through before any employee loses his or her livelihood—an investigative stage, a disciplinary stage and an appeal stage. I prefer to think of those three stages as distinct and separate.

The investigative process is important to discover the relevant facts. If it is properly conducted it secures fairness for the employee or, in this case, the MSP, by providing him or her with an opportunity to respond to the allegations. Even if misconduct is established, the investigative stage provides an opportunity for any factors to be put forward that might mitigate the offence.

I will touch on the legal requirements. In giving evidence to this committee, it is important that I stress again the distinction between the common law and statutory positions on natural justice. I am sure that members are well aware that employment legislation, which may be complex, is still based on the simple and straightforward concept of reasonableness.

The common law and the statute have two things in common—they tend to dictate little about the application of specific procedures and are based on principles. As I set out at page 5 of my paper, there are few specific entitlements or requirements at common law in relation to, for example, issuing warnings prior to dismissal, requiring improvement in performance or even giving reasons for dismissal.

The statutory position is different. While it applies to the employment relationship, the principles are highly relevant to the committee. The unfair dismissal provisions of the legislation say that the employer will act reasonably in treating any reason for dismissal as sufficient reason for dismissal of that employee. However, employment tribunals, the Employment Appeal Tribunal and the higher courts have evolved principles around that basic concept. The general expectation now is that a process will have three distinct stages—investigation, discipline and appeal—which should, as much as possible, be kept separate from one another.

As I have expanded on my paper, which I hope members will find helpful, I will close my opening remarks. I want to leave as much time as possible for questions.

The Convener: Thank you, Mr Mackay. Des McNulty will ask the first question.

Des McNulty: There is an obvious trade-off between the speed of investigation and procedural fairness. You seem to be pushing us in the direction of having separate elements to that procedure, each of which would take time. Could it be to the disadvantage of someone whose conduct was under investigation if they had to go through a protracted series of stages?

Malcolm Mackay: That is a fair question, Mr McNulty, but my response is that the process does not have to be protracted. It is possible to achieve a reasonable depth of investigation within a relatively short period of time, although much will depend on the procedure that is applied to that investigation.

When a decision is to be made by a committee, one option is to appoint an investigating officer. That has a double advantage. The investigating officer carries through the day-to-day, detailed investigation and presents the information in a coherent form to the committee. That saves committee members the time of going through the whole investigation. At the same time, an independent step in the process is created.

Des McNulty: So there is the option of appointing an investigating officer who reports the findings to a committee.

Professor Munro not so much suggested another option as indicated that it might be a possibility. An independent tribunal could be arranged, involving members of this committee in that stage of the process—perhaps under an independent, legally qualified chair. I believe that the Neill committee at Westminster is discussing that option.

Would that be equally appropriate or are there some areas to which you want to draw our attention?

10:30

Malcolm Mackay: This may sound strange coming from a lawyer, but I would not necessarily favour having a lawyer chair a committee such as this. There is an important distinction to be drawn about the role of lawyers. Decisions can be made about a person's reputation, livelihood, or whatever, based on a factual inquiry, with the assistance of a lawyer, but it is important that it is members of the committee who make decisions in the light of the investigation and, where appropriate, legal advice.

My firm has been involved in one or two cases in which a lawyer has sat as a legal assessor but has not been part of the decision-making process. We have found that that method can be extremely helpful, particularly in public or quasi-public proceedings.

Des McNulty: I agree with you on that. I prefer the idea of a legal assessor to that of a parliamentary commissioner. Returning to the separation of investigation and adjudication, do you envisage a scenario in which the committee splits so that two or three members are involved in an investigation process and the remaining members are involved in an adjudication process?

Malcolm Mackay: That is a possibility, although it is not what I envisaged. It is often helpful if one individual, with assistance if it is required, is tasked with carrying out investigations and develops experience in doing that. Carrying out investigations properly and reporting facts coherently and efficiently are skilled functions. Split committees might be seen by the public as two parts of the same committee attempting to create a feel of independence. If, however, there were someone who knew how to question witnesses, gather evidence, and—perhaps most important—present that properly, I do not think that there would be the same perceived difficulty. That scenario reflects what courts and tribunals have preferred over the years.

Des McNulty: You are suggesting that, ideally, the facts should be investigated by an individual with the right set of skills, background and knowledge and that the role of the committee should be to receive a report from that person and delve further in a committee hearing according to due process. Is that correct?

Malcolm Mackay: Absolutely. The disciplinary step in the process will always involve further investigation of facts. Whoever makes the decision will clarify and expand on issues, ask questions and so on. Perhaps the person conducting investigations could be a clerk to the committee. The task could be part of a more substantial role, as it will be hoped that it will not have to be done very often. The clerk would present documents to the committee and be available to answer the committee's questions about the way in which the investigation had been conducted.

Tricia Marwick: I am in broad agreement with the principle that you describe. At what point in the process does the committee hold public hearings?

Malcolm Mackay: Public hearings would take place at the disciplinary stage—the second stage. It is not necessary—I suggest that it would be potentially inappropriate—to have the investigative step or process in the public glare. That is beneficial if an allegation is trivial, malicious or without foundation, as the case will not proceed.

Des McNulty: I want to be clear about this. At the moment, if complaints were to come in, they would go to the clerk to the Standards Committee, who would decide how they might be investigated. If the complaint was found to be substantial, there would be a hearing. Perhaps it is logical that the Standards Committee should not be involved in that process until it has been established that there is a serious or significant matter to answer. Should matters be routed away from the Standards Committee until we have established that there is a case that we would wish to investigate?

Malcolm Mackay: I hope that there is logic and practicality to what I suggest here because, realistically, somebody has to be the recipient of a complaint.

Des McNulty: Somebody has to commission an investigation. At the moment, we would commission an investigation and respond to the outcome of it.

Malcolm Mackay: I see no difficulty with the committee delegating the function of investigation to a designated person, who carries out that investigation and reports back to you. To an extent, any disciplinary hearing will contain elements of further investigation and then the disciplinary decision. When members of the committee are questioning witnesses, they would be doing their own investigation, before reaching a decision. The decision is the bit that comes at the end, usually following an adjournment.

Des McNulty: Professor Munro suggested—if I have got it right—that in effect we have two kinds of procedure. One is for routine, run-of-the-mill matters that we might have to investigate—although I hope that there will not be many of them. Another is for what he called serious and contested cases where, because of the implications for individuals involved, we have to make absolutely certain that we are meeting every letter of procedure.

On receiving an initial complaint, how would we decide whether it was a serious and contested matter or whether it was routine or run of the mill?

Malcolm Mackay: With the greatest respect, I have to say, probably because of my background as a practising lawyer, that I have difficulty determining how that would work. The problem is that at some stage, somebody has to make a judgment about whether the complaint is serious. In my experience, issues that appear to be quite trivial or without foundation at the beginning can grow arms and legs—and vice versa. I would have difficulty with any kind of two-tier process.

The answer might be, for example, for a

subsection of the committee to deal with matters that were perceived to be more straightforward, while the full committee could be called together for a contested case. However, I have difficulty even with that—it would be a compromise. To have public credibility and internal credibility, there has to be a clear, simple procedure that is applied to all cases. No judgments should be made until a judgment has been made by this committee, having heard all the evidence presented in the appropriate way.

Des McNulty: That is my view as well.

In your written evidence, you make the point that it is entirely appropriate—in serious matters, anyway—for people to be permitted legal representation. The committee would not have difficulty with that, but the Neill committee recommends that, in certain circumstances, Parliament should provide legal representation for individuals who are the subject of a complaint. Do you have any comments to make about that?

Malcolm Mackay: I would be strongly against that. It is for the individual to determine how their interests can be best presented. That is the way it should be left. Again, a fundamental difficulty is that somebody somewhere has to make a judgment on whether legal representation ought to be offered. That involves certain prejudgment of the issue, because we would be saying, at that stage, "This is sufficiently serious for us to provide representation." It should be for the individual to make the decision.

Des McNulty: I think that we have dealt with the ECHR. Would you like to add anything to Professor Munro's comments?

Malcolm Mackay: No. I agree with his comments.

Des McNulty: You said that your background is in employment tribunals and employment law. There is an issue in employment law that relates to loss of livelihood. In a Parliament, the electorate can, in effect, deprive any of us of our position. The Parliament cannot remove one of its members, although it might be able to impose a financial penalty or some kind of process of exclusion. Does the fact that we are unable to remove the livelihood of a member change your advice?

Malcolm Mackay: It does not. We are talking about having public hearings, questions from which can be reported in the press. I can think of no stronger public statement than that as constituents would form views based on what they read in the press. We should have safeguards to prevent that happening.

Des McNulty: The mere fact that an MSP has been accused of something could be seen as a huge penalty on that member. Things that might be trivial in a criminal sense might be interpreted by the press as being detrimental to an MSP's position.

Is there a mechanism that we can use to reduce the level of exposure and, if the individual ends up being acquitted of an offence, to alleviate the damage to the individual's reputation?

Malcolm Mackay: The only thing that can be done to alleviate the damage is to apply the highest possible standards to the investigation and the disciplinary process. Anything else leaves the committee open to the allegation that the Parliament is looking after its own. We have to apply the ECHR principles and the generally accepted principles of fairness. It is inevitable that allegations and personal details will get into the public domain, but there is nothing we can do about that. The principles that we have talked about today must underpin the process.

I have concerns about appeals. Instinctively, and applying the rules of fairness, I would want there to be an independent appeal. There are practical difficulties, but an obvious option, if it were constitutionally possible, would be to have a decision by this committee subject to appeal to the full Parliament.

The Convener: That is effectively what we have at the moment under standing orders. The decision of the committee goes to the full Parliament as a recommendation, which then takes a decision. Any member who has been accused of something would have the opportunity to wrestle with the issues in Parliament.

Malcolm Mackay: I appreciate that. My difficulty is the distinction between a recommendation and a decision. Ideally, there should be an opportunity to make an internal appeal against a decision that affects livelihood or reputation. The employment appeals tribunal generally accepts that as reasonable.

10:45

The basic statutory concept of reasonableness has been interpreted as meaning that employees should be entitled to redress grievances and to appeal against decisions affecting their livelihoods. An independent appeals process has the additional benefit of allowing fresh evidence to be heard at a later stage if necessary. I am making a general comment, because that is the concept that has developed in the employment context.

Des McNulty: Does it apply in the processes that, for example, the British Medical Association might go through in dealing with professional misconduct? Does it have a further appeal stage?

Malcolm Mackay: Not necessarily. I have set

out some models in my paper. Generally speaking, the BMA relies on the possibility of an appeal to the courts, so you are similar to that extent.

The Convener: You can see our dilemma: the final decision is not made until it reaches the full Parliament, and there is no higher body.

Malcolm Mackay: I understand the difficulties and I appreciate that I am not being particularly helpful because I am simply throwing out a general proposition from employment law, which would be difficult to apply. We are talking about applying the highest standards of fairness to the process.

Des McNulty: Is it not the case that, if there is a procedural irregularity as opposed to a failure to consider evidence, the decision could be appealed through the courts?

Malcolm Mackay: Yes.

Lord James Douglas-Hamilton: What skills are required for an investigation?

Malcolm Mackay: First, one needs the ability to be absolutely objective. Secondly, one must have the ability to formulate questions appropriately. Finally, one needs the skill of properly and objectively recording the answers to those questions, articulating them in a document.

Lord James Douglas-Hamilton: Are you aware that when we had the recent inquiry into the so-called lobbygate question, we had a special adviser to assist us? Do you think that we should recommend a legal assessor, standards commissioner or special adviser? What aspect of independence and what qualification would that person need to have?

Malcolm Mackay: Legal training would be helpful in providing the skills required in that job. However, that would not be essential as long as the person had a clear understanding of how the committee works. It does not need a special appointment. A good, well-qualified clerk to a committee is likely to be very capable of carrying out that role effectively.

Lord James Douglas-Hamilton: Can MSPs be seen to be as independent as a legal assessor or commissioner?

Malcolm Mackay: You have phrased your question carefully. If we apply the test of the perception of a member of the public, there may be difficulties about whether an MSP would be seen to be independent. To be honest, I do not think that that is a real practical difficulty. A great deal will depend on the character of the person who carries out the investigations, on the way in which they do that and on the way in which they understand their role.

Lord James Douglas-Hamilton: But you would recommend an independent officer to assist the committee?

Malcolm Mackay: Yes. The officer would not need to be completely independent of the committee, but would need to be independent of the decision-making process.

Lord James Douglas-Hamilton: Bearing in mind that there may be relatively few serious cases—I hope very few, if any—might an independent tribunal or ad hoc body be unnecessary?

Malcolm Mackay: I think that it would be unnecessary.

Lord James Douglas-Hamilton: As well as being somewhat costly and bureaucratic.

In relation to appeal, the suggestion was made that if MSPs on this committee make a recommendation about an individual or individuals, when the case goes to Parliament it might be appropriate for them not to vote, but for other parliamentarians to come to a view on their recommendation. Do you have any views on that?

Malcolm Mackay: To ensure that the highest standards are applied and seen to be applied, it is essential that members of this committee who have been part of the decision-making process that produced the recommendation should not vote when the case comes before the Parliament.

Lord James Douglas-Hamilton: However, they would be able to vote on recommendations on general issues, such as the code of conduct.

Malcolm Mackay: That is different, as members of the committee would be best qualified to vote on such matters.

Tricia Marwick: You may correct me if I am wrong, but it seems to me that you are suggesting that there should be some sort of independent assessor or adviser to the committee who would be responsible for sifting and carrying out the initial investigation. The adviser would then give a report to this committee, which would make either a recommendation or a decision that would go to the Parliament for either final decision or appeal. Would that model meet the kind of tests that you are applying in terms of employment legislation? This may be an unfair question, but do you think that it would meet the test of public satisfaction?

Malcolm Mackay: That is a perfectly fair and appropriate question. The only area where I see a potential difficulty in public perception is in the absence of an appeal following a decision of this committee. You have explained that to me, so I am taking that into account. However, you have asked me a direct question and I have given you a direct answer. The word “recommendation”

suggests to me as an outsider something that is likely to be accepted, and that there is no real process after this committee has deliberated. That concern comes partly from dealing with employment situations. Private employers are expected to have independent appeals processes.

The Convener: Are you saying that a recommendation of this committee to the full Parliament would be perceived by the public as a request for a rubber stamp?

Malcolm Mackay: That is the problem that I foresee.

Tricia Marwick: From your point of view, would it be preferable if this committee took the decision and the Parliament was the appeals body?

Malcolm Mackay: That is a model that would be very difficult to challenge, both morally and legally, although I know that there would be difficulties in implementing such a procedure.

I would like to explain why I have found the appeals process to be so significant when dealing with employment cases. As we make clear in our submission, there is no such thing as an open-and-shut case. Sometimes people behave differently at the disciplinary and the appeals stages. Sometimes at the disciplinary stage, the defence may be, "I didn't do it", but once it is clear that a decision has gone against them, the defence may turn to, "Okay, I did do it, but there were reasons for it." That can put pressures on the individual. In the employment context it can mean that all the facts are not drawn out before the decision to dismiss is taken.

I have consistently found that employers who have applied open and fresh appeals processes have been able to stop injustices happening. It also has the effect that a properly conducted appeal can even render what would have been an unfair dismissal fair, if the appeals body has been prepared to look at fresh evidence and listen to new submissions, rather than deal with procedural irregularities alone.

Lord James Douglas-Hamilton: I take it that your recommendation would be that the MSPs on this committee should not vote when this issue comes before the Parliament, but there should be no bar on them speaking to provide an explanation.

Malcolm Mackay: There should be no bar on that whatsoever. It is essential that they have that opportunity.

The Convener: Are there any more questions?

Des McNulty: I wish to pick up two points. The first is the appropriateness of a debate on the floor of the Parliament as an appeals process, which seems to be questionable. If you are arguing that one of the advantages of an appeals process is that it provides an opportunity to rehear evidence, I would have thought that it would not be appropriate to do that in that context.

I want to pick up another point, which came out of Tricia Marwick's summary. My understanding is that you were suggesting a preliminary sift, or the establishment of evidence, by somebody who has the appropriate legal training or skills, but that the substance of the complaint would be dealt with by this committee. So it is not a question of a reduction in the role of this committee; it is a question of saying that the committee would hear evidence in a more structured way.

Malcolm Mackay: Absolutely. That should make your job easier and more efficient.

The Convener: Thank you, Mr Mackay. I am happy to say that your evidence has been extremely helpful to us in our deliberations.

I now call on our witnesses from the Neill committee: Professor Alice Brown, Christine Salmon and Philip Aylett. Before calling on Lord James to lead the questioning on behalf of the committee, I invite Alice Brown to make some opening remarks on the most recent report of the Neill committee.

Professor Alice Brown (Committee on Standards in Public Life): I thank the Standards Committee for inviting me to give evidence. The Committee on Standards in Public Life welcomes this opportunity to share its experience of the Westminster parliamentary system to assist you in resolving the issue with which you are currently concerned, namely, the development of an investigative procedure for complaints about the conduct of members of the Scottish Parliament. Members of our committee are aware of the constitutional differences between the Scottish Parliament and the Westminster Parliament, and are sensitive to the implications of those differences. That is the context in which we should start.

We have handed out a short statement, because the object today is to allow the maximum time for questions, so I shall say just a few words. I am supported this morning by Philip Aylett, on my right, and Christine Salmon, both of whom belong to the secretariat of the Committee on Standards in Public Life. They will be able to explain some of the details of the committee's recommendations in our last report, and any background points that you want to raise. I am happy to talk in my capacity as a member of the Neill committee or, more generally, in my role as a member of the consultative steering group. However, Philip and Christine will be able to provide details of any aspects that you may want to explore.

I would like to say a few words to put the work of

the Neill committee into context, which will allow the maximum time for questions afterwards. I shall begin by describing the origin and purpose of the committee, as they are relevant to some of the points that have been raised this morning. The committee was established in October 1994 by the former Prime Minister, the right honourable John Major MP, as a means of restoring public confidence in standards of public life.

Anxiety had been caused at that time by the cash-for-questions scandal and there was concern about allegations that former ministers were obtaining employment, after leaving office, with commercial firms with which they had had connections while in office. It was also feared that appointments to public bodies were being unduly influenced by party political considerations.

11:00

The committee was set up to address what were perceived to be difficulties and a lack of public confidence. Reflecting the breadth of the concern, the committee was given wide terms of reference, which I would like to elaborate briefly. Its remit was:

"To examine current concerns about standards of conduct of all holders of public office . . . and make recommendations as to any changes in present arrangements which might be required to ensure the highest standards of propriety in public life.'

That remit was expanded in November 1997 to enable the committee to carry out an inquiry into the funding of political parties, which was the subject of one of our other reports. The committee is now chaired by Lord Neill of Bladen QC. Lord Neill succeed the right honourable Lord Nolan in November 1997. I joined the committee at the end of 1998, so I am a new member.

The committee has published six reports so far, covering a range of public institutions. The most relevant of those to today's session are the first and sixth reports. The first report covered members of Parliament, ministers, the civil service and public appointments. In the sixth report, we reviewed the implementation of the recommendations that were contained in our first report. We thought that it was appropriate to stand back, after five years, to consider whether the recommendations had met the objectives that we had set. That is a good principle to establish for this and other committees. I hope that you will find it helpful if I describe, in very broad terms, the recommendations that relate to parliamentary investigative procedures, which are contained in those two reports.

The first report laid the philosophical foundations of the committee. It set out the seven principles of public life that have provided the touchstone for all the committee's deliberations. The principles, with which I know that the Standards Committee is familiar, are selflessness, integrity, objectivity, accountability, openness, honesty and leadership. Those principles have been incorporated into the MPs' code of conduct and, by and large, into the Scottish Parliament's code of conduct. Members of this committee will recall that the formulation of those principles was also influenced by the work of the consultative steering group and some of the consultation exercises that were conducted by that group.

As far as investigatory procedures are concerned, the most important recommendation of the first report was the creation of the office of the Parliamentary Commissioner for Standards, who is responsible for maintaining the "Register of Members' Interests", providing guidance and advice on matters of conduct and interest, and investigating and reporting complaints about MPs' conduct. That recommendation was accepted by the House of Commons, and I understand that you will hear evidence from the current holder of that office, Ms Elizabeth Filkin, later this month.

The Nolan committee had taken the view that the House of Commons needed to develop a culture of respect for the various resolutions of the Parliament that governed the conduct of its members. It decided that that was best achieved by including a significant independent element in the enforcement of the rules, within the context of a self-regulatory system. The committee believed that independence was an important characteristic of the commissioner's work. I am sure that this committee will want to return to that matter in discussion. The Nolan committee recommended that the parliamentary commissioner should have independent discretion to decide whether a complaint merited investigation and discretion to decide how to proceed with the case.

In the sixth report, recently published under the chairmanship of Lord Neill, we reviewed, among other things, the implementation of the recommendations for the House of Commons. Following concerns about the fairness of certain disciplinary procedures in the House of Commons, we revisited the issue of procedures for cases involving allegations of serious misconduct by MPs. By "serious" we meant those cases that could result in the imposition of a substantial penalty, and which would be likely to have a significant and detrimental effect on an MP's reputation and livelihood. That is also linked with the points that were raised earlier.

We began our consideration of the House of Commons' investigative machinery by classifying allegations into five categories: criminal cases dealt with by courts; contested allegations of serious misconduct not amounting to a criminal offence; contested allegations of other

misconduct; non-contested cases; and malicious or frivolous cases. As the Home Secretary is committed to bringing members of both Houses of the Westminster Parliament into the criminal law of corruption, the first category is relevant, although it is one that we imagine will rarely arise.

The committee focused on the second category—serious contested non-criminal cases. In such cases, which we envisaged would arise only rarely, we proposed that a tribunal should be appointed to try the case in accordance with fair procedures akin to those applied in the courts and by professional disciplinary bodies. We suggest in our report that the tribunal should consist of two or four members of Parliament of substantial seniority, and a legally qualified chairperson.

Our recommendations are not intended to displace the centrality of the House of Commons Standards and Privileges Committee. However, we recommend that the tribunal should report its findings and conclusions as to the MP's guilt or innocence to the Standards and Privileges Committee. In turn, the committee should, in appropriate cases involving guilt, make a recommendation as to penalty to the House of Commons. Those are the stages that we have discussed in the context of Westminster. We also envisaged that there should be a possibility for appeal, and we made recommendations accordingly. We still await a response to our report from the House of Commons.

I have given a brief account of the two reports. I have no doubt that members will want to explore the detail of the recommendations contained in them. A critical point to bear in mind, and one that I know the committee has in mind already, is the fundamental difference between the Westminster and Scottish Parliaments. In Scotland, unlike Westminster, contravention of the parliamentary regulations on the registration and declaration of interests, or the ban on paid advocacy, are criminal offences. However, the Neill committee felt able, in relation to the Westminster Parliament, to work on the basis of a classification of misconduct, of which a small proportion of cases would be likely to fall into the category of criminal. The situation is different here in Scotland.

Although there is no question that useful lessons can be learned from the Westminster experience, the differences between Westminster and Scotland could give rise to different solutions. Members will be aware that the National Assembly of Wales, in response to yet a different set of circumstances, has decided to appoint an independent part-time adviser. We are here to offer any help that members may consider useful in reaching decisions about what is appropriate for the Scottish Parliament.

My colleagues will elaborate on the details of the first and sixth reports that might be relevant. However, I would like to make a personal statement about the aspects that I think are important. It is crucial to consider the context in which you are operating, the whole ethos of the Scottish Parliament, the role of the Parliament in relation to the Executive and the issue of public confidence and trust in the Parliament. In moving on from that, the committee must be clear about the principles that it is establishing before thinking about procedures. Public confidence is high on the list of principles that must be addressed, as are independence, natural justice and fairness, and clarity about procedures and about the role of different people in the procedures.

Having established the principles, the next thing is to think of different stages or steps in the process, and to be clear about what all of them are. Some of them have already been mentioned today: advice and guidance; sifting of potential complaints; investigation of those complaints and how investigations are conducted; how evidence is collected; who adjudicates—who makes the decision; and what the appeals process is. We should also bear in mind that rights issues are involved here, including the rights of the individual MSP to be protected in the process.

Having set out those various stages, members might want to distinguish between different types of case, but the context is different from the distinction that we make, because of what I said earlier. One distinction which we have found particularly helpful—I know that much is made of the distinction between serious and non-serious—is that of contested or non-contested. It is the contested cases, whether they are considered serious or not, which are, I think, the really important ones. If a member is accused of something that might, on the face of it, not be particularly serious, it might, as I think Des McNulty has said, still cause a lot of damage to that person and they might want to contest it. That is the crucial distinction to bear in mind.

Having done that, we then ask the very serious question: who should most appropriately carry out the specific stages of the process—individuals or the committee? That is what we will be exploring this morning, and also relevant to that decision is the extent to which the different aspects of the various stages are held in public or private. Members are left with the question of what the key role of this committee is. What would the role of others, a third party or a tribunal, be in the process, and at what stage should they be involved?

Lord James Douglas-Hamilton: Thank you very much for that extremely comprehensive statement. I think that I am right in thinking that you served on the consultative steering group. In

the course of its report, I believe that you recommended that there be a standards commissioner. Is that still your view?

Professor Brown: I want to make the distinction between my personal view and my speaking on behalf of the Neill committee: when answering that question, I will not be speaking on behalf of the Neill committee.

Members should bear in mind that the CSG had to deal with a wide range of issues on standing orders and procedures, involving specific details, financial aspects and so on. The time which we had to allocate specifically to codes of conduct and procedures was not great.

A sub-committee, which I was not on, examined that. Members may recall that that sub-committee said that there were at least four options. First, a standards committee might have full responsibility for all aspects of the procedure. Secondly, there could be a standards committee with advisers coming in at various stages. Thirdly, there might be a standards committee being helped by a commissioner. Last, there might be a commission.

After some discussion, we went for the option involving the commissioner. The broader consultative steering group's view was that this matter should be re-examined in the light of the Parliament's experience. That would still be my view, and that is why I welcome the opportunity to explore the options in more detail. We did not have that chance.

Lord James Douglas-Hamilton: I would like to you ask for your own view. You made it clear that public confidence in the Parliament is extremely important, and that you would rate that highly in whatever systems are put in place. If the committee appointed either a legal assessor or standards commissioner, where would your preference lie?

Professor Brown: I am genuinely open-minded at this stage, although that is not a very helpful response. Let me put it this way: public confidence is vital. Members of the public must see that procedures are clear, open and transparent. The principle of independence or of being seen to be independent is also important. How would a member of the public see it if this committee, which comprises MSPs, is handling its own affairs at all stages of the process?

I have some sympathy for the proposal of involving a third party at the early stages of the process, such as sifting and the other procedures described by your previous witness. I think that such a proposal would be valuable in assisting the work of the Standards Committee—I will not use the term "parliamentary commissioner", as that makes people think automatically of the Westminster model. However, ultimate responsibility for procedures and for making recommendations to the Parliament lies with this committee.

Lord James Douglas-Hamilton: Is it your view that the general public would not see MSPs as being as independent as a legal assessor or a standards commissioner?

Professor Brown: Members of the public could see MSPs, as a group, as independent, but the process would be enhanced if it had a properly independent element.

Lord James Douglas-Hamilton: Would that be a strong enhancement or a minor one?

11:15

Professor Brown: Such an enhancement would have to be appropriate to the work of this committee. In Westminster, where there are more than 650 members of Parliament, the post of parliamentary commissioner, at four days a week, is part time; the National Assembly for Wales has also opted for a part-time post. The Scottish Parliament should have a post that is appropriate to its circumstances, although at this stage it is difficult to envisage how many cases are likely to arise. None of us envisaged that this committee would have to deal with a case quite so early on in its life.

Lord James Douglas-Hamilton: Earlier, I mentioned a recent case in which it was made clear that the proceedings of the Scottish Parliament, including this committee, could be subject to judicial review. In your view, would it be safer if we had an independent element?

Professor Brown: My response is similar to that of Professor Munro, of whom you asked that question earlier—it depends what you mean by "safer".

This issue, like many similar issues, is about perception. The Parliament should have a robust system that members feel is subject to outside scrutiny and that, as a collective, they could justify to outside—

Lord James Douglas-Hamilton: But is it your view that an independent element would increase public confidence?

Professor Brown: I think that it might increase public confidence.

Des McNulty: I think that the issue is a bit more complex than it may seem from this discussion. The advantage of an independent element lies in the separation of an independent procedure from the Parliament. If MSPs are involved, people could argue—although I dispute the argument—that, because we are politicians, we are somehow more partial than anyone else would be. However, the

processes involved in establishing an independent procedure reduce transparency at all stages.

There is a high degree of transparency in the way in which we have conducted the process, because the process is conducted in public—the public can see for themselves what happens and makes judgments on that basis. Therefore, it is not simply the case that an independent element would ensure greater public credibility, as there is arguably an equally strong case that a process that involved MSPs would have greater transparency. There must be a balance between the elements, which could be determined operationally rather than in the way that seems to be coming out of your exchanges with Lord James.

Professor Brown: I agree with you entirely—it is a matter of balance. That is why I said that it was important to consider when it would be appropriate to hold aspects of an investigation in private and when to do so in public. One might argue the case for the initial sifting stage to be held in private, as to hold that stage in public would not be to the public's advantage, particularly if the case was frivolous.

On the other hand, the way in which the Standards Committee handled the case that it dealt with helped to restore public confidence, because the process was so transparent—we saw what was going on and we were able to hear the evidence. Members must be clear that, in attempting to meet one objective, they do not damage another objective that they hold just as dear.

The Convener: Is it not a crucial difference between Westminster and the Scottish Parliament that Westminster's Standards and Privileges Committee meets in private?

Professor Brown: Yes.

The Convener: That follows on from Des's comments about transparency.

Tricia Marwick: The Neill committee's sixth report highlighted five areas of discipline, ranging from the most serious and perhaps criminal to the frivolous. The Standards Committee would not have five categories because, as we have said, breaches of the rules on the registration of paid interests and advocacy are subject to the criminal law. In reality, the Standards Committee would look at perhaps three categories of offence: frivolous—although such cases may not come to us—serious and breaches of the code of conduct. Criminal matters certainly would not come to us, so there are crucial differences.

Professor Brown: Indeed. One of the differences that I mentioned was whether a case was contested or non-contested. If a case is not contested, not all aspects of the procedure may be called into play, particularly on appeal. Those are the kinds of issues that need to be considered.

One of the problems for this committee and bodies like it is in anticipating cases. In our sixth report, we responded to cases that we had not anticipated in the first report. Procedures must always be reviewed to see whether they meet adequately the circumstances that cannot be foreseen but arise further down the road.

Lord James Douglas-Hamilton: Convener, I want to run through some routine questions. Should the Scottish Parliament adopt different procedures for different types of cases?

Professor Brown: That is a matter of opinion. Perhaps one of my colleagues would like to talk a bit about how we approached that at Westminster.

Christine Salmon (Committee on Standards in Public Life): I can give only factual information, as I am an official, but I may be able to explain why we chose to adopt different procedures. The five-point classification of offences has been described. Criminal offences go directly to the police but, as Professor Brown has said, there is a huge distinction, because it is difficult to envisage the sorts of activity that would constitute a criminal offence at Westminster.

When we were doing the sixth report, the Home Secretary told us in evidence that the new legislation on corruption would cover MPs, which would bring into play the possibility of criminal offences, although, as the Nicholls committee said, such cases would be incredibly rare.

The category of serious offences includes the notion of legally and factually complex cases, which would require the Neill committee to decide some sort of court-like procedure to ensure fairness. The Neill report recognised that there had to be a balance between a process that had the full rigour of a court-like procedure and one that was practical, speedy and able to resolve more minor cases quickly and effectively. The committee took the view that the parliamentary commissioner could handle those cases.

Those are the two categories of contested cases. We felt that the uncontested cases did not require anything like that sort of procedure and could be dealt with expeditiously. That is why the Neill committee felt that the classification was helpful. However, whether it could be translated to the Scottish Parliament situation is another matter.

Lord James Douglas-Hamilton: Do you accept that the Scottish Parliament is very different from the House of Commons in that it is much smaller and, arguably, considerably more disciplined, so that we will probably have many fewer cases?

Professor Brown: We would certainly hope so,

but I would not like to make that kind of prediction.

Lord James Douglas-Hamilton: Do you accept that there are practical questions about complexity and thoroughness, which might require the establishment of special procedures?

Professor Brown: That is another case in which the committee might want to have different options to employ. I am persuaded by the idea that, as far as possible, procedure should be the same for all cases, even if not all stages of procedure are employed in all cases. My starting point would be that everyone should be treated the same. However, because cases will tend to be different and of varying complexity, it would be helpful to have the option of employing different aspects of procedure.

Tricia Marwick: I would like to ask you about public accountability and restoring public trust, because that was the starting point of the Nolan committee and the Neill committee. One of the guiding principles of the consultative steering group was that the Scottish Parliament would be different and that it would be open and accountable. Do you think that the establishment of a parliamentary commissioner or a similar post that was completely independent would be more or less likely to secure public trust in this Parliament?

Professor Brown: I believe that there would be advantages in having such a position, regardless of whether we call it a parliamentary commissioner. It might be more accurate to say that there would be advantages in having such a role. A previous witness made the point that the function needed only to be carried out by someone who was independent of the members of the Parliament—it could be carried out by a clerk to the committee, for example. However, we would need to explore whether that was appropriate or whether it would be better to have a third party come in. I am not saying that the job would be full time. We would hope that it would not be and that there would be someone available when the circumstances arose.

Tricia Marwick: Are there any circumstances that you can foresee in which the Standards Committee could legitimately meet in private?

Professor Brown: Yes, but it depends on what aspects of the procedure the Standards Committee was dealing with. If it were dealing with all stages of the procedure, from the point at which a complaint was made, it might want to meet in private to discuss whether at first glance there was any foundation to the allegations. That relates to my point about protecting the rights of individual MSPs. However, I would not want that to compromise the principle of procedures being as open and transparent as possible. We need to balance the rights of individuals with the rights of the public to know what is going on in the Parliament.

Tricia Marwick: You know that last year—and I am sure that you followed the case as closely as the rest of us—we held the lobbygate inquiry. Do you think that the broadcasting of the inquiry detracted from the fairness and effectiveness of the procedures, or do you think that it re-established trust in this Parliament's commitment to carrying out its duties as effectively and openly as possible?

Professor Brown: That is a very difficult question, because there is a distinction between holding meetings in public and broadcasting or reporting more generally in the print media. Clearly, the media have a role to play in explaining the different aspects of the process. However, the Neill committee decided that there could be occasions when it would not be a good idea to have the proceedings broadcast because the editing of that material might be unhelpful. It is for this committee to decide whether, on balance, the broadcasting of the lobbygate inquiry was positive or negative. Generally, I would want the committee to be as open as possible, but I can see that there might be dangers in some aspects of that.

Lord James Douglas-Hamilton: You mentioned the advantages that might accrue in terms of public confidence from the appointment of a commissioner. What in your view are the differences between having a commissioner and having a legal assessor? Do you think that the weight of argument lies in favour of a legal assessor or in favour of a commissioner, were the committee to go down the path of choosing one or the other?

Professor Brown: We must be clear about what stages of the process we are talking about. Malcolm Mackay was asked about the skills that a person might need at the initial stages of sifting information and carrying out the initial investigation. The person would not necessarily need to have a legal background—they would have to have broader awareness and skills—but there might be issues on which one would want legal advice at different stages of the process. You have to be clear about which individuals would be coming in at which stages to fulfil which function. I would want to be clear about that kind of distinction. If you take that approach, the process will be robust. At various points, you are drawing on experience and skills that are necessary to the process and to ensure that the system is fair.

Lord James Douglas-Hamilton: If you had to make a choice, where might your thinking lead you?

11:30

Professor Brown: You are asking me to make an unfair choice between apples and oranges.

Tricia Marwick: Or pears.

Professor Brown: Yes, or pears.

Lord James Douglas-Hamilton: Obviously, we are here to be of service to our countrymen and women. How best do you think that we can meet their aspirations?

Professor Brown: Again, that is a difficult question to answer simply. I think that you should be honest, open and rigorous in all aspects of what you are doing.

Tricia Marwick: The question whether the Standards Committee should have any role in investigating alleged breaches of the ministerial code exercised this committee early in our proceedings. There is a code of conduct for MSPs and there is also a ministerial code. Do you subscribe to the view that ministers are MSPs and so are also required to be answerable to this committee and, ultimately, the Parliament? Do you think that we have a role in examining alleged breaches of the ministerial code?

Professor Brown: That again is a case where the Westminster situation is different from the one in Scotland. Talking with my CSG hat on, I would say that we saw all MSPs as members of the Parliament more generally—we saw them as publicly accountable, which meant that there would be a role for the Standards Committee. However, in their role as ministers, there might be specific aspects on which the First Minister would want to hold them to account.

In the Westminster case, we made it clear that the Prime Minister is the ultimate judge of the requirements of the code and the appropriate consequences of any breaches. We would expect the First Minister to have a similar role in relation to a minister's work as a minister but, wearing my CSG hat, I would take a broader interpretation and say that, ultimately, a minister is also an MSP and so should also be accountable to the Parliament. I stress that that is a personal point of view.

Des McNulty: How should the Standards Committee deal with complaints that it considers to be trivial or frivolous? The complaints might be thought important by those who are making them, but we must make a judgment. What standards of proof should we require in relation to MSPs' conduct?

Professor Brown: Again, that relates to whether the matter is private or public. Because the Parliamentary Commissioner for Standards has the role of considering matters initially, we recommended that, if the complaint had been made public, the response of the commissioner, with the permission of the MP, should also be made public. In other words, the complaint is frivolous and the MP wants that to be made known. Therefore, the accusation is in the public domain but so is the public statement that it is considered to be frivolous because it has not been proven. That will be a matter for you to determine and it will depend on who fulfils the commissioner's function.

I would have thought that it would be helpful for the initial stage of the inquiry to be private, so that you could explore the allegation. However, if the allegation were made public by another party—which is perfectly likely—and you came to a judgment on it, that should also be made public, particularly if you were saying that there was no case to answer. That would ensure that the member in question received a fair hearing.

The Neill committee shared the view of the Nicholls Committee on Parliamentary Privilege that, in determining a member's guilt or innocence, the criterion applied at all stages should be at least that the allegation is proved on the balance of probabilities. You are not a court of law and you are not gathering evidence in the way in which a court would; none the less, there is the issue of how the outside world would view an investigation, so the criterion should be the balance of probabilities. In the case of more serious charges at Westminster, a higher standard of proof may be appropriate.

The Convener: Before I say a word of thanks, I would like to ask a question that has not arisen this morning, although we will probably deal with it at our next meeting. Do you see any role for a national standards commission in the Scottish Parliament's disciplinary proceedings?

Professor Brown: My personal view on this issue, which also arose during meetings of the consultative steering group, is that there has to be some notion of compatibility about standards, whether for quangos, local government or the Scottish Parliament. In other words, certain principles should apply across the board. None the less, a separate standards commission standing independently of the Parliament would have problems attached to it. To some extent, the Parliament has a role in receiving allegations and in self-regulation, as long as—and this is where the aspect of independence comes in—people in the outside world are satisfied that allegations are treated fairly, openly, transparently and with an element of independent judgment. I do not see that it would be necessary to have a national standards commission doing that job at this stage, but the debate is on-going.

It might be instructive to look at what the National Assembly for Wales has decided—I know

that my colleague Philip Aylett has been considering that matter, if you want to explore it. One concern that I wish to raise as an individual is that, in the code that you are operating, a lot of cases may be deemed to be criminal offences. I wonder whether that is not a huge responsibility to lay at the feet of the clerks, who have to give advice and guidance when a member ends up facing a criminal charge. That is a matter for you to consider, but I question whether it is fair on the clerks.

The Convener: I speak for the whole committee when I say that it has been extremely helpful to be able to draw on the valuable experience of the members and secretariat of the Neill committee. We are grateful to you all for the contribution that you have made to our deliberations on models of investigation.

Professor Brown: We are happy to appear again on any other occasion when that is deemed useful.

The Convener: Thank you.

Before we move on to agenda item 2, I want to remind everybody that at our next meeting on 22 March we will be hearing evidence from the Convention of Scottish Local Authorities, the Parliamentary Commissioner for Standards Elizabeth Filkin, and Frank McAveety, the Deputy Minister for Local Government.

Cross-party Groups

The Convener: We move to agenda item 2. There are two applications for cross-party groups, which we will take in order. Members have copies of the submitted forms. The first application is for a Scottish Parliament cross-party group on children. Are there any comments on the application?

Des McNulty: It seems highly worthy.

The Convener: Are members happy to approve the application?

Members *indicated agreement*.

The Convener: The next application is on citizenship, income, economy and society. Do members have comments on that application?

Tricia Marwick: The application seems to meet all the requirements, so I am happy to support it.

The Convener: Does everybody else agree?

Members *indicated agreement.*

The Convener: I will ask the clerks to write to the chairperson of each group to inform them of the committee's decision to approve their applications.

Des McNulty: We should keep the profile of the cross-party groups under review. An issue that has arisen regarding a group that has been approved, and which is likely to come before the committee is whether the scope of that group is sufficiently general. Do we want cross-part groups that are, in effect, local campaigns, or should groups be about broader issues? I do not want to discuss that question at length now, but we should consider whether applications that we receive are for the best kinds of cross-party groups or whether we should encourage people to examine broader, more general issues.

The Convener: That is a fair point. It is part of our job to consider each application as it arrives, and to apply the test of whether the group is sufficiently general in nature. I appreciate what you are alluding to. We can review applications later.

Register of Interests (MSPs' Staff)

The Convener: Our next item of business is consideration of the motion to be lodged on behalf of the committee, seeking Parliament's approval for the proposed register of interests of MSPs' staff. The motion will form the basis of a short debate in Parliament on the morning of Thursday 16 March. Members have the proposed text of the motion before them. Are there any comments?

Tricia Marwick: I am happy with the text of the motion, but I am concerned that it has just been published. There will be a lot of interest in the matter, particularly from our staff. There are issues in the motion to which we must draw their attention and on which we need to explain our thinking, so it might be premature to hold a debate on the matter next week. Perhaps we should delay the debate by a week to allow members to speak to their staff.

Lord James Douglas-Hamilton: I understand that members of staff have not been consulted, as MSPs were not consulted before the code of conduct was issued. It might be helpful if the register could be reviewed in the light of experience. It is, however, a useful first step to put it in place as soon as possible. It is directed at MSPs rather than at their staff, because MSPs are responsible for their staff.

Des McNulty: The committee's view was that we needed to move as quickly as possible on the issue. However, I have sympathy with Tricia Marwick's point that we must ensure that, if a provision is being put into place that affects others, people are appropriately informed about the committee's thinking and about the implications of the provision. Perhaps we should seek advice from the clerks about how quickly information could be provided.

The Convener: The committee agreed that it is important to get this done quickly because it is important that it is added to the code of conduct. The committee has discussed the code of conduct in detail; the discussions were open and a report on them was presented to Parliament. The process for the register of staff interests has been the same. Are you suggesting that we should have the debate at a later date, rather than on 16 March?

11:45

Tricia Marwick: The debate should not be delayed by more than a week. The document was published only today and MSPs' staff should have a chance to consider it and feed their views back to us. That will mean that we are able to have a better-informed debate.

The Convener: Lord James, as a member of the Parliamentary Bureau, could you tell us how the proposal would affect parliamentary programming? I understand that only certain days are given over to committee business and that 16 March is one of them.

Lord James Douglas-Hamilton: Tricia is also on the bureau, of course.

The Convener: I apologise, Tricia.

Lord James Douglas-Hamilton: If the committee came to a view, my only question would be whether it would be appropriate to consult MSPs' employees before the report was issued. If employees are consulted, they might want changes to be made—we did not allow MSPs to ask that changes be made.

It is important that the report should be reviewed. It is relatively small and if changes need to be made, we could make them quickly. The question is whether there should be consultation before the report is published or a review after it is published.

The Convener: My view is that that is what the debate is for—we can make amendments after that debate. We have debated the report in the committee—it applies to MSPs and to the code of conduct.

Des McNulty: We have established the principle, but that is not what we will consult about. The idea that the proposal would apply to MSPs, who would be responsible for dealing with it, is also a point of principle. However, we might want to consult about the wording in the register. We could indicate that the form is a draft form that could be modified in the light of consultation with those who are directly affected by it. We could have a debate to agree the principle and finalise the form two or three weeks later.

Tricia Marwick: I would be happier if the committee took to the debate a report that met with the approval of MSPs. It will be difficult to accept amendments to a report that we have already done. I do not want to rule that out completely, but it would be better to secure unanimous support.

My only concern is that MSPs are required to ensure that their staff fill out forms and register their interests. Most MSPs' staff are unaware that we have been discussing a register of their interests. Most MSPs knew that we were drawing up a code of conduct, but I do not know if the researchers and other staff are aware that we will have a debate on this matter next week.

I am just asking for a wee bit of time to go back to the party groups and to be available to MSPs and staff members who want to ask questions.

The Convener: I understand that. I am conscious of the fact that some members of the committee are not present. In the debate on the code of conduct, we specifically referred to the annexe and to the fact that the annexe would be attached fairly soon. We are happy with the report on the register of staff interests—it is fair and appropriate. In the debate, I could make it clear that we are committed to reviewing the code in four to six months' time, to ensure that it is working satisfactorily.

Tricia Marwick: There should not be any particular problems for any MSP's staff. As employers, we must ensure that our staff are aware that something that will impact on them is coming up. It is from that point of view that I am asking for a little time.

The Convener: The annexe to the code of conduct is not necessarily applicable to current members of staff—they do not have to sign up to it under their current contracts. The annexe—if Parliament approves it—would apply to new members of staff who are taken on by MSPs from next Thursday. We would be able only to encourage current members of staff to sign up.

Lord James Douglas-Hamilton: You mentioned that the register would be subject to review. Perhaps Tricia Marwick would be happier if the motion were amended to incorporate words appropriate to that.

Tricia Marwick: No. If we are presenting the recommendations of the Standards Committee, we should ask Parliament to endorse those. In the summing up we can acknowledge points that come out in the debate and say that we will consider those. However, the motion should ask for the approval of Parliament for the report that we have produced.

The Convener: Would you be happy if I made that clear in my opening remarks?

Tricia Marwick: Yes.

The Convener: Is it agreed that we proceed on that basis?

Members *indicated agreement.*

Meeting closed at 11:52.

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