STANDARDS COMMITTEE

Tuesday 9 March 2004
(*Morning*)

Session 2

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STANDARDS COMMITTEE
3rd Meeting 2004, Session 2

CONVENER

*Brian Adam (Aberdeen North) (SNP)

DEPUTY CONVENER

*Mr Kenneth Macintosh (Eastwood) (Lab)

COMMITTEE MEMBERS

*Bill Butler (Glasgow Anniesland) (Lab)
*Alex Fergusson (Galloway and Upper Nithsdale) (Con)
*Donald Gorrie (Central Scotland) (LD)
*Alex Neil (Central Scotland) (SNP)
*Karen Whitefield (Airdrie and Shotts) (Lab)

COMMITTEE SUBSTITUTES

Lord James Douglas-Hamilton (Lothians) (Con)
Marilyn Livingstone (Kirkcaldy) (Lab)
Alasdair Morgan (South of Scotland) (SNP)

*attended

THE FOLLOWING GAVE EVIDENCE:

Mark Richards (Scottish Parliament Directorate of Legal Services)
Catherine Scott (Scottish Parliament Directorate of Legal Services)

CLERK TO THE COMMITTEE

Sam Jones

SENIOR ASSISTANT CLERK

Sarah Robertson

LOCATION

Committee Room 4

Scottish Parliament

Standards Committee

Tuesday 9 March 2004

(*Morning*)

[THE CONVENER *opened the meeting at 10:46*]

Item in Private

The Convener (Brian Adam): Good morning and welcome to the third meeting of the Standards Committee in 2004. I invite members to switch off their mobile phones. We have received no apologies—we are all present and correct.

We need to consider whether to take item 7 in private. I suggest that we should take it in private, for reasons that we have discussed in the past. Paragraph 10.2.32 of the "Code of Conduct for Members of the Scottish Parliament" requires the committee's initial consideration of a commissioner's report to take place in private. That is intended to ensure the privacy of any further investigation of the complaint. The committee's decision will be announced in public session and any oral evidence that the committee may require will be heard in public session. Is it agreed that we take item 7 in private?

Members *indicated agreement*.

Members' Interests Order

10:47

The Convener: Item 2 concerns replacement of the Scotland Act 1998 (Transitory and Transitional Provisions) (Members' Interests) Order 1999, on which we have a paper. We have considered the issue in the past and are starting formally the procedure for replacing the order.

I draw the committee's attention to the principles that underlie the test for determining a registrable interest, which are found in paragraphs 5 to 9 of the paper. We have with us Mark Richards from the directorate of legal services, who is working alongside the non-Executive bills unit on the issue. If we require any guidance, our legal adviser is present to provide it. I invite members to give their views. In the first instance, we should consider whether we are willing to accept the test for determining a registrable interest.

Mr Kenneth Macintosh (Eastwood) (Lab): May I ask Mark Richards to comment on an issue straight away? I refer to paragraph 8, on the test for determining a registrable interest. The test is that

"it could reasonably be considered that an interest might prejudice or give the appearance of prejudicing the Member's participation in Parliamentary proceedings."

I am conscious of the fact that currently MSPs have no defence against any breach of the members' interests order. I was trying to work out in legal terms how the provision is likely to be interpreted. Is the phrase

"it could reasonably be considered"

a common legal test? Those of us with daily experience of this job might have a different notion of what is "reasonable" from that of the members of the public. Does the word "prejudice" in paragraph 8 of the paper have a legal standing? Is it a test? I take it that "prejudice" is a more substantive term than "influence". I would welcome Mark Richards's comments on how substantial the test is as it applies to MSPs. How would it be interpreted by a court, rather than just by other MSPs?

Mark Richards (Scottish Parliament Directorate of Legal Services): The test, which will be applied on an objective basis, will relate to what an ordinary person would perceive the interest to be. The issue is not just about examining what members might think, but about looking at what an ordinary person on the street might think. The two opinions might be different, as you said, although they should not be. It is not a question of the opinion of the individual MSPs

who hold the interest, as that would be a subjective test. In effect, MSPs have to put themselves in the shoes of the person on the street and to consider what such a person's perception of the interest might be. For example, would the interest prejudice the member's ability to participate in proceedings? The word "prejudice" will be given its ordinary meaning.

You mentioned the word "influence". If it is considered that a member might act, as a consequence of an influence, in a manner that was different from the way in which he or she would act if there were no such interest, it would be clear that he or she would be prejudiced.

You also mentioned offences. If there is little risk of prejudice, I would expect that a member probably would not be prosecuted. However, that would be a matter for the procurator fiscal, who would consider the matter in terms of the public interest—he would consider whether there was a public interest in proceeding with a prosecution. That would depend on the degree of prejudice that existed.

The Convener: The third paragraph of the preface to the paper states that a forthcoming paper will cover the general issue of criminal defences. We have yet to deal with the nitty-gritty of that and we will have backing papers on it in future. We should take this opportunity to establish our views on the test for determining a registrable interest.

Mr Macintosh: I just mentioned the criminal defence issue in passing. I am more concerned about the threshold test and the need to establish how substantial the threshold should be. There is a clear difference between something that prejudices one's behaviour and something that gives the appearance of prejudicing one's behaviour. Although the test is objective, it will be quite difficult for most members to be sure that they have got it right, as opposed to suspecting that they have done so. I am trying to establish whether there is a body of legal precedent in interpreting the criteria. The same criteria were used in the standards that were laid down for local government, but I am trying to work out whether they have been interpreted by the courts.

Mark Richards: Objective tests are common in a great deal of legislation and always have to be interpreted by the courts. They are not new. I draw the committee's attention to paragraph 8 of the paper. The prejudice test is referred to in article 5 of the existing members' interests order, which deals with declarations of interest. Members already have to consider what might appear to prejudice their ability to participate in proceedings, so the test is nothing new.

Mr Macintosh: I am clear that it is nothing new. What I did not know until it was recently pointed out to the committee was that there is no defence. I am conscious that, until the provision is tested—I am not necessarily hoping that it will be tested—we might be, with all the best intentions in the world, setting a test for behaviour that does not do justice to members or to the public and that does not serve the interests of either very well. I believe that we have got the test right, but I am anxious that we are taking a step into the unknown in the sense that no one has applied the test in practice, so we are not entirely sure what it will mean for members' behaviour.

The Convener: It would be interesting to see how a court might interpret the provision. The clearer the Parliament's view, the easier it will be for the court to interpret the legislation. It might be an idea to have some examples worked up as background papers, so that, in future, a court that has to interpret the provision on registrable interests will have an idea of what the Parliament meant.

Mr Macintosh: I am thinking of specific examples. At a previous meeting, Alex Neil mentioned members holding shares and we also talked about unit trusts and pensions. That argument could be taken as far as which company a member had their mortgage with and where their bank account was held. I am not sure where we draw the line. Although the test is supposed to be objective, the line is not firm; it will move along with public opinion. I am slightly anxious about the test being open to misinterpretation. Members might fall foul of it inadvertently and be investigated not through any fault of their own, or because of a deliberate action, but because they had interpreted a members' interest requirement in a different way from a member of the public.

Donald Gorrie (Central Scotland) (LD): I agree with a lot of what Ken Macintosh has said. It would be helpful to have examples. To put my cards on the table, I think that we have a serious problem with an excessively Calvinist, hair-shirt tendency.

What is likely to alter a member's vote or lobbying? I have some examples. Some years ago, I started up a wee translation agency, which still exists. If the Parliament is giving its public relations translation work to the company that I am still a little bit involved with, I have an obvious interest and I should not participate in any decisions on that. That is quite clear.

On the other hand, if I or an Edinburgh member had, say, £25,000-worth of shares in Scottish & Newcastle plc and a member of the public said that I or Mr X did not campaign vigorously enough against the company removing itself from Edinburgh because I or Mr X had some shares, that seems to me to be ridiculous. I do not see that

a small gain in some shares would alter someone's opinion in that way. We have to make things clear. As Ken Macintosh said, once we get into unit trusts and so on, the whole matter gets so diluted that it becomes ludicrous.

There is also the non-financial issue—often, enthusiasms for causes are far more important than the odd bit of money. For example, in local government, there was a big issue in the Edinburgh and Lothian region about the possibility of Hearts and Hibs joining up to share a ground. In the end, Lothian Regional Council defeated the proposal, allegedly on the strength of the votes of the Celtic supporters, who were against both teams. That was a joke; I am not sure whether it was true. However, it enshrines a serious point, which is that people may cheat—if that is the right word—on behalf of a football team, the boy scouts or some other very good cause on which they are keen. They are much more likely to cheat on those grounds than on rather piffling financial grounds. We must pursue all of that and get some examples.

11:00

The Convener: Your example relates not necessarily to people being shareholders or season-ticket holders, but to their support of a football team.

Donald Gorrie: In those days, people did not have shareholdings in clubs.

The Convener: Membership of an organisation is not necessarily the only factor by which someone might be seen to be—or might actually be—influenced. That needs to be borne in mind when we discuss non-financial interests in future, but I draw the committee back to consideration of whether we are prepared to accept the test for determining a registrable interest. Does anyone have any other suggestions?

Mr Macintosh: I am happy about the test that we have had in place, which has not been—

Alex Neil (Central Scotland) (SNP): Put to the test.

Mr Macintosh: Exactly—it has not been applied. Are we aware of any examples of the test being used? We introduced the test in relation to standards in local government. We should be consistent—there is a strong argument that we should treat ourselves as we treat others. I am anxious to find out whether there are examples—perhaps at local government level—of how the test has worked in practice. I am happy to approve the current test, because it has been in place for four years. However, I wonder whether, before we come back to consider the members' interests order in its totality, further work could be done to find out whether the Standards Commission for Scotland has used the test to deal with an inquiry or a complaint.

The Convener: Do members agree with that suggestion?

Alex Fergusson (Galloway and Upper Nithsdale) (Con): Yes, although I would like to make a brief comment. The issue relates to a conversation that we had in a slightly different context about clarity in the legislation. At that stage, we virtually agreed that we should not endorse anything that did not provide absolute clarity. I have no difficulty with the test and, although I am happy to endorse it at the moment, I think that, in the intervening time that is available to us, we need to consider how we can further clarify exactly what the recommendation refers to. There is a problem in saying that the test should be applied on "an objective basis" and then introducing a subjective subparagraph. If there is any way in which we can increase clarity on how the test is applied, that would be greatly welcomed and would make endorsement of the test much easier.

The Convener: It strikes me that that is what members are seeking, but they are not offering any solutions.

Alex Fergusson: I am hoping that you will come up with the solution, convener.

Mr Macintosh: I am asking whether it would be possible to make inquiries of other systems in which the test is applied; I am sorry to put that on the clerks. The local government system is the only other one that I know of. Perhaps the test applies at Westminster. Does it apply in any other jurisdiction?

The Convener: I believe that it applies at Westminster.

Mr Macintosh: We should find out whether it has been tested.

Alex Neil: Did you say that it applies at Westminster?

The Convener: Yes.

Mr Macintosh: We should give examples.

The Convener: We are trying to review what the practice has been in the past four years. We are also following through on the requirement in the Scotland Act 1998 that we put something else in place. We have found no fault with the existing test so far, but it is always the Standards Committee's duty to be reviewing the procedures under which we operate and the areas for which we are responsible. If matters come to light, we will examine them. In the meantime, it is good that we look for experiences that other bodies may have had.

In light of paragraph 10, can I take it that we accept the test as it stands?

Alex Neil: We accept it, subject to further clarification.

Donald Gorrie: We are agreeing the test as a basis for policy development.

The Convener: At this stage, we are not going through a line-by-line scrutiny of a bill but reviewing what our predecessors did. In my opinion, we will then need to produce our own consultation document. I am quite happy to hear whether members disagree with me on that, but I think that we will need to consult on our proposals prior to producing our final recommendations. At this stage, we are just examining the issues. Nothing will be set in stone as a consequence of any decision that we make today. If we accept the principle that the test has so far not been found wanting, we can consider where it may or may not have been challenged in the past. That is a reasonable starting point.

The next part of the paper deals with some issues that we have already touched on. Perhaps we can now go through them one by one. Do members have any views on remuneration and related undertakings?

Alex Neil: The previous committee reached what I regard as a sensible conclusion on remuneration and related undertakings. Will we formally endorse that conclusion so that we do not need to revisit it?

The Convener: That is my intention. Given that the previous committee has already done much of the work, I think that, if we agree with the conclusions that it reached, we need not consult further either other members or the general public. However, where we take a different view, we could consult on the changes that we propose. Does everyone agree to that as a principle?

Members *indicated agreement*.

The Convener: Let us consider the issues that are set out in the paper and go through them one by one. Does anyone take a different view from Alex Neil that the previous committee arrived at a conclusion that we can support?

Bill Butler (Glasgow Anniesland) (Lab): There is a point of view that says that being an MSP should be the only role or job that MSPs have, but the previous committee's recommendation is a reasonable compromise, so it is entirely sensible that we stick with it. I see no strong argument against it.

The Convener: Is anyone on the committee otherwise minded?

Members: No.

The Convener: On election expenses, members will note that we are to some extent being offered advice that the current provisions have been superseded by events.

Mr Macintosh: I agree with the recommendation that we should remove the obligation on election expenses. I have always found it funny that, after having to take a great deal of care to ensure that we get our election expenses right for the Electoral Commission, we then have a sort of second hurdle that is not as rigorous as the first. The obligation on election expenses seems unnecessary and serves no purpose. I would be far happier if we had one clear line of accountability under the Political Parties, Elections and Referendums Act 2000. The way in which members deal with their election expenses would then be separate from their duties as MSPs.

Alex Neil: I totally agree with Ken Macintosh. However, as with several other aspects of the Scotland Act 1998, it does not seem that much thought was given to independent members. There is a gap in the legislation. Political parties are required—quite rightly—to register each quarter the donations that they have received that are over a certain amount of money and that are from certain categories of people and organisations. All that is on the record with the Electoral Commission. The system is easily accessible, transparent and open.

However, if an individual stands as an independent candidate and is elected as an independent member, donations that they have received in the run-up to the formal election campaign are not covered by anything. Let us suppose, for example, that the election is to take place in two months' time, in May. When I declare myself as an independent candidate for the Scottish Parliament—you should not read too much into that, by the way—the formal process for submitting election expenses will be triggered, but if I wait until next Tuesday before declaring myself as a candidate and I receive a large donation from a corporation or an individual before Tuesday, I am not required to report that donation to the Electoral Commission as part of my election expenses, because I am merely an individual and have no status as a political party. I might be acting in that way because I am bent and corrupt.

The Convener: That is an interesting challenge.

Mr Macintosh: I had no idea that that was the case. I am concerned, because obviously the most recent Scottish Parliament elections threw out a number of different challenges to our ways of thinking. We should certainly do some further work on that matter—that might fall back on the clerks. There are some independents in the Parliament and there are some single members of declared parties, who are probably in a slightly different

position—I know that those members have difficulties because they are not treated in the same way as the others. Is it the case that they qualify for support?

Alex Neil: John Swinburne, for example, had to register his party before he could do anything. As soon as a party is registered with the Electoral Commission, it becomes subject to the normal requirements of all political parties, irrespective of its size. An independent person, however, who is not part of a party, such as the two members that are currently in the Parliament—

The Convener: There are three independents.

Alex Neil: Sorry, there are three: I think that I am right in saying that the Parliament has one first-past-the-post member and two list members in that category—

Bill Butler: No, there are two first-past-the-post members.

Alex Neil: No, sorry, there are two first-past-the-post members and one list member.

I raise the issue because I talked to George Foulkes on Friday night at the Ayrshire Chamber of Commerce and Industry dinner and he pointed out that one of the gaps in the Scotland Act 1998 means that if, an independent member on the list retires or dies, they are not replaced and the number of MSPs is reduced. No one thought about that possibility when the 1998 act was drafted. I suspect that that is another loophole that needs to be closed.

Donald Gorrie: Alex Neil has raised an important point. We should accept that for political parties, as Ken Macintosh said, the Beecher's brook hurdle is already in the Political Parties, Elections and Referendums Act 2000, so nothing more is needed. However, a member who is elected as an independent should not only submit their election expenses, but declare donations above a certain amount that they have received in the previous year—or some such requirement. It would be overkill to expect every person who stood as an independent to comply with a huge number of requirements, but we should act in relation to members who are elected as independents.

The Convener: I ask the clerks to consider and take legal advice about the matter. I do not know whether we can make a distinction, as part of our work on the members' interests order, between people who are elected as members of political parties and those who are not. We might need to explore that and we might be stuck with producing something that applies to all members, irrespective of whether they are members of political parties.

Alex Neil: The distinction exists in law, because independent candidates do not have to submit anything to the Electoral Commission. When such candidates are elected, they are officially designated and listed as independent members.

The Convener: I am just trying to ensure that, when we get a report on the matter, that issue is clarified.

11:15

Mr Macintosh: I do not want to go off at a tangent, but I would like to raise something that I am aware of. This might be wrong, but I heard that a single member who is a member of a political party qualifies for Short money but an independent member does not.

Alex Neil: That is another anomaly.

Mr Macintosh: It is anomalous and slightly unfair.

The Convener: That is not part of our remit.

Mr Macintosh: I imagine that it is part of the Standards Committee's remit, even if we would not deal with it in relation to our consideration of the members' interests order. We are trying to apply standards fairly across the board to all members. I do not think that an ordinary member of the public would see any difference between Margo MacDonald or Jean Turner, who are independent members, and John Swinburne, who is a member of a political party. However, our Parliament distinguishes between them.

If we do not discuss the matter today, perhaps we should do so at a later date.

The Convener: We could seek advice on that.

I have a minor point on the part that deals with sponsorship. If a member received sponsorship from an organisation in the form of the provision of an office at no cost or a nominal cost to that member, might it be reasonable to think that the member might be beholden to that organisation?

Alex Neil: I think that that is already covered. The order defines sponsorship as

"financial or material support on a continuing basis to assist him/her as a Member".

The Convener: It also says that that

"does not include constituency plan agreements or other forms of sponsorship of a Member's constituency party".

Alex Neil: What is a constituency plan agreement?

The Convener: I have no idea.

Mr Macintosh: It is when a trade union sponsors a Labour Party constituency party.

Alex Neil: Can we not just say that, then?

Mr Macintosh: I just did. MPs used to attract that sponsorship personally, but that is no longer the case. Now, the constituency party attracts the sponsorship.

Alex Neil: The convener's point concerns an organisation supplying an office free of charge. However, is that not already dealt with?

The Convener: That is what I am asking.

Sam Jones (Clerk): That situation is given as an example in the code of conduct, which says:

"the provision of free or subsidised accommodation for a member's use on a continuing basis should be registered".

The Convener: Fine. In that case, it is covered.

Are members content with the recommendation of the previous Standards Committee in that regard?

Members *indicated agreement.*

The Convener: I am sure that members have some views on the part that deals with gifts. We have discussed this area before.

Alex Neil: This is not something that I would go to the barricades over, but I think that it would be a lot simpler—particularly from the point of view of the public—if anything above £250 had to be registered. If we follow the recommendation that the sum should be anything above 0.5 per cent of an MSP's salary, people will have to go and look up what an MSP's salary is and—once they have got over their anger about that—calculate what 0.5 per cent of it is. Having a set sum of £250, which could be raised to £300 or whatever in the next session and so on, would make life a lot easier for everybody. Further, the fact that the situation would be clearer would mean that there would be hardly any excuse for an MSP to default on the code of conduct.

Bill Butler: I agree that having a set sum would make the situation more comprehensible. In the last bullet point in paragraph 24, the previous committee suggested that a percentage threshold should be expressed in the legislation, but that an actual figure or global sum should be published annually or at the beginning of each session. That seems to be a reasonable compromise. It meets Alex Neil's point, but also keeps the idea of the threshold being a percentage of an MSP's salary, which will ensure that it will increase incrementally.

Karen Whitefield (Airdrie and Shotts) (Lab): Like both Bill Butler and Alex Neil, I think that we need to have a figure that people can understand immediately. I wonder what the basis would be for altering that figure, either at the beginning of a new session or annually. Although we should set a figure that the public and MSPs can understand, a percentage should be set out in the legislation for an automatic uprating. The figure could be published annually so that people would know that it had changed and it could be rounded up so that rather than being £255.76, it would be a sum of money that was reasonably easy to recognise. Members would know that if they received a gift that was worth more than that amount, they would have to register it.

Alex Fergusson: Karen Whitefield has said very much what I was going to say. This discussion reminds me of the discussion about clarity that we had on this subject at a previous meeting. If we go with pure percentages and the figure of £261.73, we are clearly in the realms of farce. However, I could live with something that said every four years that any gift had to be declared that was worth at least 5 per cent of an MSP's salary and which set out a clear sum. That would have to be clear and easily understandable, particularly for the public, otherwise we would be in the realms of farce.

Donald Gorrie: I would go for a figure, but if we take on Bill Butler's suggestion, that would be fine. I have received very few great gifts, so I obviously have very few friends, but there we are. In countries from the east, giving gifts is part of the deal. Having had slight dealings with a Government in the far east, I own a picture and a wee china horse. The wee china horse might be worth 5p and one of hundreds that are churned out or it might be Ming—I honestly have no idea—and the same goes for the picture. My point is that most gifts are not cheques for £260, which we would know we had to declare. I do not know how we could cover that. Are we supposed to guess how much a gift is worth? Do I have to write down that I have a wee china horse from such and such a Government?

The Convener: As we move on, that might become even more difficult.

Donald Gorrie: I did not even get the horse abroad; I think that I got it in Edinburgh.

The Convener: Most members seem happy to support the suggestion in the third bullet point of paragraph 24 on the principle that in the legislation we have a percentage stipulated and the figure, rounded to an appropriate sum, could be published annually, so that it is in the public domain. We have not had any debate this morning—although we have done in the past—about what the threshold figure should be. This is perhaps a different view from that of our predecessors, but I suggest that we consult on the figure and threshold percentage and on the principle of whether we should stipulate a percentage while publishing a clear annual figure. I suggest that we consult on whether the threshold of 0.5 per cent or 1 per cent of an MSP's salary is acceptable.

Bill Butler: That is reasonable.

The Convener: I think that Mr Fergusson made a slip of the tongue when he suggested the threshold of 5 per cent.

Alex Fergusson: Sorry, I meant 0.5 per cent. It was not a slip of the tongue, but a slip of the decimal point.

The Convener: Are members happy to go along with that suggestion?

Members *indicated agreement*.

Mr Macintosh: We should also have some sort of test for Donald Gorrie—perhaps we could call it the "Ming or mingin?" test.

The Convener: Members have to answer the question about the value of gifts. If members have to ask what the value of a gift is, that might give offence to the donor, especially in the type of area to which Donald Gorrie referred. That could cause difficulties. I do not know whether we can register gifts without putting a monetary value on them. Perhaps that is a measure of the society that we live in and a result of the background to the need for the members' interests order—we are interested only in how much members get.

Bill Butler: We should use the broad rule that if one is in doubt, the gift should be registered. That is about all that we can say sensibly. A member could not possibly be so ill mannered as to ask how much a gift cost.

The Convener: Yes, but we need clarity. A member of the public might think that a member's views will be prejudiced as a consequence of receiving a gift. How will the public know whether a member will be influenced by a ceramic item if they do not know whether it is worth 5p or £5,000?

Bill Butler: The public will know because the member will have registered the item. If a member registers a gift, they are saying that they have no difficulty in registering it because it will have no influence on them or will not make them prejudiced. Suspicion would arise in the public's mind if a member did not register something and it was subsequently discovered that a gift had been given.

Mr Macintosh: Apart from the joke, I made the point because I was thinking about the issue of the criminal defence. Members take different views on the issue; some members declare absolutely everything, but I am not sure that that is helpful. For Donald Gorrie to declare an object that is worth about £10 or less gives it an importance out of all proportion and is not helpful. If no monetary value is mentioned next to an item in the list, members of the public will not know whether the gift is extremely valuable or of little consequence. I would discourage Donald Gorrie from registering gifts that he feels are clearly not worth more than £250.

The important question is that if someone complained about Donald Gorrie because he started speaking regularly for the Republic of China or whatever, what would his defence be? If he genuinely thought that the gift was not worth declaring, he should not be subjected to the ordeal of being questioned about the matter. I am happy with the threshold and the interpretation of how we put a monetary value on gifts, but I am concerned about what happens to MSPs who inadvertently fall foul of the rules, perhaps because they did not want to cause offence to the donor.

The Convener: We will never produce a list of do's and don'ts; at the end of the day, judgments will have to be made by the member. Guidance can always be sought from the clerks on whether something should be declared, but the only person responsible for the declaration is the member.

Karen Whitefield: I agree that there needs to be an element of self-policing. All MSPs have a responsibility to ensure that they do everything possible to safeguard themselves. From time to time, in the course of our duties, most of us are given a bunch of flowers for opening a garden fête—in the case of male colleagues, their wives or partners might be given the flowers—but members are sometimes given something else. Nothing prevents members from contacting the clerk. When I visited a distillery in my constituency, I was given a bottle of whisky. I spoke to Sam Jones, who could tell me how much the bottle of whisky was worth.

Alex Fergusson: Off the top of her head?

Bill Butler: She is a very helpful clerk.

Karen Whitefield: You could have knocked me over with a feather when I heard the amount. The whisky was wasted on me, as I am teetotal, but never mind. There are ways and means for members to find out such things, to keep themselves on the right side of the Standards Committee and to meet the standards that we all set ourselves.

11:30

The Convener: I thank Karen Whitefield for her contribution. I assume that members are content with my suggestion.

Alex Fergusson: I put down a marker that it would be far more sensible to consider setting a level once a session, rather than once a year, for the sake of clarity and simplicity.

The Convener: The committee should decide what it will consult on. I am happy that we consult on whether uprating should take place in line with

members' salaries annually or once a session. We should also consult on whether the threshold should be set at 0.5 per cent, 1 per cent or another percentage of a member's salary. When we draw up a consultation document, we can revisit that point. Is that agreed?

Members *indicated agreement*.

The Convener: We have agreed to consult on the issue, because members take different views and a range of options is available.

What do members feel about the current provision and the previous committee's recommendations on overseas visits?

Alex Neil: I ask for clarification on a matter that arises from my experience. Before becoming an MSP, I ran my own consultancy business, which undertook business in the UK and overseas. Since becoming an MSP, I have undertaken much more limited consultancy work, all of which has been overseas. In the year when I made my first visit abroad, I was told that I did not need to register every visit, because the business accounts would be registered.

If someone is engaged in consultancy—I know that MSPs from other parties are in a similar position—we need to make it clear that related visits are part and parcel of what the Parliament has recorded about trading. It might not be helpful to have to register all visits, most of which are made during recesses. I have stuck to the advice that I was given, but we might want to clarify the position.

The Convener: That situation is not covered clearly in the previous provisions or the recommendations.

Alex Neil: Clarification is needed one way or the other.

The Convener: How might the position be clarified?

Alex Neil: I was advised that visits are covered if they relate to trading and the results of that trading are reported in any case. Everybody knows that I undertake consultancy for the World Bank, the European Union and others on occasion—that is no secret. Once my annual accounts have been audited, they are submitted every year and are available through the register of members' interests. I think that that is adequate, but people might think that every visit that is made in those circumstances should be recorded.

Mr Macintosh: The point is interesting and may require clarification. We need to strike a balance, because we want transparency and openness. In the past, a perceived problem at Westminster has been a freebie or junket culture occasionally developing, and we want to avoid that. There is no suspicion that that is happening in the Scottish Parliament, but, at the same time, what we publish in the name of transparency is sometimes used as a rod with which to beat us. That would not necessarily happen in the context of the travel to which Alex Neil referred. However, one of our colleagues has to fly up and down to his constituency all the time and he got pilloried for the fact that he goes back regularly to see his constituents.

The Convener: Or even his family.

Mr Macintosh: Yes.

On Alex Neil's example, I am not convinced that we need to declare again funds that our Parliament or another public body has approved and which have been declared or scrutinised previously. I am not sure what the function of declaring them again would be. The briefing paper states that the

"Register performs a useful function in recording non-personal travel which has not been funded by the Parliament".

I question the usefulness of that function. Of what use is it to record such information? To whose advantage is it? Surely it would be to the advantage only of people who want to run stories against MSPs or the Parliament. Ultimately, such information is given importance that it does not merit, which damages the Parliament.

If people are elected to serve the public and do so by making useful, appropriately funded public visits that they would not otherwise have made, such visits should not have to be declared. There might be an argument for doing so if it were suspected that a sort of junket culture—freebies a-go-go—was going on in the Parliament. However, there is not even a suspicion that that is the case. As a result, I question the usefulness of declaring the kind of travel to which Alex Neil referred. If a public body has approved and paid for an MSP's travel, it should not be declared. Such a declaration has no useful function or public benefit.

The Convener: What if a Government body outwith the United Kingdom or the European Union paid for an MSP's visit?

Mr Macintosh: That point is worth debating.

The Convener: Perhaps public concerns were expressed in the past about politicians' travel because they went to various exotic parts of the world on trips for which other Governments or commercial concerns had paid. As a consequence, such politicians' views might have been considered to be open to prejudice. For example, would it be appropriate for a non-EU country or one that aspires to join the EU to invite the Parliament's European and External Relations

Committee to visit at that country's expense rather than at the Scottish Parliament's expense? Should not such support be declared in the register?

Mr Macintosh: Perhaps we should discuss that matter at greater length. The members' interests order exists in the interests of transparency rather than to place members under suspicion of not observing the highest standards. That is a good argument for declaring trips and so on. However, we must be aware that people interpret and use declarations that are made under the order in a certain way.

There are no grounds for thinking that a culture of abuse of travel is growing in the Scottish Parliament. There are no such allegations and we should not create an environment in which they might be encouraged. However, I am aware that that is often what happens with published information. We publish information in the pursuit of transparency and openness, but instead of gaining benefit from such a system, we find that the system often rebounds on the Parliament when the information is used as evidence that something is going on when it is not. That has happened a number of times and I am concerned that it would happen if we had to declare all travel.

The Convener: Is that view shared by the committee?

Donald Gorrie: Yes. I support the main thrust of Kenneth Macintosh's argument. I suppose that two possible sins are associated with overseas travel, the first of which is the freebie; I am thinking of some sort of organisation that always meets in the Seychelles, but does not do too much business. The second is corruption. When I was at Westminster, I made only two visits abroad, one of which was to look at Danish offshore wind turbines. Although the visit was educational, it could have led to my lobbying on behalf of someone or other who wanted to get a contract. We need to guard against freebeeism and corruption.

I agree with the general thrust of what Kenneth Macintosh said, but do we have to declare trips that are funded by the EU, a Government within the EU or even by Westminster, which is not a sinful organisation? We need to re-examine the detail of the recommendations.

The Convener: We have a range of issues to examine, one of which is whether our predecessor committee got it right. Do we need to declare sponsorship of foreign travel by agencies of the United Kingdom or the European Union? I am not sure who pays the folk who go off and become election observers and such things.

Perhaps we should consult on the recommendations so that it is not the seven of us who make the decision. It is clear that we are not unanimously of the same mind as our predecessor committee on the matter. Alex Neil raised a different issue that might not have been considered previously. We should also consult on whether it is necessary to spell out the detail, line by line, as a separate heading under other employment, about which information is available elsewhere in the register. I think that that was the point that you were making, Alex.

Alex Neil: Yes.

The Convener: Are members content that when we draw up the consultation document we should revisit that question, and that the questions would be drawn up in those areas?

Mark Richards: Would it be helpful if—

The Convener: We are going to get a little advice, for which we are grateful.

Mark Richards: The rationale behind Alex Neil's comment on overseas travel is probably that he is making the initial payment for the overseas travel. He is not going on a freebie or anything like that. Alex Neil would bill whoever he is doing the work for and get the money back from them.

Alex Neil: It is usually at charitable rates.

Mark Richards: He shows the remuneration in his accounts, which is fine. As far as the overseas visits are concerned, the expenditure is met by him, albeit that he is billing someone else and getting the expenses reimbursed as part of the work that he is doing.

The matter is a policy decision for the committee. You might want to consult on whether that method is appropriate or whether members should declare each visit even if it is in connection with other work that they undertake.

The Convener: I am sure that we will be grateful for your input into the framing of any questions on the issue. Thank you for the clarification. I assume that that is the appropriate advice that Mr Neil received in the first session of the Parliament. The matter has now been discussed, it will be in the *Official Report* and we will consult on it—all of which will clarify the issue.

I suggest that we move on to heritable property. Are members content with the recommendations of our predecessor committee?

11:45

Alex Fergusson: No. I have an anomalous situation, which I think it would be worth teasing out just a little bit. I have to refer to my own personal circumstances, unfortunately.

Quite rightly, the recommendation aims to protect the identity of tenants, and I completely understand that. However, I have a farm that is

rented out to a tenant. I have only one farm and only one tenant. In my declaration of interests—and I have no difficulty with this—I declared the amount of money that I receive in rental from that farm. Because I have only one farm and only one tenant, I would like to tease out whether it is right that the tenant should be exposed to public scrutiny of the amount of money that he is paying me in rent for the unit. He is readily identifiable, because there is only one unit, and any neighbour or business person who was dealing with that tenant and happened to be a little concerned about things could find out from public information the exact details of what the tenant is paying.

As I said, I have no difficulty with declaring that, but I just wonder whether that is right within the context of a system that is, quite rightly, designed to protect the identity and details of the tenant of a property.

Alex Neil: Indeed. Could the information in relation to the tenant be regarded as a breach of the Data Protection Act 1998?

Alex Fergusson: Help. I am already doing it.

Mark Richards: I do not think that I necessarily need to comment on that.

The Convener: Could we have some advice?

Mark Richards: The previous committee envisaged the issue being dealt with by determining the level of detail of information that is required to be registered, so that, although the address of the property would not have to be registered, its wider location would be described.

The Convener: That is pretty hard to accept if we are saying that we want to protect individual tenants in individual cases such as the one that Mr Fergusson describes. If he declares that he owns a farm and has a tenant, everybody in his neighbourhood will know exactly who is being spoken about and it will be easy to determine the details of what is a private arrangement between them.

Alex Fergusson: I will not be unique in that respect. There will be many other circumstances like that, I am sure. You can hide the address, but anybody who wanted to find out details of what my tenant is paying could do so, particularly in the world of farming, which is a closed circle. That would not be possible under normal circumstances. If I were not employed in this job, that information would not be in the public eye. The fact that I am employed in this job could be seen as disadvantaging the tenant and making the public party to information that, under any normal circumstances and legislation, they would have no right to know about.

The Convener: We should perhaps consider the issue from the other direction. Why is it in the public interest that the information be known? How could the income from heritable property prejudice the decisions of the member?

Mr Macintosh: I have flagged that up as a clash. In one sense, one is under a duty, but if, in another sense, one is not, one has a defence. Therefore, the members' interests order contradicts itself. Let us suppose that the tenant was not an individual but a company such as Monsanto, which paid you £500,000 to raise genetically modified crops.

Alex Fergusson: I wish. [*Laughter.*] No, I do not wish.

Mr Macintosh: I think that you would declare such an interest anyway. The point of declarations of interest is to ensure that we are transparent about substantial sources of income and so about potential influence or prejudice in our behaviour and actions. It is to give people information, and again there is a transparency argument. I suggest that, in a case such as Alex Fergusson's, the figure is not necessary—the precise figure is certainly not necessary. It could be argued that a banding system could be used to address such problems.

I do not know how we would do it, but I would expect some discretion to be used in addressing the point. You could declare the figure to the clerks, but when it was published, it could be done approximately rather than precisely, perhaps using a banding system. Ultimately, you are disclosing something that might affect your tenant's commercial interests as well as his personal privacy.

Alex Fergusson: The banding approach is the way to get round the matter and I heartily endorse it, if it can be used.

The Convener: We are not making final decisions today. We are trying to find areas in which we do not need to revisit work. Perhaps there are areas in which discussions are still to be had.

Perhaps we ought to consult, for example, on how the individual interests of MSPs' tenants can be protected and whether there ought to be a banding arrangement or some other mechanism at least to give tenants some privacy and to ensure clarity about members' interests. Are members content with that approach?

Members *indicated agreement*.

The Convener: Views have been expressed on interests in shares in the past. Do members wish to express views today? Do members agree with the previous committee's recommendations, or is there an alternative recommendation?

Donald Gorrie: The percentage share of the issued share capital is a more reasonable criterion. As I have said before, I honestly do not think that having shares in a large public company is likely to alter a member's voting habits, but the percentage approach would catch smaller companies in relation to which the issues are possibly more relevant. I would have thought that a percentage share is a more reasonable criterion.

Currently, the nominal value of a person's shareholding is used. If the market value were used instead of the nominal value, a huge number of shareholdings would be brought into play that are not currently in play because most companies' market value is much higher than their nominal value. There is also the issue of members being required to update the value of their interest in shares every year. The percentage share of issued share capital seems to be a reasonable method, although I do not know whether the figure should be 1 per cent.

There is also the issue of whether only the member's shareholdings or the shareholdings of the member's wife, partner, child or whoever should come into play. Again, there could be a serious invasion of the private affairs of individuals who are not MSPs but are connected to MSPs.

Mr Macintosh: The point about the 1 per cent shareholding relates to a person declaring whether they have a controlling interest in a company or how substantial their interest is. A person might have shares as a way of saving money or whatever, and there is a difference between having less than 1 per cent of a huge company and having an active and on-going interest in that company. If the shareholding is less than 1 per cent, one is clearly using the vehicle as a savings mechanism or whatever. If it is more than 1 per cent, one might have an idea that the person wants to influence the company's actions in various ways. The approach is absolutely fine and I am happy with it.

On nominal and market values, the problem is that nominal values of shareholdings have been shown to be fairly meaningless. The nominal value of a shareholding might not exceed £25,000, but one could easily have substantial sums of money in a company in real, cash terms, as I believe Donald Dewar had. He had substantial shares—many tens of thousands of shares—that did not exceed the threshold because their nominal value was less than £25,000, although in real terms they were worth considerably more than that.

The issue is whether that should be declared. If we are going to declare shares, it is only sensible to use the market value of the shares rather than the nominal value. The nominal value can be meaningless.

The Convener: At the risk of offending Mr Butler, I refer again to Donald Dewar. Although Mr Dewar's shareholdings were significant in terms of overall value, he did not hold enough shares in any of the individual companies to have had an influence over the decisions that the companies made. The question is whether the level of his holdings had any influence over his decisions. I do not believe for a minute that it did, but we have to be careful about the public perception.

Donald Gorrie made a point about having to uprate every year if the value of the shares is more than £25,000, which would involve considerable effort. Some people choose not to buy insurance policies or unit trusts or do not have private pension plans, but they save for the future by having a large number of small shareholdings. It is a difficult area, but the example that Kenny Macintosh gave might well be of concern to individual members of the public.

Bill Butler: Paragraph 31, entitled "Recommendations of the Previous Committee", states:

"The Committee believed that the market value of a shareholding is a more apposite measurement".

I think that that is correct. I also agree with the previous committee's proposal that

"Members be required to update the value of their interest in shares on an annual basis at the beginning of the financial year."

That is reasonable. It gives an objective picture and we are all interested in the public perception of each member and of what their interests mean in real terms. I have no problem with that.

Alex Neil: We should not mention anyone, even if they are no longer with us. The issue is substantive and we should not refer to any individual.

The Convener: That is neither here nor there.

Bill Butler: I agree; the issue is the thing.

The Convener: Absolutely.

Alex Neil: I want to clarify the issue in relation to ministers. As I understand it, ministers and First Ministers are required to put any substantive interests into a blind trust for the period during which they are in office. Is it the blind trust or the holdings in the blind trust that are registered in the register of interests?

The Convener: I am not sure what the situation is with regard to ministers, first or otherwise, of the Scottish Parliament. That might be something that we can have clarified.

Alex Neil: There must be a practice at the moment.

The Convener: I am not sure that the matter is necessarily dealt with under the members' interests order. In fact, it is dealt with under the ministerial code. Perhaps we can have clarification on that.

Alex Neil: It might be a legal loophole. We must remember that we are now going on to make primary legislation. We must get it right.

I do not know whether the position applies only to the First Minister or to all ministers, but if a minister's assets must be held in a blind trust for the duration of their time as a minister, we must ensure that the legislation does not leave them exposed to potential litigation in respect of being a member. Perhaps the legal boffin, Mark Richards, will comment on that. What is the current position?

Mark Richards: I would have to have a look and come back to the committee.

Sam Jones: I do not think that the issue has ever been put to us. During my time as the clerk to the Standards Committee, we have never been asked whether a blind trust would be registrable. I imagine that that would depend on whether the member still had any kind of influence over the shareholders. The members' interests order talks about holdings that would be

"subject to the control or direction of a member".

We would need to look into the matter.

12:00

Alex Neil: We need to clarify the matter. It goes back to what Ken Macintosh said about interpretation of the objective test. Somebody could cause mayhem if this became a loophole in the legislation. We must be absolutely sure that we cover that.

Mr Macintosh: I would like to comment on where we should draw the line and whether unit trusts, bonds, securities and so on should be included. It is difficult to draw the line between a member's registrable interests and their personal finances.

I do not think that someone should have to declare their mortgage, which is a measure of their debt rather than their wealth; yet, that might be an important factor in our considerations—I do not know whether people would say that or not. We need to be clear about why someone should declare £25,000 of shares but not more than £100,000 of mortgage. At the moment, we draw a line at that because it is quite intrusive. Some people might have a prurient desire to know such details, but are they of political import and do they increase transparency in any way? I am not sure that they do. The difficulty is in establishing where we draw the line and what the purpose of that is.

The Convener: I think that we have moved on.

Mr Macintosh: Is that not part of the same discussion?

The Convener: Let us deal with the shares issue.

Mr Macintosh: I am sorry. I thought that this was part of the same discussion.

The Convener: I suppose that it could be.

Donald Gorrie: The point that Ken Macintosh made a while ago took us to the heart of the problem. If somebody has a serious influence on a company's policy, that could be relevant—if they have 5,000 shares in a small company that is pursuing developments in Glasgow over which they could have influence, it is reasonable for the public to know about that. However, if a member has £25,000 or even £100,000 of shares in a huge multinational company but has no influence over its policy, the information is irrelevant.

The rule must come into effect when a member could have real influence. I assume that Government securities, fixed-interest bonds, fixed-interest securities—which a lot of companies now issue—and unit trusts, over which a member could have no influence at all, would be excluded. Influence is the key issue.

Alex Neil: I agree with Donald Gorrie; however, I believe that there are two issues. The first concerns the influence or control that the member has over the policy making of the commercial operation; the second is the member's vested interest. Let us take the potential demutualisation of Standard Life. We might have a debate in the chamber on that issue, as such a move would have a major impact on the Scottish economy, and a member might have a policy with Standard Life. I have a policy with Standard Life. As it happens, I am against demutualisation, but let us suppose that I was for it—in fact, following the mess that has been made of its finances, I am tempted to be for demutualisation to try to recoup some of my money.

At the moment, I do not have to register my with-profits policy with Standard Life, which may or may not be worth more than the shares that a member would have to register. Why is it that, if I had a 1 per cent share in a medium-sized business, I would have to register that, but I do not have to register a more substantial vested interest in demutualisation—although I have no control over the policy other than my vote at the annual general meeting? The issue is where we draw the line, which is not easy. Perhaps we need to consult and have some research done on practice elsewhere.

Like a number of other members, I do part-time consultancy work. Since I became an MSP, I have not done any such work in Scotland, but there is

nothing to stop me from doing so legally. Scottish Enterprise is at present rejigging its consultancy work. If I had a potential indirect financial interest, either as a competitor or as a potential subcontractor, should I declare that? There are loads of questions about the issue. We need to consult more widely, because I do not have a clue where we should draw the line.

I do not know why the figure at which members must register shares is as low as 1 per cent of a company's shares, given that a person would be hard put to control a company with 1 per cent of the shares. I believe that in financial services legislation there is a threshold at which a person is entitled to a seat on the board—I think that it is 29 per cent of the shares. Perhaps we should consider other relevant legislation and tie in our rules to an appropriate measure. The issue is not only about influencing or controlling policy; it is also about vested interests. That must be taken into account.

The Convener: Do we have a general agreement that unit trusts should not be included in the order, on the basis that it is difficult to see what the vested interest is in unit trusts and what influence there is over the companies? I understand Alex Neil's point that a member might have a potential vested interest in encouraging demutualisation of a mutual insurance company or building society, but I find it hard to see what the vested interest—or other interest—is in relation to unit trusts. I also find it hard to see what interest there is in relation to mortgages, but perhaps I will be corrected on that.

Alex Neil: Ken Macintosh's point is that we might give the impression that we are all mega rich, but when one takes into account the debit side, we are pretty poor, really.

Donald Gorrie: In addition to unit trusts, fixed-interest stocks, whether from the Government or commercial organisations, should also be excluded. A person who has such stocks has no vote and no vested interest.

The Convener: It is fair to say that the committee is not of one view on the matter. We ought to consult again on the issue because it is difficult to draw the line. However, I find it difficult to think of the exact questions that we might wish to ask in the consultation process. As usual, we will rely on the clerks to extract members' concerns from the debate, but I invite members to submit to the clerks questions on which we might wish to consult. I am attracted to the simplicity of the 1 per cent or £25,000 rule, but I readily recognise that we must consider the point that a member could have £25,000-worth of penny shares, but the shares could actually be worth £15.

That concludes our consideration of a limited range of the registrable interests in the members' interests order.

Scottish Parliamentary Standards Commissioner

12:09

The Convener: Agenda item 3 is to consider the Scottish parliamentary standards commissioner's draft information strategy. Dr Dyer is unable to attend today because of a long-standing engagement, but if members have any questions, we can consider deferring the item to the next meeting. Members have been provided with the draft information strategy along with a draft leaflet. Do members have any views on the strategy?

As members are not rushing to give me their views, shall we agree to the information strategy and advise the standards commissioner that we are pleased with the document that he has produced? We could also say that we would love to hear about any updates to it and about any responses to it that he receives. Is that agreed?

Members *indicated agreement*.

Standards of Conduct Committee (National Assembly for Wales)

12:10

The Convener: Agenda item 4 is to consider an invitation to submit material to the Standards of Conduct Committee of the National Assembly for Wales. Are members content with the draft submission that is before them?

Members *indicated agreement*.

The Convener: The Standards of Conduct Committee indicated that it might wish to invite our committee to give evidence to its inquiry via a video link. Are members content to do that?

Members *indicated agreement*.

The Convener: Are members content that I offer the services of Mr Macintosh for that—if he is willing—as he also served on the previous Standards Committee?

Members *indicated agreement*.

The Convener: That will learn you not to speak so much at meetings, Ken.

Bill Butler: He has broadcasting experience.

Complaints

12:12

The Convener: Agenda item 6 is complaints against MSPs.

Alex Neil: We have not covered item 5.

The Convener: Sorry. We are on item 5, which is also on complaints against MSPs.

The paper that is before us deals with administrative procedures for handling correspondence during the complaints process. It considers how we might clarify the procedures for handling correspondence and communications from parties who are involved in complaints that are under active consideration or investigation by the standards commissioner, or by the committee. The paper suggests—in order to deal with that—some principles that are aimed at striking a balance between accessibility and transparency, which are encouraged under the Parliament's founding principles, and the duty to maintain the integrity of the complaints process.

As far as I can see, the complaints process is a quasi-judicial procedure that requires a degree of privacy in the early preliminary stages to ensure that any investigation is carried out properly. It is also improper for parties to a complaint to approach committee members outwith the procedures that are laid down in the Scottish Parliamentary Standards Commissioner Act 2002 and the code of conduct, with the intention of influencing the committee's handling of a case. Such conduct is particularly unacceptable if it occurs while the commissioner is investigating the complaint at stage 1 or stage 2, because it would undermine his independence.

Do members have any suggestions about the report that is before them?

12:15

Alex Neil: Although it is quite right that agenda items 5 and 6 are separate, we need to remember that they relate to each other. We have just approved an information strategy, the purpose of which is to ensure that the public have confidence in the system. In my view, lobbying of the commissioner or of the committee at any stage should not only be discouraged but should be unacceptable in what is a semi-judicial process.

However, it has become clear to me during the year that I have served on the committee that there are concerns—both from people who make complaints and from MSPs who are being complained against—about some aspects of the procedures. There has certainly been unhappiness, which might or might not be justifiable, about some aspects. We have to get the balance right between ensuring that the process is open, transparent, accountable and adheres to all the other principles that the Parliament is founded on, and ensuring that we retain the confidence of MSPs and, more important, of the general public, that the system is all those things. To that end, I suggest a number of amendments to the draft principles that have been proposed by the commissioner in paragraph 6 of the paper that is before us.

The Convener: The principles were not proposed by the commissioner; they were drafted by the clerk.

Alex Neil: Okay. As we know from experience, we have been lobbied about complaints—I will not mention any case in public—

The Convener: I am grateful to you for that and I counsel members to follow your example.

Alex Neil: Absolutely. We have all been lobbied about what the commissioner is or is not doing in a particular case. As the principle that is detailed in the first bullet point in paragraph 6 of the paper states, any complaints at stages 1 or 2 should be made to the commissioner. When the commissioner produces his report for us, it should have attached to it the complaints that he has received about how he has proceeded—so that we can get an overall picture—as well as his response to those complaints. The complaints might be from the complainant or the person who has been complained about; we have to be satisfied that both parties have been treated fairly and equally and that a complaint has been dealt with fairly before we reach a final decision on whether to accept the recommendations.

In relation to bullet point 1, I suggest that any inquiry or complaint concerning the complaints procedure should be addressed in writing to the commissioner, rather than be lodged by telephone or any other means. If someone complains about the commissioner, that should be on the record in writing. Any such complaints and the commissioner's response should be attached to the commissioner's report to the committee. That is my first suggestion.

The Convener: I am happy to hear all your suggestions. Other members might want to ask questions about what is before us today and I am happy for us to debate each of your suggestions, but I do not want to get down to an immediate debate on individual issues. Do you suggest that all written material that is made available to the commissioner be attached as an annex or otherwise to his report?

Alex Neil: If either party has complained to the commissioner about a procedural matter, we should have that complaint and the

commissioner's response to it before us when we receive the report. We should not be involved while the commissioner undertakes his investigation—we should not be involved until the commissioner has prepared his report. However, that report should contain all material so that we are aware of any concerns that might be outstanding. We will not know about such concerns unless we know the nature of a complaint and the commissioner's response to it. That is part of the transparency and accountability that must be built into the system, if we are to build up confidence in it.

The Convener: Are you suggesting that, parallel to what happens at stages 3 and 4, any such complaints would come to the clerks?

Alex Neil: Absolutely. The committee should be aware of all such matters and the commissioner's responses to them.

The Convener: Do members want to deal with each of Mr Neil's suggestions as they come up or shall we just deal with them all together? I am in the committee's hands.

Donald Gorrie: I have a separate but related point. I think that if either party is still aggrieved, there should be a method that allows them to make known their views at a later stage. However, that is a separate issue.

Mr Macintosh: I endorse whole-heartedly the "in writing" element of Alex Neil's suggestion. I agree with the thrust of what he is saying, but I am slightly concerned about multiple grievances. I am sure that we can all think of constituents who have a grievance about which they have made a complaint. When such people do not get satisfaction, they complain about the way in which their grievance was handled. They might go on to engage a lawyer, but not like the way in which the lawyer handles the grievance, which causes them to make a complaint against the lawyer. I can think of several examples of people who have had an initial grievance and who have gone on to have a series of three, four or five on-going grievances, which were subject to the relevant dispute resolution, grievance or complaints procedures. All those grievances could involve fundamental arguments and reasoning.

I am not entirely sure that we want further to immerse our already rather complicated and slightly cumbersome procedure in more formal rules. I appreciate that the suggestion that Alex Neil is making is designed to be fair to both sides, but I think that what is being suggested should take the form of guidance. If a person is not happy with the way in which the commissioner is carrying out his investigation into a complaint, we should suggest to the commissioner that he make that clear to the committee when he reports to us. I also think that the commissioner should make it clear to complainants that they have the opportunity to pursue their complaints afterwards with the committee; in other words, that there is a procedure that they can follow to pursue a complaint about the commissioner.

I am concerned about the fact that, before an investigation had even finished, the committee would be being asked to consider the complaint and investigation of it and a complaint about the way in which the original complaint was handled. We would end up in a very complicated situation.

The Convener: We must always balance all the principles that are involved. Alex Neil was right to refer to openness, accessibility and transparency—three of the Parliament's founding principles—but I do not think that any of those overrules justice.

Alex Neil: I am trying to achieve justice.

The Convener: The reasons why the proposals have been produced are that the interests of justice are not always being served by current practices and the independence and integrity of the standards commissioner are being undermined. We should remember that Parliament set up the standards commissioner to be independent. I do not think that we can give greater weight to openness, transparency and accessibility than we give to justice and to the integrity and independence of the standards commissioner. There is some danger that, in practice, we might be heading in that direction.

I have considerable sympathy with Kenneth Macintosh's view. The more we detail procedures, the more opportunities there might be for people who, for whatever reason, will never accept the validity of judgments that are made by someone else on their complaints. We will be providing more and more opportunities formally to challenge the system. We need to be careful not to do that because, by building such opportunities into the system, we might make it almost unworkable.

Alex Neil: I do not see how we can have justice if we sit here in ignorance not knowing whether there has been dissatisfaction with the procedure. I imagine that such situation would be the exception rather than the rule—I certainly hope so—but the committee should know the nature of any complaint and the commissioner's response. I am not saying that we need every piece of documentation: I am saying that the basics need to be there, including the original complaint in writing and the response to it. We can decide whether that information is relevant to our reaching a conclusion, but we should at least be aware of it if we are to sit in judgment and agree or disagree with the standards commissioner's recommendations.

If we are going to build up public trust in the system—in the Parliament and outside the Parliament—that basic information should be available. Donald Gorrie may want to take it a stage further and consider whether there is a need for an additional procedure for someone who is still dissatisfied when the commissioner reports. We will hear about that, but that is not what I am talking about. All I am saying is that the committee—at the end of the day we are accountable to Parliament—should be aware of any concerns or formal complaints about the procedure and the response to them.

The Convener: Shall we dispose of the principle at this stage, or shall we move on?

Bill Butler: If Alex Neil means that the information is to be attached as an annex purely for information, I am not too concerned because—correct me if I am wrong—by following that procedure the commissioner would be making us aware of any complaints about the procedure. We would be aware of the annex and we could look at it, and if it was obvious that the complaint was vexatious in the extreme we could simply discount it. That would build in another safeguard for committee members, in that we could not be accused of not having before us all the relevant, partly relevant or totally irrelevant material at which the commissioner had been looking. If that is what Alex Neil means, I am not too concerned about it. It would be reasonably helpful.

The Convener: How do other members feel about the suggestion that when a complaint about a procedural matter has been lodged with the commissioner at stages 1 or 2 or with the clerk at stages 3 or 4, that complaint should appear in an annex to the report, along with the response from the appropriate person? Is that agreed?

Mr Macintosh: I do not agree. I do not want to push the matter to a vote, but we have set up an independent commissioner whom we must trust to carry out investigations thoroughly. If there is a complaint about the way in which that has been done, there should be a mechanism to address that; there is—there can be a judicial review or the complainant can come back to the committee and the clerks. That is the process: we should not undermine it. When a complaint goes to the commissioner, he or she should investigate it thoroughly and report on it. Afterwards, we can examine the totality of whether the person has accepted the report and, if not, the reasons for their not accepting it. However, to undermine the process during the report—

The Convener: No—to be fair, that would not happen during the report. It would happen when the commissioner made his report to the committee, or when the clerks did it. It would not be during the process; it would be at the conclusion of the process. Am I right?

Alex Neil: Yes.

Mr Macintosh: All I am saying is that the suggestion does not take us any further forward. The principle that during stages 1 and 2 of the complaints procedure all on-going correspondence or concerns be directed straight to the commissioner is sound. The commissioner deals with such situations and he should handle all correspondence. Not only do I trust the commissioner, I trust the institution that was set up, which is an independent investigative complaints procedure. The commissioner should investigate the complaint and report back to us.

I do not mind receiving guidance. For example, in such cases, it would be sensible for the commissioner to include in his report a note saying, "By the way, I think you should know that the complainant has been unhappy throughout my investigation of his complaint." However, although I do not mind the commissioner flagging that up, it should not be—

12:30

The Convener: Mandatory.

Mr Macintosh: Yes. I do not think that it should be written into procedures that he must report such on-going concerns. All that there should be is an avenue for the complainant to make known his or her concerns after the commissioner has reported back. Otherwise, we would be undermining the system.

The Convener: Before I take Mr Fergusson, I wonder whether our clerks or legal advisers wish to give us guidance on this point.

No? Okay, then.

I will take Alex Fergusson.

Alex Fergusson: I find myself to be quite open-minded on the issue. That said, there are some things that I do not quite understand. First, the third bullet point in paragraph 6 says:

> "Any additional material relating to a complaint at Stage 3 should be addressed to the Committee Clerks who will make this material available to the Committee".

I presume that that complaint could also be about the complaints procedure. If that is the case at stage 3, I cannot quite see why it should not also be the case at stages 1 and 2 and why such material could not be included as an attachment to the report.

I acknowledge Kenny Macintosh's point about receiving guidance on the matter. However, if we received a report in which the commissioner informed the committee that he had received

complaints about the procedure, I would immediately want to know about the grounds of such complaints. I presume that we would then ask the commissioner about that, and he would have to go into all the details. Would attaching material about the nature of the complaint to the report not simplify that whole process? I cannot quite see the harm in such an approach.

The Convener: Ken Macintosh is clearly concerned that, having set up a commissioner who is independent, we are obliging him to tell us about the nature of any complaints that might be made against him. Is that the kind of message that we want to send out?

I am certain that that is not the intention behind Alex Neil's proposal. However, with vexatious complaints or in situations of the kind that Kenneth Macintosh described—in which an initial complaint is followed by a series of complaints about procedural matters—the more detail we include in the procedure, the more opportunities there are to challenge it. On the other hand, such an approach might protect the commissioner. If any complaints had been made against his procedural actions, he would have that opportunity to detail those complaints and his response to them and to be seen to be adhering to existing law and procedures. However, as I said, I share Kenneth Macintosh's worry that the more detail we include in the procedure the more opportunities there will be for detailed challenges to it.

Mr Macintosh: Instead of considering complaints against members, we will end up considering complaints against the commissioner and the complaints procedure itself. Every single time that the commissioner returns a judgment that does not find for the complainant—or every time it looks as if the commissioner will not agree with the complainant—the complainant will have the opportunity to complain about the procedure itself. As a result, we will end up asking questions about our procedure.

Instead, we should simply say, "This is our procedure. We think it's fair and robust and we will defend it." If the complainant wants to take matters further at the end of the process, there should be a procedure that allows them to do so. However, we should not overcomplicate matters that are already quite complicated—we should trust the commissioner to deal fairly with matters and we should not build into the procedure a means with which to question it. Such an approach would simply undermine the commissioner and the system and would result in our having to deal with separate disputes, although we have a difficult enough job in dealing with the initial complaints against MSPs.

Alex Neil: I fundamentally and absolutely disagree. We should know all the facts when we receive the commissioner's report. If we do not provide a facility for people to make such complaints if they want to—which, I imagine, will be the exception rather than the rule—people will have no confidence whatever in the procedure. I must say that, from my experience as a member of this committee, I am not convinced that our procedures are in any way right at the moment. From what I have seen, we have a long way to go before our procedures are right and fair—they are definitely not right and fair at the moment.

We would be failing in our duty as MSPs if we were not to take into consideration the concerns of complainants, or of members who are the subject of complaints, about whether procedure has been followed. We have just heard that our role is semi-judicial: clearly, if there was a problem about procedure in a court of law, the matter would be reported and dealt with before any final judgment was reached.

It is only fair, both to the public and to MSPs—to complainants and to those who are the subject of the complaint—that a complainant's concerns be at least registered in an appendix to a report. We might not be in a position to judge the matter one way or the other: we might agree with the concerns or disagree with them. However, if a pattern of complaints emerges, the publication of such concerns may be one way of finding out that there are flaws in our procedures that need to be addressed.

There has to be a quid pro quo, especially if we are to deny people the right to lobby the committee—as is quite right, in my view. We need to strike a balance—the balance is not right at the moment and is potentially unfair. In some cases, it might be unfair to the complainant; in other cases, it might be unfair to the member who is being complained about.

I do not see what harm would be done by attaching as an appendix to a report any complaints about the procedure that arose during the course of an investigation. As Alex Fergusson pointed out, a bullet point in the paper suggests that we should agree to that for stage 3, so why cannot we allow for that at stages 1 and 2?

The Convener: The logical conclusion to your proposal is that all material that appears before the standards commissioner should come before the committee. In that case, the commissioner's judgments would certainly be affected. For example, the fact that the commissioner's published report did not include a particular aspect might be a ground for complaint about the procedure. If, having received a series of submissions from the complainer and the person who was the subject of the complaint, the commissioner chose not to include all the material in his final report, a procedural complaint might be

lodged to the effect that the commissioner had not included all the material. We have to allow the commissioner to make such judgment.

Alex Neil: I am not asking for all the material to be published—

The Convener: But that is the logical conclusion of your argument.

Alex Neil: No, it is not. I ask that a copy of the complaint about the procedure, together with a summary of the commissioner's response to the complaint, be included in the appendix. I do not want letters to and fro to be included or anything like that. I just want a summary of the situation.

The Convener: If the complaint is that the commissioner has not included material—

Alex Neil: The complainant would not know that.

The Convener: Consider the circumstances that might arise for the complaint that is the next item on our agenda. If the published report does not include the material that we have before us, a complaint could be lodged with the commissioner. Would the commissioner then have to publish his justification for not publishing all the material that was made available to him?

Alex Neil: No. My proposal is clear. If a complaint about the commissioner's procedures is lodged—as we are asking people to do—during the commissioner's investigation, that complaint and the commissioner's response to it should be made to known to us when the commissioner reports to the committee. By that time, the commissioner will have reached his conclusions and documented his findings in the completed report, which will contain all the relevant evidence. All that I am saying is that an appendix to the report should make us aware of any complaint about the procedure and of the commissioner's response to that complaint. I do not want copies of all the correspondence between the complainant and the commissioner.

Bill Butler: In an attempt to break the logjam, I propose that, if it is acceptable to the committee, we take some time to reflect on the matter, not only so that committee members can reflect on Alex Neil's proposed amendment—or, I guess, amendments—but so that the commissioner can also have an opportunity to reflect and, if possible, comment on them. That would prevent us from rushing into making a judgment, which is the last thing that we want to do about such an important matter.

Alex Fergusson: I second that proposal, which offers an eminently sensible approach.

The Convener: Bill Butler's suggestion is eminently sensible in relation to the whole report. We want to tease out all the issues, and we have been back and forth on this particular one. Mr Neil, will you clarify whether, if your suggestion were to be accepted, you envisage that the annex would be a published document or a private paper, perhaps for the committee?

Alex Neil: The annex would have the same status as the rest of the report, so it would be published only when the report was published.

The Convener: We move on to your next suggestion.

Alex Neil: Perhaps Donald Gorrie wants to comment.

Donald Gorrie: No. Bill Butler's sensible proposal short-circuited what I was going to suggest.

Alex Neil: I think that my other suggestions will be less controversial. First, we might need to redraft the fourth bullet point of paragraph 6 in the light of the decision that we reach today on agenda item 6.

The Convener: Yes. The matter in that bullet point absolutely depends on our decision on item 6. Of course, whatever decision we reach on item 6 will be incorporated in our report.

Alex Neil: The fifth bullet point at paragraph 6 says that the committee would provide guidance on the

"timing for making written submissions to the Committee."

Surely that should read, "written and oral submissions"?

The Convener: Oral submissions can be made only at a meeting of the committee. Would we need to put that in?

Alex Neil: That is my point. In full, the fifth bullet point says:

"Should the Committee decide to conduct its own investigation at Stage 3, the Committee will provide guidance to the parties to the complaint on the format and timing for making written submissions to the Committee."

We dealt with a case recently in which oral evidence was submitted after the committee reopened the case after receiving the commissioner's report. Surely we should give guidance on that.

The Convener: I do not have any particular difficulty with that.

Alex Neil: The sixth bullet point says:

"Any contact aimed at influencing members of the Standards Committee either individually or collectively or 'lobbying' by any party to a complaint which is under investigation by the Commissioner or consideration by the Committee will be viewed as unacceptable."

I suggest that we add "and reported accordingly" to the end of that point. It is about getting the balance right; clearly, the fact that someone is lobbying the committee should be made known at some point.

The Convener: I am quite happy to accept that suggestion, if other members are, too. However, I am concerned that, although it is clear what sanctions are available to the committee against members of the Scottish Parliament, there appear to be no sanctions against any member of the public at present. We have touched on the matter informally in the past, but perhaps we could look at it again. If we are continually lobbied at every stage, an ultimate sanction might be to dismiss the complaint because the procedure could become so contaminated that there would be no possibility of justice. Perhaps that would be taking things too far. However to achieve the balance that you are talking about—

12:45

Alex Neil: I am trying to build in balance both ways.

The Convener: Any complaint ought to be investigated properly. If it becomes impossible to do that because the process becomes so contaminated that we cannot deliver justice, the committee might choose, in extreme circumstances, to dismiss the complaint because it cannot deal with it. How do members feel about that?

Alex Fergusson: I tend to agree. The word "unacceptable" is perfectly good in context, but if something is unacceptable without an ultimate sanction, it is in fact acceptable.

The Convener: The only sanction that we can have is to dismiss the complaint.

Alex Fergusson: In an extreme situation.

Mr Macintosh: My slight concern is that we keep talking about a semi-judicial process. It is true to say that we should be rigorous and fair in the process, but it is not a judicial process. I am concerned about the process becoming even more legalised, if I may use that term, and more complicated and bureaucratic. It is already becoming cumbersome, which is not in anybody's interests because it then becomes difficult to have confidence in a process that one finds difficult to understand.

In this particular case, what Alex Neil suggests is addressed in the next bullet point—that a member could be the subject of another complaint as a result of attempting to influence the committee. Rather than view such behaviour as being "unacceptable", I suggest that we discourage it. We should try to discourage MSPs who are complained about and people who make complaints from lobbying the committee. We do not want to escalate matters, but introducing a further layer of sanctions would imply that if someone had the audacity to send an e-mail to members of the committee during the complaint process, we would escalate matters again. We should instead be getting at the heart of the matter—when somebody makes a complaint, we should deal with it as quickly and fairly as possible. There is no point in building a complicated system in which one could make a complaint about somebody who lobbies the committee, saying that they had undue access. We should discourage everybody from trying to influence or lobby the committee. We should not build in more sanctions; there will always be sanctions against members' behaviour and we do not have sanctions against members of the public anyway. We should be careful about going beyond what is our desired objective and entrapping ourselves in a web of complicated procedures that do no justice to anybody and which do not serve the interests of fairness in the long term.

Bill Butler: I see what Kenneth Macintosh is driving at, but I think that the word "discourage" is not strong enough. Such behaviour is unacceptable, so "unacceptable" is fine, and "reported accordingly" is fine as well because we are giving people information. We all accept Kenneth Macintosh's point that there are no sanctions against members of the public, but the committee has to know when the situation reaches the point at which, in extreme circumstances, the only sanctions that we can take would be extreme.

Karen Whitefield: I agree with Bill Butler's comments. This is a fundamental point, especially as there are sanctions that apply to members for lobbying the committee but none that apply to members of the public. If we say simply that we discourage people from lobbying, some will say that although the committee does not want them to lobby, there is nothing to stop them from doing so. Our sending the signal that we consider any lobbying of the committee to be "unacceptable" and that it will be "reported accordingly" might suggest to people that they should exercise caution and judgment before embarking on a course of action. In some cases it may be necessary for us to send that signal. To "discourage" something sends out a very different signal from our saying that we consider a particular behaviour or action to be "unacceptable".

Alex Fergusson: I do not disagree at all with those comments. Is there not a perfect logic to continuing that train of thought and saying that, in extremis, in the face of continued, prolonged lobbying, the complaint could be dismissed at the end of the process?

The Convener: I have considerable personal sympathy with that view. It may be difficult for us to proceed as Alex Fergusson suggests, but if the process becomes so contaminated by continued lobbying, it will be very difficult for the committee to reach a judgment on an issue without having its views clouded by the lobbying that is taking place.

Alex Fergusson: That is why I used the expression "in extremis". There would be an element of sanction—one that I hope would never be used. It would always be at the disposal of either the committee or the commissioner to say to the complainant that they should be very aware that continued lobbying might lead to their complaint being dismissed.

The Convener: I seek advice on this matter from our advisers. Is it reasonable in terms of natural justice to dismiss a complaint because the procedure has become so contaminated by lobbying that it would be difficult to deliver justice?

Catherine Scott (Scottish Parliament Directorate of Legal Services): I have misgivings about the suggestion and would like to look into it and think about it more. Simply dismissing a complaint and offering no alternative to the complainer might be a problem.

The Convener: We have already agreed that we will reflect on matters. Perhaps this is one of the matters on which the advisers and members can reflect.

Donald Gorrie: If the complainer knows that all his or her e-mails to members of the committee go straight into the bucket, in due course he or she may get the message. If the person has a genuine complaint about procedure, it must be pursued—we said that we would reflect on that matter. The strongest wording that we could use would be to say that lobbying "will be viewed as unacceptable and reported accordingly". Adding threats of scrubbing the whole basis of the complaint would not be very clever, but we must make clear very strongly that lobbying is unacceptable. The clerk could point out politely that if people keep lobbying, they do not do their chances any good.

Karen Whitefield: We need to remember that the fact that someone behaves in a manner to which we as members of the committee take exception or that we think does their case little good does not mean that they do not have a genuine complaint to make. I would have serious reservations if we were to disregard a complaint because somebody had failed to conduct themselves with due probity, because they might have a genuine complaint.

In our daily work, we all deal with members of the public. People are not always reasonable, but sometimes the system has made them behave like that. That does not excuse them but it can be an explanation for why they behave the way they do. We have to send out a signal about how members of the public, and MSPs, should conduct themselves, but we have to bear it in mind that people have the right to make a complaint.

The Convener: The key point to consider is the sixth bullet point in paragraph 6—the one that begins with the words, "Any contact". I suggest that we should agree to it as written, with the addition that Mr Neil suggested. At a future meeting, we can consider the other points that we said we would reflect on. I would like to finish this agenda item now, because we have given it a fair thrashing. When we come to consider things further, we will be able to consider how we might include the principles in section 10 of the code of conduct.

In the meantime, we should advise the commissioner of our views, working on the basis of the amended bullet point 6. We will reflect on specific issues later. In particular, we will consider the detailed point that Mr Neil raised on the first bullet point.

Members *indicated agreement*.

The Convener: It is now almost 1 o'clock. We have two items left on the agenda, one of which has to be taken in private. I do not think that we need to consider item 6 today. Like other agenda items, it is likely to lead to some discussion. Are members happy that we should defer item 6 but deal with item 7?

Alex Neil: I am happy to delay discussion provided that no reports come from the commissioner until we have agreed on the principle. As I argued when we discussed the previous case that we dealt with, the principle is very important, dealing as it does with the availability of the draft report to both parties.

The Convener: But what you suggest would mean that we would not consider item 7 now.

Alex Neil: Item 7 has already been more or less completed. We have received a report.

The Convener: As far as I am aware, we have received no other complaints against MSPs. I intend that we should consider item 6 at our next meeting, whenever we decide to hold that meeting—either later this month or, as I suspect members will want, on 20 April.

Alex Fergusson: The issue is important and I am sure that members will have a lot to say on it. If we are going to defer discussion of item 6, we should agree to discuss it at the meeting that has been provisionally scheduled for 23 March.

Alex Neil: I think that that is fair.

The Convener: Okay. We do not have to decide on that here and now, but I take it that members

are happy with my proposal that we defer our consideration of item 6 and that we now move on to consider item 7 in private.

Members *indicated agreement*.

The Convener: I seek the committee's permission to use my discretion in deciding whether we should have a meeting on 23 March. I will discuss the suitability of that date with members individually. I am happy to consider dealing with the matter at the meeting on 23 March, but that might not be convenient for everyone and I would rather not spend five minutes debating that now. We should deal with the matter at a meeting no later than 20 April and it should be the first item on the agenda. Are members satisfied with that?

Alex Neil: I am happy with that.

Alex Fergusson: I am happy to have a private discussion about the matter.

Alex Neil: Convener, before we move on, I want to put on the record that I am not happy about the e-mail that we received last night, which I regard as an attempt to bounce the committee at its meeting this morning. We received an e-mail from the clerks at 4 pm last night, on the ground that it was a late paper, but it relates to an e-mail that was sent on 3 March at 10.30 and I do not see why it could not have been included in the papers that were distributed on Thursday night.

The Convener: That was not the clerks' fault; it was my fault.

Alex Neil: I am not blaming anyone, I am just saying—

The Convener: The reason why members were sent the e-mail at all was that I believed that it was important that the information should be available to members—it was not originally the intention that members would have that information. The information was not issued with the intention of bouncing anybody into taking a particular position. I was aware that there was a range of views on the issue in the committee and I thought that as I was aware of the content of the e-mail, it would be appropriate for other members to have the opportunity to read it. I accept full responsibility for that and I am sorry if you felt that there was an attempt to influence the debate in a particular direction; that was not the intention.

Alex Neil: Okay, I accept your word on that. The e-mail is full of inaccuracies—obviously I will comment on that at the meeting at which we discuss the matter.

The Convener: Perhaps we should deal with that at our next meeting. The information will be available to members then.

13:01

Meeting continued in private until 13:10.

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