

STANDARDS COMMITTEE

Tuesday 23 March 2004
(*Morning*)

Session 2

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STANDARDS COMMITTEE

4th 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

CLERK TO THE COMMITTEE

Sam Jones

SENIOR ASSISTANT CLERK

Sarah Robertson

LOCATION

Committee Room 4

Scottish Parliament

Standards Committee

Tuesday 23 March 2004

(Morning)

[THE CONVENER *opened the meeting at 11:02*]

Item in Private

The Convener (Brian Adam): Welcome to the fourth meeting in 2004 of the Standards Committee. I ask members to switch off their mobile phones. I have received apologies from Karen Whitefield, who is on another committee that is meeting today. I seek the committee's agreement to deal with item 6 in private, for the reasons that we have already given. Is that agreed?

Members *indicated agreement.*

Cross-party Group

11:02

The Convener: Item 2 is consideration of an application to re-establish the cross-party group in the Scottish Parliament on disability. As the proposal certainly qualifies under our scheme, I suggest that we agree to it and that, accordingly, I write to Michael McMahon. Is that agreed?

Members *indicated agreement.*

Complaints

11:03

The Convener: Item 3 is consideration of an item that we did not quite reach at our last meeting. We have decided to consider the item earlier on today's agenda, to ensure that we deal with it. This item has obvious implications for our consideration of the next agenda item. We have a complaints procedure, which it was agreed that we would keep under review. In December, we agreed that we would examine whether the Scottish parliamentary standards commissioner's report would be disclosed to the complainer. Members have a paper that gives the arguments for both sides and sets out the practice that is followed in other complaints procedures.

If we are of a mind to disclose the commissioner's report, it is suggested that there are two places in the complaints procedure at which such disclosure might be made—at the end of stage 2, when the commissioner produces a draft report, or at stage 3, if the committee decides to undertake its own investigation. One of the options would be to show the commissioner's draft report at stage 2, without his conclusions. That is the current approach of one of the other public bodies that deal with such complaints—the Scottish public services ombudsman.

I throw that open to discussion. We will hear what members have to say.

Mr Kenneth Macintosh (Eastwood) (Lab): I think that I have made my views known. For various reasons, I am not especially keen on disclosing the commissioner's report to the complainer. I am aware of only one situation in which doing that might have been seen to be fairer than following the existing procedure, but that is only one example, and I would be loth to change the procedure for the sake of one example.

The danger in disclosing the report to the complainer is that it would encourage further correspondence and encourage the complainer to view the process incorrectly. The paper that the clerks have prepared reinforces the point that what we have is not a dispute resolution process, but a complaints procedure. We appointed the commissioner to consider such matters independently. He should do so and report to us, after which it is for us to make a decision. The only reason for the commissioner's report being made available to the MSP is that the MSP's reputation and standing are under discussion. Nothing else is a matter for the committee to comment on.

Other issues may be touched on in the complaints procedure, but that does not justify any

change to the current process. We must focus on the point of the procedure and not widen it to be a dispute resolution process. The procedure is intended to handle complaints against members of the Scottish Parliament and to deal with them fairly. The current process does that.

Donald Gorrie (Central Scotland) (LD): I do not suggest that the whole report should be sent to a complainer, but there is an argument for giving him or her the factual part of the commissioner's draft report, either at the end of stage 2 or certainly before we hold hearings. To expect somebody to debate a document that they have not seen is unfair.

I accept that the person with the most to lose is the MSP, who must be properly protected. However, the commissioner's report may cast serious doubts on the complainer's truthfulness—that depends on the complaint—and he or she must have some protection against that.

There are quite good arguments for giving the factual findings to the complainer. The argument that doing that could prevent big problems later is strong. If the complainer thought that the commissioner had totally ignored or underplayed a statement that they had phoned so and so at such a time, he or she would have an earlier chance to point that out privately, which would avoid a big stushie later about the process being unfair. I support disclosure to the complainer without conclusions at the end of stage 2, or certainly by the beginning of stage 3, if it comes to that.

Alex Neil (Central Scotland) (SNP): I support Donald Gorrie's suggestion. The only just process is to make the report available at stage 2 to the complainer as well as the MSP who is being complained about.

We should follow the example that has been set by Professor Alice Brown, who is four ombudsmen rolled into one. She covers the Scottish Executive, housing associations, local government and health. She stated in a letter to me:

"a draft Report is issued to both the complainant and the listed authority complained about. The draft sets out the issues involved and facts of the case, and normally includes evidence gathered from documentation and through interviews. A standard letter accompanies these drafts asking the complainant and the authority"—

in this case MSPs—

"to check the facts and to make us aware of any inaccuracies. The findings and recommendations are not included in the draft. Instead they are part of the final Report that is sent to both parties on the same day that the report is laid before Parliament and a copy is sent to the office of the First Minister."

Contrary to the misleading information in the e-mail from the standards commissioner that was circulated—

The Convener: What is misleading about it?

Alex Neil: I am coming to that.

One of the misleading things is that, contrary to what the e-mail says, a number of bodies show their reports to both sides. The Mental Welfare Commission for Scotland shows its reports to both sides as a result of the Docherty suicide cover-up allegation case four or five years ago. A number of organisations, including the Law Society of Scotland, the General Teaching Council and the General Medical Council, show the report to both sides. I have checked with the Scottish Prisons Complaints Commission what its procedure is. If the commission does not find in favour of the prisoner's complaint, it writes to him or her explaining why and how it reached the decision. If it does not find in the prisoner's favour, it will often seek to resolve the complaint at local level and will contact both parties. Therefore, the idea that only one ombudsman follows such a procedure is nonsense and it is inaccurate.

I have listed seven reasons why I believe that it would be a derogation of duty for us not to approve the same procedure as that which is used by the Scottish public services ombudsman. I will run through those reasons quickly. First, the founding principles of the Parliament are that it should be open, accessible, responsive, transparent and accountable. The current system is none of those to the complainer. Secondly, there is the issue of justice and the basic principle of equality of treatment. Thirdly, ours is a unique system in which this is the one and only chance that the complainer—be it an MSP complaining about another MSP or a member of the public complaining about an MSP—has to complain. In many of the other systems, the complaints procedure is a last resort; in ours, it is the only resort and there is no appeals procedure if someone does not agree with the commissioner's findings and recommendations.

Fourthly and fifthly—I believe that these are among the reasons for the procedures under the new Scottish public services ombudsman being changed from the procedures under two of the previous ombudsmen whom she succeeded—there are the issues of human rights and freedom of information. We should stick not only to the letter but to the spirit of human rights legislation; I do not see how that legislation can be adhered to if one side gets the draft report and the other does not. The freedom of information provisions, when they are introduced in January next year, will be retrospective.

Sixthly, the current procedure is positively unfair to the complainer. The evidence at stage 3 is seen not by the complainer, but only by the MSP who has been complained about. The member can make representations on the draft report, but the

complainer cannot do so. I disagree with Ken Macintosh when he says that the proposal to disclose the report to the complainer would create more correspondence. If it creates more correspondence and better justice, let us have more correspondence. The issue is about justice, not correspondence.

My seventh and final point relates to the e-mail from the standards commissioner, which disturbs me. He states that we should

"feel reassured that his view is supported as appropriate practice within the Dunedin Group."

The public services ombudsman was not at the meeting of 27 February. Her deputy was there, but did not express any opinion. I have with me a letter from Kevin Dunion, who states of that meeting:

"At the most recent meeting there was a brief discussion in response to a request which had been previously circulated by the Parliamentary Standards Commissioner for feedback on the procedures adopted by other members of the group who investigated complaints."

He then says:

"Rather than offer my opinion I was interested to hear of the approach being taken by others".

11:15

The Convener: For clarification, what is the status of that letter?

Alex Neil: It is a letter that was sent following the last meeting. I wrote to Kevin Dunion, seeking clarification of his position on the matter.

Alex Fergusson (Galloway and Upper Nithsdale) (Con): Convener, I am slightly concerned that we are discussing in public the content of a confidential e-mail that is also part of a private briefing paper. I would like your ruling on whether that is in order.

The Convener: As far as I can see, there is nothing in what Mr Neil has disclosed that is not already in the public domain. It is interesting that Mr Neil has gone to some considerable effort to challenge the content of the e-mail. It is also interesting that he has chosen not to share his information with us other than when we are in public session. Did you think to make it available to the committee in advance, so that we might have the same amount of time to consider the matter before we discussed it?

Alex Neil: Will respect, that is a bit of a red herring. I am referring to an e-mail that was circulated on the day before our previous meeting and clarifying correspondence that I have received since, based on the papers with which we have been presented, which are in the public domain. I am entitled to check.

The Convener: I do not dispute that; I question whether it would not have been better for you to share that information with the rest of the committee before the meeting than to give it to us now.

Alex Neil: I received some of the correspondence only this morning. I do not think that sharing it in secret before the committee meeting would have been the right way to go about it.

The Convener: If the correspondence was not confidential, it could have been circulated in the same way as other information that the committee has received.

Alex Neil: Apart from anything else, I have not had time to circulate the correspondence, because I have received most of it only in the past couple of days. However, it is still relevant and I believe that the e-mail should be a public document, as it has been circulated among committee members for information.

Two other aspects of this worry me. First, Dr Dyer's e-mail states:

"the meeting was appreciative of the reasons for not showing a draft to the complainer, including risk of inappropriate publicity."

In my experience, the only inappropriate publicity that the committee has had so far has come from the MSPs who have been complained about, not from complainers. That remark is, therefore, an insult to members of the public. Secondly, Dr Dyer states at the end of his e-mail:

"This e-mail is confidential - if I did not intend to send it to you, please let me know, and then delete it."

How does that relate to the issues—

The Convener: That is a standard disclaimer that Dr Dyer puts at the bottom of all his e-mails.

Alex Neil: Well, I find it very strange.

All in all, the information that Dr Dyer has provided us with has been unbalanced, misleading and, frankly, inaccurate. The only way in which to achieve justice in this matter is to give the complainer and the MSPs who are being complained about equal treatment, so that there is justice for both sides. Alice Brown has the template for the way ahead, especially in the light of the new legislation on freedom of information.

Alex Fergusson: I do not want to make a lengthy contribution, but I find myself split on this issue. I have great sympathy with Ken Macintosh's view and I am especially keen that delays in the findings of an investigation into a complaint against a fellow MSP should be kept to an absolute minimum. I am concerned about delays in the process.

I now know that I can refer to the e-mail that Dr Dyer sent. His final sentence before the disclaimer states:

"Of course along with this view goes an obligation to be willing to check back during the investigation with the complainer any information supplied by the people complained about which they may wish to challenge."

I do not see how that could be done without the complainer having been able to view the factual part of the report. I therefore find it difficult to oppose the disclosure of the factual part of the report only, given the arguments that were made by Donald Gorrie and Alex Neil.

Bill Butler (Glasgow Anniesland) (Lab): I take on board many, if not all, of Ken Macintosh's words of caution. Without rehearsing any of the points that have been made, I believe that the case for disclosure of only the factual element at stage 2 is overwhelming. Most of what I was going to say has been said better by other members.

Mr Macintosh: Alex Neil is obviously concerned about this matter. He made a heated contribution—well, perhaps it was not heated, but it was certainly passionate. I do not view the matter in that way. I would rather take a dispassionate view.

There is an argument about fairness, justice and outcomes. It is difficult to consider this matter based on one particular case that has arisen. I am not suggesting that that is what members are doing, but one case has certainly thrown up the issues that are under discussion. We have no way of knowing whether that case is typical. In fact, we know that it is not typical because none of the other cases in the previous session of Parliament revealed this specific issue to be a problem at stage 2.

The comparison with the public services ombudsman, Alice Brown, is probably not very fair. In my experience, the public services ombudsman deals with complaints about a process in a public service, rather than with complaints about individuals. There is a difference. When the complaint is against a public service, there is not the same potential damage to an individual's reputation. The Parliament's reputation and individual MSPs' reputations are serious matters, and damage to them would have long-term consequences. I do not think that the same argument could be applied to any part of the public services, where processes are being considered. There is no exact parallel to our situation.

It was said that there are examples of other ombudsmen sharing their conclusions with the complainer, and I would be interested to know at what stage that happens. There is no doubt that we should share conclusions at the end of the process. There may even be an argument for

making the report available after it has come back to the committee—in other words, after the commissioner has considered a case and presented a report to us. If we make a further investigation at that stage, there is an argument for making the report available to the complainer as well as to the person who has been complained about. There is an argument to be made about fairness because of the proposed extra step in the inquiry process, but I am not sure that it should apply at stage 2 of the complaints procedure, because it would prolong the situation and undermine the commissioner's status.

I do not agree that the seven points that Alex Neil made add up to the conclusions that he draws from them. He suggested that privacy or confidentiality is the same as secrecy, which it clearly is not, and that transparency is affected by confidentiality. I disagree: a process can be totally transparent and accessible and yet be confidential. I do not doubt that, four years into the Parliament's existence, improvements could still be made to our standards process, but we have the basic approach right and we should develop it, rather than undermine it by following the suggestions that have been made.

Alex Neil talked about equality of treatment, but the problem with that is that he assumes that the complainer and the member who is complained against have equal standing, whereas they do not. The complaint is about an MSP, not about the complainer, so equality of treatment does not apply because the complainer and the member who has been complained against are not two parties to a dispute. I disagree fundamentally with Alex Neil's point. There are arguments about justice and fairness, but I disagree that treatment has been unequal in this case.

The only resort is this procedure. It is common to have a complaints procedure like ours and it is possible to go to the Court of Session afterwards.

Alex Neil: If one is a multimillionaire.

Mr Macintosh: Your suggestion that there is no appeal adds to my fears that to open up the process at stage 2 by sharing the commissioner's findings with the complainer, before the commissioner has concluded his investigation, would be to suggest that the committee can be appealed to over the head of the commissioner. The point of establishing an independent commissioner was to give some robustness and independence to the process, so that members of the public could have faith in the commissioner's independence and would not have to come to the Standards Committee.

I am not convinced by your arguments about human rights and freedom of information. The information is free, so there is nothing to worry

about on that, and I was not sure what your point was on human rights.

You said that the process is positively unfair to the complainer. There is an argument for that view if we investigate a complaint further at stage 3, but I do not consider the process to be in any way unfair to the complainer at stage 2. I cannot see how it can be unfair, because the complainer has a chance to present his or her point of view, the commissioner takes a view on that and it is then up to the committee to interpret that view. If we want to take a complaint further, we are at liberty to do so, but the process is not unfair to the complainer at stage 2. More correspondence is not to be encouraged. It would not achieve better justice, but would undermine the system and people's faith in it. We must have a robust system.

There are different ways of looking at the Dunedin group's views. I do not think that those views should necessarily be the be-all and end-all. We know how the system works; we have set up a system with an independent commissioner and should stick with it. If we have modifications to make, they should be made at the later stages of the process rather than at stage 2.

Alex Neil: I disagree with almost every point that Ken Macintosh made. On the point about reputation, the complainer's reputation can also be at stake whether the complainer is another MSP or a member or members of the public. The key point is that it is noticeable that other organisations that deal with complaints about individuals, particularly about their professionalism—organisations such as the GTC for teachers and the GMC for medics—show their reports, excluding, I think, the findings and conclusions, to both parties to ensure that the reports are accurate and properly reflect the investigation.

11:30

The Convener: I have not heard any member challenge that point. The difference between Alex Neil and Ken Macintosh relates to the stage at which the report, without conclusions or findings, should be disclosed. Is that a fair comment?

Alex Neil: Quite frankly, I do not think that Ken Macintosh is suggesting any alternative. He simply wants the status quo to continue for the time being. However, I do not think that the status quo is at all acceptable. By the time that a report comes to the Standards Committee, we should be absolutely sure that both sides agree that it is properly balanced and factual. I do not see the danger in not disclosing the findings and conclusions until both sides have agreed the facts of the matter. All the arguments are the other way.

If we get reports that people say—rightly or wrongly—are factually inaccurate, that will lead to

public dissatisfaction. That has happened. I think that we will protect the commissioner's independence much more by giving the report to both sides to allow them to check that it is factually accurate and to confirm that they are happy with the balance of the facts. At that point, the commissioner can add his findings and conclusions before sending the report to the committee. That would be a perfectly fair system and such systems are being used increasingly by organisations that have been established for a long time and are now changing their practices to meet the requirements of new and forthcoming legislation.

I know that we are not in a judicial system but, if we do not follow the procedure that I have described, our situation will be akin to a hypothetical one in which, after the trial, a judge makes the prosecutor and the accuser leave the court but allows the accused to stay while he sums up for the jury. That would be an absurd situation to be in.

An argument has been made about more correspondence being generated, but I think that it would be much better to clear the air at an earlier stage so that we do not end up with a report that is totally discredited—rightly or wrongly; fairly or unfairly—by a complainer because of something that they believe to be factually inaccurate. Once the complainer has signed up to the factual accuracy of the evidence, they will have no credibility if they say that the report is factually inaccurate, although, obviously, they will still be able to complain about the findings. The procedure that I have outlined would protect, rather than undermine, the commissioner's independence.

Donald Gorrie: I accept what Kenneth Macintosh said about not wanting to prolong the proceedings. The rule could be that, on receiving the evidence, the complainer would be allowed to set out their case either in only one letter or only one meeting with the commissioner. Any dispute about a factual matter could be sorted out in one meeting; we do not want to have a prolonged examination of people's slightly varying interpretation of facts.

Alex Neil: At the moment, if someone makes representations when they see the draft report, the commissioner does not need to accept them. However, the MSP would probably be able to prolong the process much more than the complainer could. The situation is one-sided.

The Convener: I do not want this debate to become too one-sided.

Mr Macintosh: I would like to clarify what we are making a decision about. Alex Neil suggests that the information should be shared with the

complainer and the person about whom the complaint has been made and that, once they have agreed on the facts, the commissioner can proceed. I find that an impractical and unworkable suggestion. When people make complaints, the facts of the matter are nearly always subject to dispute because they are subject to interpretation.

Alex Neil: In that case, the information should not be shown to either side. Both sides should be treated the same.

Mr Macintosh: If one could extract the facts of the dispute so that they could be clarified with both sides in a fair way, I would not oppose that. In all the commissioner's reports that have appeared so far, the conclusions are implicit in the way in which the report is written—although it may be possible for reports to be redone. The facts are laid out and the argument is made as the report proceeds. No member who has read a report or complaint does not know before they reach the end what the conclusion will be. As one reads a report, it becomes clear what the conclusion will be. I cannot think of a report that has not pointed clearly to a conclusion.

Alex Neil: What about the Hutton report?

Mr Macintosh: I am referring to reports by the Scottish parliamentary standards commissioner.

The Convener: I, too, have a view on the issue. I am concerned that disclosing the full report—even without the conclusions—would invite challenges to the way in which the commissioner deals with issues. That would allow some kind of appeal process to develop.

Clearly, there are two separate stages. The first is the work of the commissioner whom the Scottish Parliament has appointed to deal with issues independently. Secondly, responsibility passes to the committee once the commissioner has submitted a report to us. If we start to change our approach, there will be a blurring of the two roles, which bothers me. Donald Gorrie has suggested that any complainer should have one opportunity to meet the commissioner to attempt to correct or challenge his report. The suggestion is helpful, but unless some complainers get what they want—irrespective of the commissioner's judgment—they will use such a process as a vehicle to challenge that judgment.

I disagree with some of Ken Macintosh's remarks. It is not our job to tell the commissioner how to conduct investigations. The commissioner is independent. If we tell him how to conduct investigations, he will become less independent. When I consider how reports are made, it strikes me that the commissioner goes back and forth between the complainer and the person against whom a complaint has been made to ascertain the facts of the matter. I did not infer from the

commissioner's e-mail what some other members have inferred. I refer to the comment:

"along with this view goes an obligation to be willing to check back during the investigation".

That is a statement of what happens. If we tell the commissioner how to conduct investigations, we are in danger of encroaching on his independence.

The procedures that other ombudsmen use are interesting and valid. That information will help us to reach a decision. However, the bulk of those procedures concern resolution of disputes between two parties who are trying to resolve their differences. A complaint against a member is not a matter for dispute resolution—an accusation has been made against a member under the code of conduct. As Ken Macintosh said, we are not dealing with a situation in which there are two equal parties and the complainer is somehow disadvantaged. We are dealing only with an accusation that has been made against a member. The two situations are not the same.

I am open minded about whether we should disclose the factual basis of the commissioner's conclusions, without showing his findings. I may even be open minded about when that should happen.

As I said, I do not think that there is a direct parallel with a dispute about health service provision. In that situation, the dispute is about someone who expected to get a service not getting that service. The same is true of complaints to the GMC and the Law Society of Scotland. Normally, in the case of a complaint to the Law Society, someone is complaining about the service that was delivered by a solicitor and the society deals with the complaint on that basis. In those sorts of cases, we are talking about dispute resolution.

Having expressed my view on the matter, I am more than happy to give Mr Butler—and indeed, other members—an opportunity to come back in, although I remind the committee that we need to reach a conclusion on the matter. I suggest that we do so on the basis of the recommendations in paragraph 26.

Bill Butler: On that point, convener, as fortune would have it, I am looking at paragraph 26. No one around the committee table wants to weaken the independence of the commissioner—the independence of the commissioner is paramount.

It is possible to produce a report in which the facts are set out and one may or may not be able to deduce from those facts the conclusions that would follow on. Donald Gorrie made a good suggestion of a meeting in which the complainer could iron out with the commissioner any dispute

about the facts. If it is not possible to accomplish that in one meeting, I suggest that the commissioner could simply set out the remaining matters of factual dispute in an annex to his report. Indeed, we will discuss something along those lines under our next agenda item. If we were to agree to that suggestion, our approach would be factual and informative and would not weaken the commissioner's independence. The reports would give a fuller picture and I always believe in giving the fuller picture.

On that basis, I would opt for the stage 2 recommendation in the second bullet point, together with the proviso that Donald Gorrie made of having one meeting to sort out any differences between the complainer and the commissioner. As I said, if the differences cannot be sorted out, they could be outlined in an annex to the report.

The Convener: I assume that you are making a proposal.

Bill Butler: Well, it is not—

The Convener: If so, I am happy to accept it, but perhaps the words “one meeting” are rather prescriptive, as the discussion could be held over the phone. Perhaps we should use the words “one opportunity”.

Bill Butler: The word “opportunity” is fine. I am happy for the appropriate word to be used.

Alex Neil: May I make a suggestion, convener? I think that we all accept your point that it is not our job to be prescriptive about how the commissioner should undertake his work. The commissioner could decide either to accept or not to accept Donald Gorrie's point. Our job is to set the framework, in which we should embed the principle that the full report will be available. To tell the commissioner only to have one meeting would weaken his independence.

The Convener: That was my worry.

Bill Butler: We could say something along the lines of, “The commissioner might wish to complete that part of the process timeously.”

Mr Macintosh: I have a question on an earlier point. I was not suggesting that we should tell the commissioner how to investigate. I am sorry if what I said led the convener to that conclusion. However, what do we do if the commissioner shows his findings to the complainer and the complainer does not agree with him?

Bill Butler: The facts will decide the matter.

Alex Neil: That is up to the commissioner.

Alex Fergusson: Surely that is almost the situation that we have at the moment. If conflicting factual arguments are put to the commissioner, it is up to him to determine on which arguments to

base his judgments. That remains the case even where the complainer still does not agree on the facts—indeed, that is where the commissioner's independence comes in. He has to make up his mind which facts will determine the findings of his report.

11:45

Alex Neil: On the basis of Ken Macintosh's argument, an MSP who is being complained about under the current system can hold up the proceedings for as long as they want. If I saw a draft report that said, “Alex Neil did this and that,” I would engage the commissioner for as long as I could. I would then have an unfair advantage and the issue is—

The Convener: But that is—

Alex Neil: Let me finish—

The Convener: With the greatest of respect—

Alex Neil: You must let me finish my argument.

The Convener: That continues the fallacy that this is a dispute resolution procedure, in which one side is opposed to the other.

Alex Neil: No, it is not a dispute. Two examples are the procedures of the GTC and the GMC, which are not about dispute resolution. In dealing with complaints about professional standards that affect individuals, those bodies show the factual report to both parties before they publish or agree it. That is an exact parallel.

The Convener: Can we proceed on the basis that we have a broad agreement—I am looking at Ken Macintosh, who might have a slightly different view—that it is appropriate to disclose the report without the findings? Is that agreed?

Alex Neil: At stage 2?

The Convener: Let us put that issue to one side. Are we agreed on the more general point?

Mr Macintosh: When the commissioner shows his report to the MSP, the MSP does not have a right of veto over it. The MSP can raise concerns and the commissioner can either reflect those concerns or not. Neither the complainer nor the MSP has a right of veto. Just to be clear, the report should be disclosed without the findings and the commissioner should not have to get agreement from either party.

The Convener: Do we agree in principle that the report should be disclosed without the findings?

Members: Yes.

The Convener: The next question is when the report should be disclosed.

Alex Neil: I propose that it should be disclosed at stage 2, because I do not think that the process is logical otherwise.

Bill Butler: I second that.

Donald Gorrie: Yes.

Mr Macintosh: I am not wildly keen on the arrangement, but I will not stand in the committee's way if it takes that clear view.

The Convener: I am quite happy to suggest that the report should be disclosed at stage 3. If the committee decides not to proceed further and the complainer is still unhappy about the process, the complainer has the right to go to a judicial review. If we decide at stage 3 to proceed with an investigation, it is inappropriate that someone might have to answer questions on a report that they have not seen. I favour disclosure at stage 3.

Alex Neil: I think that that is wholly illogical. The point is to ensure that the original report is based on fact—

The Convener: My concern is that at that stage the Parliament has already determined that the matter is one for the commissioner.

Alex Neil: We agreed that as part of the first decision. We agreed that either the complainer or the MSP can make whatever representations they like to the commissioner when they see the draft report. It is for the commissioner to decide whether he accepts any part of that representation—it is his report. The point is that he has had the opportunity to filter out any factual inaccuracies or alleged imbalances and to consider the matter. When stage 2 is completed, all further stages are based on that report, so if it is wrong—

The Convener: If there is no further stage, those who have made a complaint would have redress beyond the committee.

Alex Neil: Where? Do not tell me that you mean judicial review.

The Convener: Absolutely.

Alex Neil: Oh, come on. Unless someone is a multimillionaire, they cannot get redress through judicial review.

The Convener: We are going round the houses now. We should resolve the matter by taking a vote on it. I am happy for you to propose that the report should be disclosed at stage 2, Alex. I understand your position clearly and I know that it has support. However, I am putting an alternative view to you and I hope that you have sufficient respect for it to realise that that position, too, is logical. The issues are not clear cut to the extent that one is right and the other is wrong. There are alternative ways of proceeding, depending on whether the emphasis is placed on the

independence of the commissioner or on the right of access to information. I accept that there are sometimes dichotomies in such matters and I take a slightly different view from yours. I am happy to agree that the report be disclosed, but I believe that that should be done at stage 3.

Alex Neil: I propose amending what we agreed to include the recommendation that the report be disclosed at stage 2.

The Convener: Okay.

Alex Neil: It is a good job that there is no party policy on the matter.

The Convener: Let us not worry about that. The question is, that the report be disclosed at stage 2. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

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

AGAINST

Brian Adam (Aberdeen North) (SNP)
Mr Kenneth Macintosh (Eastwood) (Lab)

The Convener: The result of the division is: For 4, Against 2, Abstentions 0. That is a clear-cut vote; the matter is resolved.

Alex Neil: The report will be disclosed at stage 2.

The Convener: Agenda item 4 is consideration of the paper on administrative procedures for handling correspondence during the complaints process. We dealt with the bulk of the matter at our previous meeting. I suggest that the easiest way of proceeding is to deal first with the matters on which, I suspect, there will be little or no debate and then to move on to the issue that we debated previously. The sixth bullet point in paragraph 6 of briefing paper ST/S2/04/3/5 was agreed at our previous meeting, but a minor change to the wording was suggested, which was to add the words "and reported accordingly" at the end. Do members agree to that change?

Members indicated agreement.

The Convener: Okay. Thank you.

The fifth bullet point of paragraph 6 may be improved by a textual adjustment that would make it clear that the committee has the right to decide who will and will not be heard and that there is no absolute right to be heard. The suggested change is that we add the words "or oral" before the word "submissions". Is that agreed?

Members indicated agreement.

The Convener: At the risk of being wrong again about what might or might not be controversial, it was suggested previously that we might need a form of words that would allow us to apply a sanction for persistent lobbying on the part of a complainer. However, we did not agree the principle of having such a sanction. The clerks and our legal adviser have given us guidance in a briefing paper and suggested that the following words might be acceptable:

"Persistent lobbying by the complainer may be considered an abuse of process and could lead to dismissal of the complaint."

Can I have members' views on whether we need such a provision and whether the suggested words are suitable?

Bill Butler: We need such a provision and the form of words before us seems eminently sensible.

The Convener: Is there any disagreement?

Alex Fergusson: No. There is a need for a last resort, which that wording puts plainly.

The Convener: The wording reflects my view and the view that Mr Neil expressed about balance at the previous meeting.

Mr Macintosh: The legal advice is quite worrying. We have to ensure that we do not allow the fact that someone is persistent to get in the way of the fact that they might have a genuine concern. We have to be clear that we are talking about a last-resort measure.

The Convener: Yes. We would use it in extreme—perhaps even beyond exceptional—circumstances. Nevertheless, if we have the provision as a matter of record, we and any future committee will not have to struggle with the issue in relation to a particular circumstance.

We come to the more substantive debate relating to bullet point 1 of paragraph 6 of the previous paper. Members have before them a paper that goes into considerable detail on what could or could not be helpful. It might be useful if I highlighted one matter, which, without prejudice to the debate, we need to be absolutely clear on. In our cover note, the possibility is set out that "defamatory material" about individuals may be submitted as evidence. If such material were to appear as part of the annex to the commissioner's report, it would benefit from the privilege against defamation under the Scotland Act 1998. We would have to be careful not to allow that to happen—indeed, in the most extreme circumstances, we would have to be careful to ensure that we were not encouraging it to happen. Whatever decision we arrive at will need to address that point.

Bill Butler: The point to which you have just referred is serious and I am sure that we will all have noted it. Obviously, we will need legal advice, but the simple expedient of blanking out any such defamatory material would be fine. We would still have the pertinent information, but defamatory material, by its very nature, is impertinent. That would be a way of proceeding and allaying all our justified fears about that type of material finding its way in. My suggestion is that we take legal advice if necessary and simply blank out defamatory material.

The Convener: Is that the only point that you want to make?

Bill Butler: I have a few brief comments. Bullet point 2 of paragraph 4, which relates to bullet point 1 of paragraph 6 of the previous paper, states:

"If original correspondence is annexed to the report, this could involve considerable amounts of additional documentation."

I do not think that that is insurmountable and it is not a huge point to address. Bullet point 4 of paragraph 4 states:

"Letters may contain personal and confidential information about the correspondent or others, which may give rise to an obligation of confidentiality on the Commissioner and the Committee not to disclose such material to others."

That is already incumbent on us, so that point is dealt with.

Bullet point 3 of paragraph 4 states:

"The Commissioner may therefore need to seek a correspondent's permission to include his or her letter in his report. The Committee may also need to seek the correspondent's agreement to publication of his or her letter as an annex of the Commissioner's report."

That is a little problematic, but it is not insurmountable. I have other comments, but I am sure that members will want to make other points, too. I am still of the opinion that the amendment to bullet point 1—the additional wording—that Alex Neil proposed is correct and that the amended bullet point is fit for use.

12:00

Alex Neil: I agree with Bill Butler. I want to emphasise that, if someone makes a complaint to the commissioner on the process—at stages 1 and 2, such a complaint can be made only to the commissioner—it is fair that we ask that that be recorded. I am not asking—nor would I ever ask—that when such a complaint has been made, every bit of correspondence, every minuted phone call and every e-mail be inserted in the main body of the report or in an annex. However, it is reasonable that the fact that the complainer, or the MSP who is being complained about, has expressed dissatisfaction with an aspect of the

investigation, be recorded somewhere. It is clear that that should be known to the committee before it decides whether to accept or reject the report or to carry out a further investigation. I am asking only that such matters be recorded; I am not asking for all the minutiae to be supplied to the committee, because that would be unreasonable.

In any case, I hope that the decision that we have just taken to show both parties the draft report, minus the findings and conclusions, at stage 2—which I think was wise—will help to resolve such issues. I imagine that the commissioner would—if he believed that the complainer or the MSP who was being complained about felt strongly enough about an aspect of the investigation—refer to that in his report as a matter of course, and that those involved would say whether what the report said was a true reflection of the complaint.

Basically, I am just asking for a simple recording somewhere—perhaps in the annexes, depending on the seriousness of the complaint; that is up to the commissioner—of the fact that some level of dissatisfaction has been expressed by one party or the other. The last thing that I want is to have to wade through mountains of correspondence on such a matter when it is not necessary to do so, particularly if the issue has already been resolved.

Donald Gorrie: I think that a fair summary would be quite acceptable. We certainly do not want lots of repetitive letters, or to encourage people to produce more and more repetitive letters. It would be sufficient to have a sort of diary that said that Mr X wrote in to complain about such and such on 10 June, but the commissioner felt that he did not have a good point.

If Bill Butler's suggestion about blacking things out worked, it would be okay. I would not object to editing of documents. I would find it acceptable if the commissioner said for example, "I received a letter from Mr X alleging blah, blah, blah. His language was so intemperate that I have summarised it here." We certainly want to avoid encouraging people who are over-enthusiastic about their cause to keep on producing more and more unpleasant material that we do not want to read.

Mr Macintosh: You will not be surprised to hear that I am concerned about the proposal, for several of the reasons that are given under bullet point 4. They explain why the proposal might be an unhelpful road to go down. The fundamental argument is one that I made unsuccessfully in our previous discussion. I said that, by building in a complaints procedure, we would be undermining both the commissioner and the structure.

My fundamental worry is that if, coupled with the sharing of information at stage 2, we ask the

commissioner to detail any complaints about his findings, along with his response to them, we will put pressure on the commissioner to write a certain sort of report. The commissioner is an independent person who should take a fair and just view, whether or not either party—the MSP or the complainer—agrees with him. However, we are building in pressure on him to write reports that the complainers and, possibly, MSPs would agree with. That is not the same as writing independent reports. If somebody complained to the commissioner, who then wrote his report and conclusions, it might be that neither the complainer nor the MSP would be happy with that report; however, the commissioner would be doing a fair job.

By introducing the measures that we are heading towards today, we would put pressure on the commissioner to assuage the feelings, or meet the demands of, the complainer and the MSP by writing a report that somehow satisfied both of them. I do not think that that is the role of the commissioner and it would put the commissioner in a compromised position. Therefore, I do not think that it would be a good road to go down. I recognise that we could try to make the proposal work, but I do not think that it is desirable.

If we appoint a commissioner whom we think will be fair to all sides and who has everybody's confidence, we will have a robust system. We are not talking about criminal proceedings; we are talking about a procedure for dealing with complaints against MSPs. I might add that there are also elections every four years. There are many ways of dealing with matters to do with MSPs and we are in danger of getting the process out of proportion. We should set up an independent person who will be just and fair, and we should allow that person to look into matters and make their conclusions known to us. The Standards Committee will then decide what to do. What we are discussing would undermine that and head off in a different direction—the direction of dispute resolution. It would also undermine the independence of the process.

Alex Fergusson: I am with Ken Macintosh on this. I am not against changes to procedures, but I am worried about the bullet points that Bill Butler refers to as presenting a few problems that are not insurmountable. That is not a basis on which to make significant changes to what has to be—as Ken Macintosh said—a robust procedure. If we were simply to agree to the proposal, that would open the floodgates to increased correspondence of considerable length. I wish to minimise delays in the procedure, because that would be to the benefit of all concerned. I am afraid that I do not think that we have thought the matter through enough to go down the proposed route, so I am not able to support the proposal at this stage.

The Convener: The committee is obviously divided on the issue.

Donald Gorrie: I do not wish to undermine the commissioner but I do not see a problem with the commissioner listing occasions on which people write to him to complain. If I received a report, part of which was about incessant letters from a particular person, that would not help that person's case. I do not think that the proposal would undermine the commissioner. It is important not to give to people who have grievances material that might make them feel that they have more of a grievance.

At least the report should list briefly the points that have been made. The commissioner would do that—it would still be his deal. We would not be undermining him, but allowing him to make his report as full as possible, which would reduce the chance of a challenge at stage 3. The more all-embracing the commissioner's report is at stage 2, the less chance there is that the committee would take up the option of a challenge at stage 3. The report should be as complete as possible. We should not publish all the letters, but if points are made they should be included in the report—for example, as an annex—although I am open to argument about the exact mechanism.

The Convener: Do not you agree that the decision that we made on the previous agenda item will obviate the need for your suggestion in many cases? That decision already offers an avenue for redress on issues about the process at stages 1 and 2.

Alex Neil: That takes us back to the fundamental point that Ken Macintosh raised, which is that the name of the game is not to please everybody by getting the lowest common denominator between the complainer and the MSP who is being complained about, but to ensure that the commissioner and the committee reach an objective decision. At the end of the day, the commissioner does not make the final judgment; the committee makes the final decision whether to accept or reject a complaint or to carry out further investigation.

The Convener: Surely it is not up to us to decide whether the commissioner has been objective, which is the implication in what you say.

Alex Neil: No. My point is that if there is a dispute about the process, that should be made known to the committee. It would be up to the committee, based on the commissioner's recommendations, to decide whether to give weight to that. I am very much of the view that we should come down heavily on lobbying of the commissioner or the committee. Once there is lobbying, the whole system breaks down. There must be a quid pro quo, especially when a

member of the public, rather than an MSP, makes a complaint. In life, we often have to provide some way of allowing people to let off steam. In 90 per cent of cases, such complaints do not come to anything, but if people know that their concerns have been recorded, that is enough to satisfy them—they have made their point and that is that. At the end of the day, a complaint about the process will probably not be material to the final decision on the original complaint, although sometimes it will be.

Alex Fergusson: I see a fundamental difficulty in Alex Neil's proposal. On the one hand, we are asking the commissioner to edit and to be selective about which parts of complaints he puts in the annex, but Alex Neil tells us that the complainer, by blowing off steam, might be sated and perfectly happy. I understand that point, but the difficulty is that if the commissioner does not include in his selective annex the matter that the person complained about, the complaint will become all the more voluble, which will lead to protraction of the procedure. We should ask the commissioner to publish either everything or nothing—although I do not think that it would be helpful to publish everything, given the robust reporting that we want from the procedures. The argument is counterproductive.

Bill Butler: After listening to Alex Fergusson's point, I am not sure whether my point makes sense, but I will have a go anyway. To an extent, I accept Alex Fergusson's point that the commissioner should include all or nothing, but we are trying to construct a system that protects the independence of the commissioner and his judgment while being as transparent as is practicable. Paragraph 2 of the paper suggests that the first bullet point should say "Any complaint". That means that all such complaints must be published, which may not be helpful.

We could insert after "Any complaint" the words, "that the Commissioner considers relevant". If we include those words, that would remove defamatory or vexatious material, repetition and so on. That sentence would then read, "Any complaint that the Commissioner considers relevant concerning the handling of the investigation at Stages 1 and 2, together with his response, should be annexed to his Stage 2 report." That is an attempt to find the middle way. It is not a question of all or nothing; it is a question of all that is relevant.

12:15

The Convener: Could you give us the initial form of words again? Is the wording, "Any complaint that the Commissioner considers relevant, together with the Commissioner's response to it"?

Bill Butler: I will go through it again if that is okay. I am sorry if I have confused the matter. This is the second sentence of paragraph 2, on page 1, under the "Bullet Point 1" heading. The sentence as it stands begins:

"Any complaint concerning the handling".

After "complaint", I wish to insert the words—

The Convener: It might be helpful if you look at paragraph 3, under bullet point 1, which, in essence, gives an alternative form of words to that. Would that be helpful to you? That paragraph begins: "Any complaint"—

Bill Butler: No, I will stick to the wording in paragraph 2, if I may, convener. I do not want to get more confused than I already am.

Alex Neil: Bill Butler is trying to propose a third way.

The Convener: That was uncalled for, Mr Neil—enough of that.

Bill Butler: I am trying to propose a middle way, and a sensible way, of proceeding. I hope that members will see it that way. I refer to paragraph 2, which comes under the heading, "Bullet Point 1", and its second sentence. It is in italics—that was at Alex Neil's suggestion a fortnight ago. I propose to insert after "Any complaint" the words "that the Commissioner considers relevant". The sentence would then read, "Any complaints that the Commissioner considers relevant concerning the handling of the investigation at Stages 1 and 2 together with his response should be annexed to his Stage 2 report." That change will also involve replacing "the Commissioner's" with "his" in two places.

The Convener: Okay. I think that that is a helpful suggestion.

Bill Butler: Thank you.

Alex Fergusson: You have certainly found a middle way but, given that wording, I stress even more strongly that we should drop the suggestion. If I were the commissioner, and if I held the views that the commissioner obviously holds on the issue, I would simply determine that none of the complaints that I received were relevant. Therefore, I would not have an annex—end of story.

The Convener: I think that that outcome is unlikely. Given the level of debate that the matter has engendered at two Standards Committee meetings, I find Mr Butler's suggestion to be helpful. I understand the point that Alex Fergusson makes and there might be some force in it. However, should there be a welter of complaints, and should such matters still be causing us the problems that they have caused until now, the committee might well choose to revisit the matter.

Bill Butler's suggestion is completely compatible with what the commissioner has written to us. His letter is among the committee's private papers—I point out that the only reason why they are private is because they refer to an individual case. The second-last paragraph refers to the principles of the issue. The commissioner says:

"I suggest that it should be a matter for my judgement what I do or do not annexe to my report, or indeed include in it."

On today's debate, the committee will have expressed the clear view that if the process is a matter of contention, and where that is relevant to the complaint, it would be a matter of interest to the committee to hear about that. We are anxious to preserve the commissioner's independence, and we will wish to respect his judgment.

If Alex Fergusson can accept that, I suspect that we will be able to move forward. Does anyone other than Alex Fergusson, to whom I will give an opportunity to respond, feel differently?

Mr Macintosh: I agree with Alex Fergusson, but it is clear that Bill Butler has come up with a good compromise. It is not the right route to go down, but it is a good compromise.

The Convener: That is especially the case in light of the decision on the previous item.

Alex Fergusson: I would not wish to be thought of as uncompromising, convener. I am not totally happy with the proposal, but I will accept the genuine contribution that Bill Butler has made to the debate.

The Convener: Are members now content with the administrative procedures at which we have arrived for the disclosure of reports at stage 2, and what I hope is a robust method of dealing with complaints against MSPs?

Mr Macintosh: We are agreed, if not content.

The Convener: In that case, we will move to item 5, which concerns a complaint against David Davidson MSP, and on which we will announce our decision. I will make a statement first, and we will deal a little later with matters that need to be dealt with in confidence.

David Davidson has been dealing with a case on behalf of the complainer. The complainer alleges that Mr Davidson passed information about him to the local police and that therefore he did not respect his privacy. The complainer alleges that Mr Davidson breached paragraph 2.5 of the code of conduct for MSPs, which states:

"In representing people's interests, members have a duty to respect individual privacy, unless there are overwhelming reasons in the wider public interest for disclosure to be made to a relevant authority, for example where a member is made aware of criminal activity."

The standards commissioner concluded that Mr Davidson had not breached that provision of the code, although he did pass information about the complainer to the police. The commissioner has found that Mr Davidson perceived a risk to the complainer and to others, considered that the relevant authority required to be informed of that risk as a matter of urgency and considered that the risk was of such a degree as to override the duty of confidentiality and the right to privacy.

The Standards Committee considered the commissioner's report at its previous meeting. We have agreed to accept the commissioner's findings and conclusion. We note that Mr Davidson took time to consider advice from others before deciding on his course of action and that, on the basis of those discussions, the member made his concerns known to a relevant authority—in this case, the local police. His motivation in so doing was principally to safeguard the welfare of the complainer and others. Mr Davidson acted in accordance with paragraph 2.5 of the code of conduct.

I invite committee members to make any comments that they want to add on the case.

Mr Macintosh: I agree with the commissioner's findings.

Alex Neil: I agree with the findings as well.

Donald Gorrie: I agree with the findings.

Alex Fergusson: For the record, I agree with the commissioner's findings.

Bill Butler: I agree entirely with the commissioner's findings in this case.

The Convener: I thank members. I close the public part of the meeting, and we will go into private to deal with item 6.

12:24

Meeting continued in private until 12:50.

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