STANDARDS COMMITTEE

Tuesday 25 May 2004
(*Morning*)

Session 2

£5.00

Produced and published in Scotland on behalf of the Scottish Parliamentary Corporate Body by The Stationery Office Ltd.

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Tuesday 25 May 2004

STANDARDS COMMITTEE
7th 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 ALSO ATTENDED:

Jackie Baillie (Dumbarton) (Lab)
David Cullum (Scottish Parliament Directorate of Clerking and Reporting)
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 25 May 2004

(*Morning*)

[THE CONVENER *opened the meeting at 11:00*]

Item in Private

The Convener (Brian Adam): Welcome to the seventh meeting of the Standards Committee in 2004. Members should please switch off their mobile phones. We have not received any apologies—I am sure that other members are on their way.

Agenda item 1 is consideration of whether to take in private item 5, which is initial consideration of a report from the Scottish parliamentary standards commissioner at stage 3. Paragraph 10.2.32 of the "Code of Conduct for Members of the Scottish Parliament" requires the committee to consider the commissioner's report in private

"in order to ensure the privacy of any further investigation into the complaint."

Do members agree to take item 5 in private?

Members *indicated agreement*.

Cross-party Group

11:01

The Convener: Agenda item 2 is consideration of an application to establish a cross-party group in the Scottish Parliament on tackling debt. Ms Baillie, who is one of the proposed co-conveners of the group, is here and I welcome her to the meeting. If you want to say anything to the committee about the application, we would be delighted to hear from you. You are welcome to make a statement if you want to do so.

Members have a paper before them. I note that it is proposed that a number of members of the Standards Committee would be members of the cross-party group.

Jackie Baillie (Dumbarton) (Lab): I did not expect to be at the meeting and had given my apologies. Given that the application is straightforward, I should not take up the committee's time by saying a few words, but I thought that I would show the committee the courtesy of at least showing up.

The Convener: It was kind of you to do so. Unfortunately, Jamie Stone, who is one of the proposed co-conveners of the group, has been delayed, so he cannot be here today. Do committee members have questions about the proposed cross-party group on tackling debt?

Mr Kenneth Macintosh (Eastwood) (Lab): I have not so much a question as an observation. The proposal is excellent. It is proposed that many of our colleagues from Westminster will be members of the group, which is fantastic, particularly the proposal for a vice-convener. Is there a group at Westminster with which there will be formal contact, or even reciprocal membership? I hope that such relationships will be the first of many other future relationships. I would welcome any comments that Jackie Baillie has to make on that.

Jackie Baillie: We have a relationship with a group at Westminster. We considered creating a cross-party, cross-parliamentary working group, but quite quickly decided that doing so would be overly complicated and that informal working arrangements are the way forward. As members can see, a number of MPs regularly attend meetings in Scotland, which is enormously helpful. Equally, some MSPs go down to Westminster and participate in the cross-party parliamentary group there. We would encourage such things because elements of debt are reserved to Westminster, but the implications very much come home to Scotland. Therefore such co-operation is useful in developing policy areas that cross the reserved-devolved divide.

Donald Gorrie (Central Scotland) (LD): As a member of the group, I think that it is excellent and worthy.

Jackie Baillie: Top of the class.

The Convener: Perhaps those members of the committee who are also members of the group ought to declare an interest and not participate in the discussion.

Do members agree to approve the cross-party group, which meets the criteria that have been set down by Parliament?

Members *indicated agreement.*

Members' Interests

11:05

The Convener: Item 3 concerns our continued consideration of the replacement of the Scotland Act 1998 (Transitory and Transitional Provisions) (Members' Interests) Order 1999.

We have a range of papers before us and are fortunate to have Mark Richards and David Cullum here to advise us. I thank them for coming and invite them to participate fully in the discussion. I know that they are the authors of some of the papers, so they should not restrain themselves from contributing during this part of the meeting.

The first paper is ST/S2/04/7/3a and deals with paid advocacy. Do members have any questions about it?

Donald Gorrie: I fully agree with most of paragraph 10, which says that members should not be prevented from receiving assistance in connection with the preparation of a member's bill, as expert advice is welcome. However, the final sentence says:

"The Committee may wish to consider extending this provision to subordinate legislation and Sewell motions."

That does not feature in the section headed "Decision" on the next page. I have not got my head around how an outside person with a vested interest would advise a member in such circumstances, which are different from promoting a bill. I suppose that a vested interest's advice might alter the way in which a member voted on a piece of subordinate legislation or a Sewel motion, but the difference is that we do not generate those. The people who wrote that sentence must have been thinking of something that I have not thought of.

The Convener: I invite our advisers to say why that idea was included in paragraph 10 but not in the recommendations.

David Cullum (Scottish Parliament Directorate of Clerking and Reporting): I cannot comment on why it is not in the recommendations.

Alex Neil (Central Scotland) (SNP): It is in the recommendations of the previous committee.

David Cullum: The part about statutory instruments was included because committees often take evidence when considering affirmative instruments and have been instrumental in having instruments withdrawn. I know that, on occasion, people have actively briefed members behind the scenes. The worry was about situations in which briefing and assistance cross the line. That is why we flagged up the issue. We felt that Sewel motions, when they are debated in the chamber,

fall into a not dissimilar category, as members might receive assistance from sources outwith the Parliament when preparing their contributions. We highlighted those two issues as being ones that the committee might want to consider.

The Convener: Members need to bear in mind the fact that we are identifying the issues on which we will consult and which will appear in the draft bill. We are not making any final decisions.

Does David Cullum's answer satisfy you, Donald?

Donald Gorrie: As I said, I fully agree with the general thrust of the paragraph.

The Convener: If members feel that, to be consistent, we ought to include the reference to Sewel motions and subordinate legislation in the section in bold type headed "Decision" at the end of the paper, I am happy enough to do that.

Donald Gorrie: Although subordinate legislation figures in the bold paragraph on page 3, Sewel motions do not.

The Convener: Do you think that it ought to?

Donald Gorrie: Well, I do not know—the more that I think about Sewel motions, the more that I think that they are a total disaster. I am not quite clear what my views on the subject are.

The Convener: Since that is a matter for debate, would it not be appropriate to have the debate on it and include it in what we are consulting on?

Donald Gorrie: Yes.

The Convener: I have a question in respect of paragraph 9. The last two sentences talk about the provisions that apply to "future or expected interests". I know that consideration has been given to the area in the past and that the committee might wish to express its views on the proposal. I suggest that it might be difficult to predict what a member's future interest might be and to make a judgment about when it might be expected to be declared.

Alex Neil: Is that not covered in the next paper?

The Convener: The issue is covered but, given that it is also included in this paper, perhaps we should give our advisers the opportunity to explain it at this point.

David Cullum: I wonder if it would be easier to return to the issue when we consider one of the subsequent papers that specifically considers ceased and future interests.

The Convener: I am quite happy if we consider it at that time. Are members content with the recommendations on paid advocacy?

Mr Macintosh: Sorry, convener, but I have one small point that relates to the use of the word "nexus". Is it possible to avoid using that word and perhaps use the word "link" or "connection"? Nexus is not a word that most people understand readily.

Bill Butler (Glasgow Anniesland) (Lab): You did.

Mr Macintosh: The word has come up in this context many times, but it would be better for us to use plain English.

The Convener: When the consultation document is issued?

Mr Macintosh: Yes; unless there is a legal reason for using the word "nexus", a word such as "link" or "connection" should be used.

Mark Richards (Scottish Parliament Directorate of Legal Services): That is fine. The word was referred to in a judgment that considered article 6 of the members' interests order and was critical of the fact that there was a lack of what I will call connection. Essentially, the word "connection" has the same meaning; the important thing is the link between the payment and the advocacy.

The Convener: Any consultation document should spell out exactly what is meant, as not everyone will be familiar with the term "nexus".

Mr Macintosh: Not all of us are High Court judges.

Alex Fergusson (Galloway and Upper Nithsdale) (Con): Paragraph 7 talks about "a link or nexus". I support entirely what Kenny Macintosh said. In all our deliberations, we should pay strict adherence to the aims of the Plain English Campaign.

The Convener: Are members content to accept the decisions on page 3 of the paper with the addition of a reference to Sewel motions? Do members also agree that in talking about a "nexus" we really want the word "link" or "connection" to be used in the consultation document?

Members *indicated agreement*.

The Convener: We move on to paper ST/S2/04/7/3b, which deals with ceased and future interests. This might well be the appropriate opportunity to discuss future interests. Does any member have a question on the paper?

Donald Gorrie: I have been giving some thought to the subject. All of us have ambitions, which might be different from future interests. Let us take a completely hypothetical example: I am assured by people in high places that, if I continue to vote in the right direction, I will become a

member of some quango. If I declare that I am to become a member of the Scottish Arts Council, Scottish Enterprise Lanarkshire or whatever, my chances of ever getting on to those boards will be ruined. Although the example might be thought to be frivolous, it would be quite difficult to declare future interests in the real world.

The Convener: There might be examples of future interest where there is a greater expectation. Rather than being about patronage, it could be a matter of inheritance, which could give someone a controlling interest in a business, for example.

Mr Macintosh: The definition that is cited in paragraph 7 of the paper, and which is used by the House of Commons, states:

"Where a Member's plans or degree of involvement in a project have passed beyond vague hopes and aspirations and reached the stage where there is reasonable expectation that a financial benefit will accrue, then a declaration explaining the situation should be made."

That is helpful, as it implies something more than the vague aspiration that Donald Gorrie was suggesting.

11:15

The Convener: I suppose that that covers opportunities for former ministers or members who have been actively involved in developing a project, either at its conclusion or during the relevant legislative procedures, to take up a financial interest in it.

Mr Macintosh: It is all very well to take into account the fact that members might go on to work in an area to which they have some connection in their capacity as members, either after they leave the Parliament or while they are still members—that is not that uncommon—but to say that, with hindsight, they ought to have declared their interest beforehand is unfair.

Not many members would have any reasonable expectation of getting appointed to the relevant position—although they might do in some cases. There is a difference between a member being told or promised that they will benefit by working on or supporting something and a former member being told that they have been appointed to a position.

Being appointed to a post in an area in which a member has pursued an active parliamentary interest is not uncommon. I noticed the other day that Fiona McLeod, who used to be an MSP, has been appointed to the board of the Office of Communications—Ofcom—in Scotland. I am sure that, when she was an MSP, she had no idea that that would happen, despite the fact that she took an interest in that area. To say afterwards that she should have declared an interest is unreasonable and unfair. That is why I think that the definition that I quoted is useful.

The more difficult concept relates to the first question that we are invited to consider, on the

"objective test for Members to determine whether or not a one-off interest has ceased".

I was not sure what was meant by an "objective test". Could there be a time limit? Time limits are built into certain—

The Convener: Some have been suggested, including a three-month limit for some purposes.

Mr Macintosh: That is right. Suppose that a member has an active membership of an organisation, which they must declare, and they then cease to be an active member—they could be a board member of Scottish Opera, for example. I take it that the point when they are taken off the list is three months after they have last been on that board.

An objective test for a one-off interest would be different. Suppose that a member visits France to see how the French Parliament works. That would be declared among their interests, but how long would that be active? It is purely arbitrary, as far as I can see. It would be helpful to have a time limit put on such declarations of interest, of a year, two years or a parliamentary session, for instance. I have no firm views about the length of time, but such a limit would be useful. So many questions are open to interpretation on the part of members that it gives them and the public difficulty in establishing what they mean.

The Convener: I will give our advisers the opportunity to respond to that once we have heard from other members.

Alex Neil: I share some of Ken Macintosh's concerns about that first bullet point under paragraph 12. The same point arises with respect to future interests. For how long after a debate must a member declare a potential future interest in something that was relevant to that debate?

I am sceptical about the value of declaring anticipated future interests. Future interests are often unexpected. The other day, I was reading about how the Duke of Devonshire, who has just died at the age of 84, took the title—and became worth £1.6 billion—only because his brother was killed in action in 1944. Of course, he later became a member of Harold Macmillan's Government; however, if he had been an MP in 1943 and there had been a debate on inheritance tax, land ownership or something, he could not have been reasonably expected to declare an anticipated future interest in the Chatsworth estate. After all, he inherited the estate a year later only because of certain circumstances.

Our discussion of much of this stuff is beginning to disappear into areas that could bring the whole system into disrepute. We are using a hammer to crack a nut. If someone has clearly acted as an advocate of a certain measure, bill or motion and is later proven to have done so out of pure vested interest and to have gained from that, we have enough power to be able to do something. The problem arises when we start trying to predict future interests. For example, I am hoping to win the £12.5 million double rollover in the lottery tomorrow, but would I have to declare that interest if we had a debate on lottery funds this afternoon? The situation is beginning to look absurd and nonsensical.

The Convener: I think that your example calls into question your judgment of how likely you are to win the lottery and whether you are investing your money wisely.

Alex Neil: I am also talking about timescales.

The Convener: I realise that your principle is sound.

Alex Neil: If I were to win the lottery a year from now instead of tomorrow night, should I still have declared my interest at this afternoon's debate on lottery funds?

The Convener: At this point, we must decide whether the point is worthy of wider debate rather than debate among committee members. Members seem to be rather sceptical about the subject of future interests. We should at least do our advisers the courtesy of hearing why they want to include the issue in the consultation.

David Cullum: We simply wanted to bring the matter to the committee's attention. The paper also points out what happens in other jurisdictions that have a similar system.

Members have raised various points and questions about the test that will be applied. Indeed, Alex Neil's comment about the lottery is probably a good example. As he requested, we will soon discuss in more detail what the test means, but it really takes us straight back to the question whether an impartial observer would think that Alex Neil had a good chance of scooping £12.5 million. Day in, day out in debates, members have to make the same decision of whether to declare an interest. That theme has run through some members' comments this morning.

The Convener: We have touched on the influence of the lottery, for example, or an inheritance such as the Duke of Devonshire's land interests. On the subject of inheritance, someone who has influence over legislation or the way in which Government regulates business might themselves inherit a business. Moreover, Ken Macintosh touched on the example mentioned in the paper in which someone might move from taking an active interest in a continuing project to benefiting financially from it. Does anyone want to raise any other examples before we decide whether the issue is worthy of further and wider debate?

Alex Neil: I just want to ask a question that is relevant to this subject. What is the definition of an impartial observer? After all, in 53 years, I have never met such a beast. Perhaps I have been circulating in the wrong areas.

The Convener: With that poisoned dart, would the advisers care to give us a response?

David Cullum: We can perhaps deal with the impartial observer when we come to consider the next paper in more depth.

The Convener: He has been to Alex Neil's school of politics.

David Cullum: On inheritance, we have had a couple of reasonable examples. In the case of the person to whom Alex Neil referred, who inherited unexpectedly when his brother died, I presume that the brother died at a reasonably young age and that it was not expected that he would die—although there may well have been a period when that was thought, if he suffered from an illness. However, during that period, the position might have changed. If somebody was critically ill and someone else knew that they were liable to inherit on that person's death, they would have an expected interest.

The Convener: That might be rather difficult to prove. It would be rather unfortunate if it appeared in the public record that someone expected their brother, sister or uncle to die and was declaring, "If Uncle Joe shuffles off, I could really be in for something big." There may well be personal privacy interests that are greater than any potential expected private interests.

David Cullum: Those are ultimately decisions for the committee. All I can do is give you examples of how the definition might operate and how such a situation might arise. Similarly, in the case of the MSP who was not re-elected but ended up working in an area that she had been talking about, I presume that the person stood for re-election and that it was a decision of the electorate not to select them. The impartial observer could well say, "That was unexpected. It could not reasonably have been foreseen." It takes us back to how facts and circumstances would be interpreted, not by the committee but by the impartial observer.

The Convener: By others.

David Cullum: It is a decision that MSPs make day in, day out when they make declarations.

The Convener: And we are held to account for them—quite rightly.

Alex Fergusson: I am quite supportive of Alex Neil's comments—if for no other reason than that, if he scoops the lottery, I want to remain his pal. I wonder whether we cannot get over the air of cloudiness that surrounds this whole area, which Alex Neil has highlighted.

Let us return to the House of Commons definition, to which Ken Macintosh drew our attention. If we replace the word "reasonable" before "expectation" with the word "confirmed", that gets over all the problems that we have highlighted. When there is a confirmed expectation of personal financial advantage, for instance, the interest becomes declarable.

The Convener: But surely it becomes declarable at that point anyway.

Alex Fergusson: Excellent.

The Convener: It might be confirmed that someone is to inherit, but the winding up of the estate might take some months. The question is whether a person should declare their inheritance when the death cards and the will have been read or once it has come into their possession. In that case, the inheritance would be confirmed, but I cannot think of any other circumstances in which it might be.

Alex Fergusson: Let us return to Donald Gorrie's original example of someone who is going to be put on a quango. Once it is confirmed that they are going to become a member of the quango, that interest becomes registrable—not the expectation or the possibility that they might be put on the quango. I do not think that we should be in the business of having to declare possibles; we should be in the business of having to declare definites.

Alex Neil: I agree with the last sentence in principle, but I think that there is a practical difficulty. David Cullum cited the example of someone who is terminally ill. As a result of that person being terminally ill, someone may be confirmed to inherit land who is discussing a land tenure bill. I presume that, in law, they would be expected to declare that they had a confirmed expected interest because they were about to inherit a piece of land as a result of the expected death of a relative. The situation becomes absurd.

Some legislation that we passed in the Parliament's first five years was badly worded. People who must implement the legislation believe that we drafted some of it carelessly. When we draft something such as the proposed members' interests bill, we must be exceptionally careful and get it right. Frankly, I am not comfortable about declaring future interests.

11:30

Karen Whitefield (Airdrie and Shotts) (Lab): On Alex Neil's and Alex Fergusson's point, we should declare what will become a reality rather than what we hope might become real. We do not have many hereditary peers in the Scottish Parliament—that is a good thing—but they are possibly the only people who can say definitely that they will inherit a hereditary peerage. The rest of us do not know whether we will inherit anything because we do not know what Great Uncle Joe has in his will. We might believe that we will inherit something, but we do not know.

The Convener: We might even predecease the person.

Karen Whitefield: We should register an interest only when it is confirmed that we will inherit it.

Mr Macintosh: As the convener pointed out, the proposed members' interests bill will go out to consultation. We have yet to decide on it. It is good that we are airing our concerns, but it will ultimately go out to consultation.

We should bear in mind a couple of points. What is the purpose of declaring future interests? I believe that that kind of declaration was originally designed to tackle the perceived problem of what is sometimes called the revolving door. Whether that is a real problem is another issue. The revolving door refers not only to civil servants, but to former elected members leaving public office and taking up well-paid jobs in private industry or well-paid posts in an area in which they used to be, for example, a regulator of one form or another. There are frequent reports of such conflicts of interest. They are often frowned on and they leave a nasty taste in the mouth, even though those reports might be ill founded. There are many examples of the revolving door situation.

The Convener: We have had controversies even in the Scottish Parliament about, for example, retired civil servants being appointed to public posts.

Mr Macintosh: That is right. Civil servants have a code of ethics to try to prevent such occurrences. For example, they are not allowed to take up certain positions within six months of leaving their original posts and certain other things must be declared within two years. It is only fair that there should be a similar code of ethics for members. The most high-profile case that I can remember involved Douglas Hurd, who took up a post in a private company that was, I believe, involved in the Balkans. That is perhaps a bit unfair to Douglas Hurd, but that case attracted a lot of opprobrium, which may or may not have been justified.

The examples that we have heard have involved applying an awful lot of hindsight. Donald Gorrie's example is not an example of something that we want to represent in the declaration. A declaration of future interests would apply only to current MSPs; once someone was no longer an MSP, the declaration's provisions would not apply to them. They could not be applied retrospectively and would, effectively, be null and void if a person was no longer an MSP. A current MSP might want to take up a position on the board of an enterprise company or a cultural body after they ceased to be an MSP—although perhaps they would not be allowed to, because there are also rules governing that—and it would not be inappropriate for them to hold such a position, particularly if it were not a remunerated post.

If there is a perceived problem in the public mind that MSPs could go on to benefit from things that they have argued for, we must tackle that. I am not sure that declaring future interests is the best way to do it, but if the House of Commons, the Northern Ireland Assembly and the National Assembly for Wales have such a rule, so should we, despite our misgivings. It would be difficult for us to be so out of step with all the other assemblies about how we declare interests.

The Convener: As Westminster has already determined what our members' interests are and did not choose to include expected interests, there is no overwhelming case in favour of including such interests, but there is a genuine potential for debate about that. I have listened carefully to what committee members have said and I suspect that most of you do not think that there is a need to declare expected interests, but you might have a different view on whether a debate is needed on that. The question is whether we should have a debate on including expected interests in the proposed bill and I invite members to give me their views on that, not necessarily on the merits of including such interests in the bill.

Karen Whitefield: We should include expected interests in the consultation document and test public opinion on the matter. That will give us a clear indication of whether the general public believe them to be a problem and want that to be addressed, or do not think that they are an issue. Once we find out what the public think, the committee can revisit the matter. We can see that declaring expected interests might have some pitfalls, but equally it might have some merits, so we should consult on it.

The Convener: Is that view shared by the rest of the committee?

Members *indicated agreement*.

The Convener: I am sure that those who will draft the bill have got the flavour of where the committee fears that the balance of pitfalls and merits lies. The fact that we are willing to engage in a debate on the matter, although there might be arguments against, means that it ought to appear in the consultation document.

Perhaps we should deal with each of the bullet points in paragraph 12 of paper ST/S2/04/7/3b in turn, as we have dealt with the only particularly controversial part of it. Am I right in thinking that we will return to the objective test?

Mark Richards: Yes.

The Convener: We will consider how we ensure objectivity further down.

Mr Macintosh: Is it possible to consult on a time limit for one-off interests at this stage? There should be one, as we have suggested. The objective test is one thing, but a time limit is another, so we should suggest that an appropriate period after which a one-off interest would cease to be declarable would be 12 months.

The Convener: Perhaps we should offer a range of choices on that.

Mr Macintosh: Yes, one year, two years or four years.

Mark Richards: It would be an either/or: it would not be possible to have an objective test and a time limit. The committee would say either that an interest had ceased at the end of one year and therefore could be removed, or that there should be an objective test to decide whether that interest continued to influence the member and therefore had not ceased.

The Convener: Perhaps we should invite people to consider whether there should be a time limit. We are agreeing to consider whether we need the objective test on one-off interests, so perhaps we should also consider whether there is any justification for such interests to have a time limit or whether they might almost be permanent, at least in some cases.

Mr Macintosh: If we had an objective test, we could never take anything off the register, could we?

David Cullum: We would take it off when the test was no longer satisfied.

Mr Macintosh: Whose decision would that be?

David Cullum: It would be the member's decision, based on the test.

The Convener: One of the key elements of the proposal is that the member makes almost all the decisions. We have the privilege of having advice that, I hope, will be objective, but it is only advice, and we are responsible for our actions. Some of the declarable interests, such as amounts of

money, are explicit, and we are liable for our actions against those.

David Cullum: Opting for a set period might be problematic in policy terms. The issue does not lend itself to a one-size-fits-all approach because of the range of interests to which the policy could apply.

Mr Macintosh: That is a difficult one. If a member declared a one-off interest such as—oh, what, for example?

Alex Neil: A trip to France?

Mr Macintosh: Yes, or a working relationship with an oil company, or something like that. Members would declare that interest, but would not feel that it actually influenced their actions. Most members would say that they would not be influenced by such an interest. They would declare it, feeling that it would not affect their ability to participate openly in debate, but the member would then have to decide when somebody else might think that it would affect their ability to participate. That is a tricky decision.

The Convener: It risks being too bureaucratic and a burden on MSPs, who would continually have to judge what should or should not appear in the register. We have to find a balance.

David Cullum: Absolutely. If it helps—and it may not—I say to members that they would not be likely to declare something that was not registered. That would be tantamount to admitting an offence. The interest would have to be registered to be declarable. When deciding what to declare, a member's first port of call will always be the register. For new interests, acquired interests or expected interests, a member's first question will always be, "Do I need to register this?" That will then lead to the declaration. Members would not come at this from the other direction—declaration first.

The Convener: We are talking about a one-off interest that we have declared. The public's perception of that one-off event will be perishable, and I think that Ken Macintosh's question was about how we can determine when the public's perception of the event has perished, or even the MSP's personal perception of it. We would be asking MSPs to make that judgment and to keep the matter under review and at the front of their minds every time they participate in any public debate.

Alex Neil: From what has been said, I do not think that it will be enough to try to suss out whether people believe that there should be an objective test, unless we give them some indication of what that objective test for one-offs is likely to be.

The Convener: We will come to that; perhaps we should postpone our discussion on this particular issue.

Alex Neil: Exactly.

Mr Macintosh: Can we also ask about a time limit—even if we end up ruling out such a limit?

The Convener: Bullet point 2 in paragraph 12 says:

"Members should be required to register only those interests held at the time of the election or acquired since that time".

Alex Neil: Bullet points 2 and 3 are mutually exclusive, are they not? They should be an either/or.

The Convener: No. If we accepted bullet point 2, it would mean that, if a person had given up employment in order to stand for election, that person would no longer be required to register that employment—as long as they did not receive any payment after the date of the election. It might be reasonable for a member of the public to think that a member had an interest because of the member's previous employment—even if that employment ceased immediately prior to the election.

Alex Fergusson: But bullet point 5 covers that, does it not?

Mr Macintosh: But the interests that we are talking about would not be ceased interests, because they would never have been interests at all. If a member never declares interests that happen before the member is elected, those interests never become ceased—if that makes any sense. Is that right?

Mark Richards: To be rational, you would consider such interests just as you would consider ceased interests. If you have a one-off interest that continues to influence your ability to participate in proceedings, that is fine if that interest has been registered. However, something may have happened just before you became a member that would have been an interest had you been a member. That event may have an influence in the same way that a ceased interest would have an influence. Let us imagine a gift of a holiday, received two days before you became a member or a day after you became a member. In the latter case, the interest might not cease for 12 months, because it—

Alex Neil: What happens if you get a phone call two days before the election to say that you have won the holiday and you then take the holiday after you are elected? That is where the whole thing becomes absurd.

11:45

David Cullum: There is a fundamental issue that we tried to explore with the previous

committee but did not resolve because we ran out of time. It relates to the cut-off point on election and it takes us back to the purpose of the register. If the purpose of the register is to provide information about certain financial interests, including ceased interests and acquired interests, is there a policy logic in having a cut-off date as at the date of election, or should we go backwards a little bit to pick up stuff that might still influence your actions as a member?

The Convener: This is all to do with how a reasonable member of the public might perceive the matter.

David Cullum: Yes. That is the subtlety, I am afraid, of the second bullet point.

The Convener: Indeed, all the bullet points cover that. The previous committee struggled with the issue and I am not at all surprised that we are too. It seems to me that it would be reasonable for us not to take a definitive view on the matter, but to consult on it. Are members content with that suggestion?

Alex Fergusson: I am uneasy with the situation. I used to farm; that is no secret. Had I given up farming the day before my election to the Scottish Parliament, that interest would not have been declarable in any form whatever, according to my reading of the document. Had I given up farming the day after I was elected, because I was not sure whether I would be elected or not, it would be a registrable interest, even though I ceased to farm after the election. I think that we are in great danger of producing something of a mockery, to be quite honest, and I am not convinced that a consultation exercise is going to clarify the matter.

The Convener: What are you suggesting ought to appear in the members' interests order, in that case?

Alex Fergusson: I am convinced that it is more important to get past interests correct than it is to make future interests registrable. I do not have a suggestion, other than to say that we desperately need clarity in the debate, and I am not convinced that a consultation exercise is the way to get that clarity.

The Convener: You have highlighted the problem, but we require a solution.

Mr Macintosh: The only reason not to consult is if we all agree that something is wrong—we should obviously not consult on something that we are not going to implement. However, in this case we are clearly not agreed.

There is a strong argument for saying that election day is a good cut-off date for deciding interests, because people were not MSPs until then, so the rules that apply to MSPs did not apply to them.

The Convener: The point is the influences that your previous activities may have on your work as an MSP.

Mr Macintosh: Many arguments apply, but what we really do not want are registers that go back over a whole lifetime. That could make them unworkable and rather meaningless.

Alex Neil: With his example on farming, Alex Fergusson has highlighted a whole grey area. Suppose that the election were today and that I had ordered my broker—if I had a broker, which I do not—to buy Marks and Spencer shares yesterday, but that I might not get the Marks and Spencer shares until tomorrow. Is that interest declarable or not? It is a grey area. It is not simply a question of saying that, on election day, something is suddenly triggered, without a fairly tight definition of what is meant by that.

The Convener: You have highlighted another difficulty, but what we need is a solution. We have the option, as the deputy convener said, of making up our minds as to what we would want to have in the bill, without consulting on other matters, or we can take the option of consulting. I agree that there are difficult issues to grapple with, both with regard to activities and interests with which members may have been involved before becoming MSPs and with regard to any activities in which they might be involved in future, either while they are still MSPs or beyond the time when they are MSPs. Those are difficult issues to grapple with. Alex Fergusson is the only member who has said that he is concerned that consultation might not resolve the matter. Is anyone else thinking along the same lines?

Alex Fergusson: Having said what I did, I take on board Ken Macintosh's point that where we do not agree, the only way to resolve the matter is through consultation. I accept that principle.

The Convener: I have some sympathy with the point of view that by consulting we might get no greater clarity than we have at the moment. That might be worth debating. I will bring in Mr Cullum once we have heard from Mr Butler, who has been patient and quiet today.

Bill Butler: You made the point seconds before I was going to say that, although we might not get clarity when we go out to consult, we should consult on all these matters nonetheless. Perhaps we should indicate the committee's thoughts about the difficulty in coming up with a workable procedure and suggest that someone out there could give us a hint. I agree that we should consult.

David Cullum: In a sense the answer to all the points lies in how the test that applies is framed and interpreted. The current test is whether registration would be required in the eyes of the

impartial observer. With a bit of luck—fingers crossed—when we consider the test in the next paper it might provide an answer to some of the difficult questions that have been raised.

Donald Gorrie: All this stuff is totally irrelevant, because serious influences are exerted in different ways. The member must make the decision. For instance, I must decide whether a reasonable person would think that a course of conduct was right. In due course I might be abused by the press, or members of the Parliament who would say, "We don't think it was reasonable to do that." Surely, my defence would be to say, "I studied this and I thought that a reasonable person would think X and that's what I did, end of story." The whole thing is a bit cloud-cuckoo-landish, but I do not object to consulting, because consulting about cloud-cuckoo-land might be useful.

Alex Neil: Says a good Liberal Democrat.

The Convener: Do we agree to consult on the bullet points in paper 3b and consider the objective test as we do so?

Members *indicated agreement*.

The Convener: I do not envy anyone the job of drafting the consultation document.

Paper ST/S2/04/7/3c, which members have before them, considers the mechanics of the register. Obviously, the maintenance of the register is important, and we have specific suggestions about time limits. I direct members to paragraph 9, which I suspect will be easier to deal with. Does the committee agree to the bullet points in paragraph 9?

Members *indicated agreement*.

The Convener: It is agreed that the bullet points will be part of our consultation document.

Paper ST/S2/04/7/3d is on the purpose of the register. We now have the opportunity to discuss the proposed test for determining a registrable interest and we have suggestions as to how the objective test is to be applied. Before we get into the debate I will give David Cullum and Mark Richards the opportunity to explain the paper to us so that our questions are apposite.

Mark Richards: I will take it from the top. The paper is about the register's purpose, which is set out in paragraph 2. The register has two purposes, but its main purpose is to provide information about certain interests of members that might reasonably be thought by others to influence a member's ability to participate in parliamentary proceedings in an impartial manner.

That main purpose overlies everything, so a description of the interest will sometimes be sufficient to satisfy the test. At a previous meeting, the committee discussed what value of shares members should be required to register. In a sense, by setting a registrable amount or value of shares without making reference to any other form of objective test, the committee would seek to meet the purpose of the register by saying that holding that value of shares would be likely to be seen to influence a member's ability to participate impartially. That level of shares would then require to be registered. The purpose of the register underlines the test.

Given that purpose, the test comes in when there is a need to decide on issues such as whether a future interest should be registered or whether an interest has ceased. If the purpose of registration is to register those things that would have an influence, it follows that interests that a member no longer holds, but that continue to have an influence, will meet the purpose of the register, which is to register those things that have an influence.

That brings us back to the requirements for registration of future interests and ceased interests. The test that would be applied is what an impartial observer would think—although someone has already commented that they have never met such a person. Essentially, the test that must be applied is to ask what the person on the street with knowledge of the facts would think. The test is not whether the member thinks that the interest would have an influence. The deputy convener mentioned that he holds many interests that would not influence his conduct; many members may be in the same position. However, would someone in the street think that? That is the essence of the test. You have to place yourself in the position of someone else. Would someone else think that the interest would influence your conduct? That is where the purpose of the registration comes in.

The Convener: We would be required not just to be honest or to be seen to be honest but to be perceived to be honest. I do not know how members could objectively be held to account for a perception, although I understand that perception is important for the good repute of the parliamentary process. However, it is difficult to be objective about perceptions because different people perceive different events according to their own background and prejudices. Perception does not preclude prejudice. I suspect that trying to attain purity in terms of perception will be a difficult goal to achieve.

However, enough of my ramblings. Do other members wish to contribute?

Donald Gorrie: It has been said that the test should be whether other people might think that an interest would bias a member's opinion, but that is totally misconceived. For example, if some decision by the Scottish Parliament somehow helped or hindered an oil company in which a

member held a certain amount of shares such that the shares gained a few hundred pounds, would that seriously prejudice the member's vote? That sort of thing does not influence our votes.

Most people in this Parliament are keen on football. Support for a football club is much more likely to cause them to vote in a particular way—for example, if the Parliament got involved in the reconstruction of the Scottish football industry. Football is a really serious matter, as is membership of any organisation for a long time. People get highly enthusiastic about membership of a particular organisation, which might involve support for the scouts, the guides or—in the case of a Highland person—the Mòd. Membership of the masons is a well-known political issue. That sort of thing might influence people's vote.

The friendships that one has formed might also be important. If one moves in the right circles, one might have been at school with some duke or earl, or one might go shooting with them, for example. In such cases, no money changes hands, but the friendship could mean that, when the issue of whether to bring that person's estate into a national park was being discussed, one could be slightly influenced. People are influenced by non-financial considerations.

I think that all the financial stuff is irrelevant, except in extreme cases. If we are to register financial matters because the public think that we are all venal—if that is the right word—we should have to register other relevant matters: we should have to register our enthusiasms. I am enthusiastic about the Edinburgh City Youth Cafe round the corner, which I helped to start up. The Parliament will probably not have a vote on anything that would have an effect on the youth cafe but, if it did, my enthusiasm for, and dedication to, that sort of activity would significantly bias my vote. That is the kind of thing that influences people's votes, not tuppenny-ha'penny financial matters.

12:00

The Convener: I am grateful for your views, but we are considering whether to accept the fleshing out of the objective test of influence and to consult on how it might be applied to determine whether there has been an influence. Your point about non-financial interests is perfectly reasonable and valid, but we must determine whether to consult on the application of the test as spelt out in the paper.

Bill Butler: I think that we should consult on the application of the test. I do not think that it is a question of differentiating between a subjective test and an objective test. We need to find a test that would be less subjective than the test of asking ourselves whether we would be influenced by such-and-such. We could say that the test of whether the man or woman in the street thought that we would be influenced by something is less subjective.

If I were testing the ability of a pupil to speak in public, I would have a set of criteria but, in the end, my decision would be impressionistic—it would come down to what I thought, once I had listened to the pupil and applied the criteria. There is always an impressionistic element. Testing a pupil on whether he or she knows the table of elements—which I would never have done, of course, because I was not that kind of teacher—is an objective exercise, because there are right and wrong answers. We are not talking about an objective test; we are talking about a less subjective judgment or assessment. In my view, we should go to consultation, but we should be clear about what we are consulting on. I have explained what I think we should consult on.

Alex Neil: I have many concerns about a so-called objective test that is based on the view of the person in the street or the elusive impartial observer. I do not think that such a view would stand up in any court of law; I certainly hope that it would not. We would have to consider the burden of proof because, if something went wrong, legal sanctions could be taken against anyone who is proved to have breached whatever code we come up with.

May I suggest an alternative approach that we might include in the discussion paper? If we take a minute to go back to first principles, I understand that we are in this situation because the Scotland Act 1998 requires the Scottish Parliament to introduce primary legislation in relation to members' interests.

The Convener: That is correct.

Alex Neil: Five years down the road, the current code of conduct, the Scottish parliamentary standards commissioner and the Standards Committee—not all of which were envisaged by the 1998 act—are in place. The system seems to be working reasonably well in policing MSPs' declarations of interest and all the rest of it. If I were being radical, I would suggest that we write to Westminster to ask it to amend the 1998 act, but I will not be as radical as that this morning.

We seem to be getting into a terrible pickle because we are trying to write rules for every eventuality. The more we do that; the more loopholes we create. I suggest that we consider introducing a one or two-section bill that would give statutory backing to the code of conduct—with whatever additions or amendments the code might require. That might achieve what we are trying to achieve, which is a situation in which no

MSP would be able to cheat and get away with it by using undue influence or whatever. Quite frankly, if we try to include every eventuality in primary and secondary legislation, the statutory instruments will be horrendous and we will be here for years, taking a lot of notes and wasting a lot of time. Our objective could be achieved by a short bill that would give statutory effect to the code of conduct or a variation thereof. Of course we would still consult on such a bill—we consult on any proposed legislation. We should consider that approach, rather than the one that we appear to be moving towards, which might lead to one of the longest pieces of legislation in the Scottish Parliament's history.

The Convener: The option that you describe is available to us, and I am sure that the drafters would be delighted to produce a short bill. I heard what members said and nothing prevents us from going down the route that Alex Neil suggests, if we want to do so. At this stage, however, we must produce a consultation document rather than a draft bill. We are highlighting areas about which the public might have concerns and we are using that information to inform the drafting of a bill.

A draft bill was produced in the first session of the Parliament and I do not recollect that that bill was exceptionally long. However, if the conclusions of the consultation are that such a bill would be too long, we can consider whether there are areas that we do not need to spell out. If we intend to say that standards of behaviour ought to be considered in certain areas and that we will establish the criteria against which we think that the public will measure behaviour and against which we expect MSPs to measure their behaviour, the proposals that we are considering represent at least a stab at that, although they are not perfect. Paper ST/S2/04/7/3d represents an attempt to consider what is reasonable behaviour in the eyes of the public. Perhaps the response that we receive from the consultation will indicate that that is all that is required in a bill, as Alex Neil suggests.

Mr Macintosh: I have a lot of sympathy with Alex Neil's point of view. I have strong reservations about an objective test. It is difficult for anyone to be objective and it would be difficult for MSPs to interpret decisions. Fashions and fads change: what is a safe choice one year might become extremely objectionable to others the following year. We could easily be inadvertently hoist with our own petards. I am attracted to the idea of a short first-principles approach, but I do not think that we could take such an approach. A lot of the rules were drawn up at the tail end of the sleaze allegations in Westminster and are, perhaps, a reflection of that. There is a history of such rules being drawn up in Westminster. They have evolved over time there and are workable, up to a point. We are trying to extend them, partly to give the public confidence in the probity of members and of the Scottish Parliament. The public should not have to take everything on trust, and there are rules to protect us and them from disreputable behaviour.

I have a problem with the so-called objective tests. I much prefer fixed rules—perhaps we should call them arbitrary tests—that are extremely measurable. Annex 1 on page 4 of the paper deals with categories of registerable interests. All the categories, such as shares, heritable property and so on, have certain straightforward values. The gifts category relates to the influence-related test. The only problem that I have with the list is that it implies that there are no past interests. If we accept that everything that happened to a member before they were elected should be declared, every one of the tests becomes an influence-related test. For example, a member's remuneration from a job that they held before they became an MSP becomes an influence-related test rather than a description. If a member worked in a well-paid job before they became an MSP, an objective member of the public might perceive that as being something that might influence that member's actions.

I would like there to be specific, hard-and-fast rules that are easy for MSPs to interpret. They do not have to be simple but they should be capable of application in a hard-and-fast way. All of the tests should be answerable with a yes or a no. Either a member has had a gift that is worth more than £250 or 0.5 per cent of their salary, or they have not; either they hold a position in an approved organisation or they do not. To open everything up to what we call objective tests—which are actually subjective tests—is dangerous. If everything is open to interpretation, everybody is open to challenge and has to defend themselves. Instead of encouraging faith in a robust system, that would encourage a lack of faith.

The Convener: I remind members that this paper appears before us at our request. Our advisers have tried to find as objective a measure as they can of how Joe Bloggs will perceive any influence that people might have over MSPs, particularly through gifts that are given. They have also tried to address the question of family gifts and whether that would be seen by members of the public as being something by which influence could be exercised, irrespective of the value of the gift.

Ken Macintosh is quite right to draw our attention to annex 1. Members will note that the suggestion is that the influence-related test would be applied only to gifts. That was meant to be a helpful way in which we could be as precise as possible. We can never be absolutely prescriptive

as there will always be circumstances that do not fall into any category. The paper tries to deal with issues around gifts and one-off interests that might be perceived as being gifts. Is that correct, David?

David Cullum: That is absolutely correct. The alternative is that we could do what Ken Macintosh suggests, but you would need to tell us absolutely everything that would fall within any category. We would need to know and go through every conceivable gift and every conceivable family relationship. The test is an attempt to cut through that.

The Convener: If we go down that route, producing a short bill and detailed code will be even more difficult.

12:15

Alex Neil: I do not want to disagree, but the purpose of having a short bill with a code is that it would be easy to amend the code if it was inadequate or required modification. In contrast, if everything was written into a bill, or even into statutory instruments, it would be difficult to add to or subtract from the legislation to change things if we got them wrong. That is one of the reasons why I am attracted to the idea of a short, sharp bill that effectively gives statutory backing to an expanded or improved code of conduct.

The Convener: Although there may be weaknesses in the influence test, it achieves the objective, because it means that we do not need to spell things out in such detail, as one could measure influence against the objective test.

Mark Richards: The application of the test is particularly helpful if you are looking at the registration of future interests, at removing ceased interests from the register and at whether a member is required to declare all interests or only those that may influence their ability to participate in a particular instance.

The test is already in article 5 of the members' interests order. The deputy convener said that he finds it difficult to follow and understand an objective test but, as it stands, all members have to follow and understand an objective test every time they declare an interest. They may take a cautious approach—that is a matter for individual members—but they are at present applying an objective test.

The Convener: We have to do a number of things. We must make it clear to MSPs and the public what is expected of members. If we do not want to be bureaucratic, we can put the onus on members to determine whether they are likely to be influenced. At the end of the day, it is all about whether members' votes or decisions are being influenced. If we have a general test around that, we can be less prescriptive about the rest. Agreeing to paper ST/S2/04/7/3d will make it easier to produce a short bill but, in consequence, it will place more responsibility on individual members to make judgments against the background of what might or might not influence their decisions.

David Cullum: Having a short bill is possible, but producing what will be required to support it will give rise to the same issues that you will have to resolve to develop the draft bill that we were working on in the previous session. Items either will be included in the bill or they will be included in articles, codes or whatever the bill underpins.

The other point about the test, as annex 2 to the paper highlights, is that it is already in use in the courts. That is where a lot of decisions ultimately may end up, because we have no choice in relation to criminal offences, which are in the Scotland Act 1998 and will exist in relation to certain breaches. The test that the courts are used to is the impartial observer test. We have listed one or two recent examples in the paper.

The Convener: I want to draw our discussion to a conclusion. I will take Ken Macintosh and Donald Gorrie, and then we will have to agree how to proceed and the general advice that we will give to the clerks on that.

Mr Macintosh: I will not play devil's advocate exactly, but I will explain why, so far, I have gone along with the idea of the test.

The persuasive argument for me was that, unfortunately, such a test was included in the Local Government in Scotland Act 2003—we introduced a similar test for councillors in local government. I felt at the time that if we introduced one rule for local government it would be unfair to set a different test for ourselves. That is why I have supported our work to date, but I was uncomfortable with the test then and I am still uncomfortable with it.

The matter is serious, as we could effectively be criminalising people. I would prefer to have a better test. Whether we like it or not, the rules are often used politically to make allegations that damage someone's reputation. That is not our motive in drawing up our proposal, but it is often what the rules are used for. Therefore, we must be very careful. We are talking about criminal sanctions if the rules are broken, so the matter is very serious. Introducing the idea that someone could have a criminal record because of something that they did genuinely unintentionally is a very dangerous step to take. There are many examples of situations in which public opinion moves in a certain direction against certain types of behaviour that at one time were totally acceptable but which are then seen as being beyond the pale.

The Convener: Do you mean smoking, drink-driving and the like?

Mr Macintosh: There are many examples of behaviour that is frowned on now but which did not use to be frowned on.

Annex 1 makes me uneasy because it implies that the influence test will apply only to gifts, but that is not the case. If there is an influence test, it will apply to all sorts of past and future interests. I think that it is a very difficult test. As I have said before, the implication of applying the test to family members is that if a family member gives you a valuable gift, they will have some influence over you. However, your family has influence over you: what is the point of pretending that that influence is greater simply because a family member has given you something worth £400 or thereabouts? If your family does not have influence over you, what kind of family member are you? You would be in a strange relationship. The influence test gets us into absurdities that we should not be measuring. We should have clear, black-and-white tests, not tests that are open to judgment.

I will give the committee an example from the previous session of Parliament—I do not know whether members remember the case. Our colleague Richard Simpson was involved in a high-profile case, which came to the Standards Committee, to do with the measles, mumps and rubella vaccination scandal and the accusation that he was being paid fees by drug companies. He was a practising doctor and was engaged before becoming an MSP—although I think that it was still happening—in a research programme that was investigating a condition such as bowel cancer. The research was funded by Merck Sharp & Dohme, which is a big drug company that, wearing a different hat, happened to be one of the suppliers of the MMR vaccine. It was all over the *Daily Record* and every other paper that he was being funded by a drug company to participate in the discussion on the issue; that was the implication of the articles. It would be difficult for most members of the public to come to an objective decision about such a case. He was being paid substantial sums of money to do medical research—in all fairness, I think that that is what he was doing—but his reputation was sullied by the articles, which suggested another motive for his behaviour in Parliament. He suffered enough damage from that allegation—as was perhaps proven at the election—without also potentially facing a criminal record because of it. That would have been an absurd level to which to take the issue. I have no doubt that he acted as he did in all innocence and that he thought that his behaviour was justified.

I have strong difficulties with the influence test. If we are putting out the proposals to consultation, we should have alongside them alternatives that are straightforward standards against which members are measured. There should be black-and-white tests—we should declare such things as gifts that are worth more than £250 or 0.5 per cent of our salary, other remuneration and directorships. We should not declare something that we did in the past that members of the public might feel has influenced us when we do not feel that it has.

Donald Gorrie: I share many of Ken Macintosh's and Alex Neil's concerns. We want a two-section bill that says that the code of conduct has legal effect.

Annex 2 is about impartiality in tribunals. We are paid not to be impartial but to pursue our political objectives. We want to improve or change life in Scotland in certain ways. The convener and Alex Neil want Scotland to be independent, which is not being impartial. We accept that they have a political agenda and they pursue it in an honourable fashion. With all due respect, annex 2 is 100 per cent irrelevant.

I will give an example of the futility of the categories in annex 1. Overseas visits seem to be wicked. If somebody paid for me and my family to have six months at Skibo Castle, which would cost a great deal of money, I would not have to declare that, but if somebody took me on a short visit to the Costa Brava—God forbid—I would have to declare that. That is idiotic.

Also, the idea of registering donations or presents from within the family is obscene. The whole system is calculated to scunner people and to dissuade them from entering public life. It is ridiculous and open to abuse of all sorts—the concept is damaging.

The Convener: We are moving to a debate about the general principles. Alex Neil, Kenneth Macintosh and Donald Gorrie have talked about them, but we have before us, at our request, a proposal to try to introduce objectivity on the issue of whether members are influenced by events. In discussing the general principles of a bill that might come as a result of a consultation, we are several steps ahead of ourselves. We are trying to agree the matters on which we wish to consult. Given that it is now 25 past 12, we could decide to continue the discussion later, but I think that it has moved on to issues that are beyond those that are covered in the paper. I want us to decide whether to ignore paper ST/S2/04/7/3d or to include it as part of the consultation process.

As part of the overall consultation process, I am happy to include an element that highlights the desire for the simple, straightforward approach that a number of members have sought. However, the issues are real ones—our predecessor

committee grappled with them and they are issues in which the public take a keen interest. If we decide that we have had enough of the present system and that we will rip it up and start again or not have any system, we will not have any credibility.

Alex Fergusson wants to make a point. I am reluctant to reopen the debate, but he has not had much opportunity to speak on the issue.

Alex Fergusson: I will be brief, but it is important that I reinforce a point that Ken Macintosh made. Because responses to a consultation are likely to respond only to the points that are made in it, alternatives should be included in the consultation. Members have a great deal in common in their response to the papers. The alternatives should be included in the consultation; otherwise, those who respond to it will not be fully aware of the possibilities.

12:30

The Convener: I am happy to be corrected, but it seems that the alternatives revolve around the level of detail that we need in the bill and whether it ought to concentrate more on general principles such as what influences members. That is why the paper before us, which we asked for, is of some importance. In my opinion, the debate about whether the bill should be briefer and more concise will hang on whether we can give people, if not an absolutely objective test, at least a measure of the principle behind the Parliament asking folk for personal details that they would not be asked for in another type of employment. It is all about whether members are going to be influenced by the gift of a trip to the Costa Brava, as Donald Gorrie rightly said. Donald also made the important point that we are not concerned only with financial interests or with politically sensitive interests, such as membership of the freemasons, which some people take a great interest in focusing on. We are also interested in whether a member is an active participant in some community organisation and might misuse his or her influence to promote its cause.

Do members agree that we should consult on the test of influence? Do members also agree that, as part of the overall consultation and in keeping with the points that were made effectively by most members, we should seek a straightforward bill on members' interests? There will be some alternatives to the detailed information that might be sought. If we want the sort of two-section bill that Alex Neil was talking about, the sections have to be about principles, and the fundamental principle concerns the kind of influence that others may have on MSPs or that MSPs may themselves have, as the result of possessions or gifts that they have received. Indeed, as Donald Gorrie said, MSPs' other memberships or enthusiasms could have an influence.

Are members content that we should give that guidance to the clerks as they draw up our consultation paper, and that we should include consultation on this earnest attempt—which we asked for—to spell out an objective test of influence?

Donald Gorrie: Will we see the consultation paper?

The Convener: The consultation paper will come to the committee before it goes out. Absolutely. We are at the stage of dealing with all the detailed areas that have been covered by the current members' interests order, those areas that were explored by the previous committee and those that have come up as a consequence of our own thoughts. Members have expressed the desire that we should not produce an elaborate, prescriptive bill that might in fact produce weapons for those who might be badly motivated to launch attacks on individual members. That is important, and I think that the clerks have got that message loud and clear. At some point in the autumn, we shall have that draft consultation document available.

Sam Jones (Clerk): In June.

The Convener: In fact, we are being promised it before the end of June. Whether we will be able to deal with it then depends on other business, but we shall try to have a stab at that so that the consultation exercise can take place in the early autumn. Those who have to produce the draft bill will then be able to do so before the end of the year, so we can adhere to the timetable. I have certainly heard loud and clear what members want and I have no problem with that, but we need to conclude our consideration. Are members content with the proposal?

Members *indicated agreement*.

The Convener: We shall now move on to item 4. I hope that we are able to deal with it a little more expeditiously than we have the other items. I thank Mark Richards and David Cullum for their helpful contributions to that debate. We look forward to their further contributions as we plough on with the register of members' interests.

Code of Conduct

12:34

The Convener: Item 4 relates to the code of conduct, which we agreed to fine tune. We now have the administrative procedures and directions to the parliamentary standards commissioner before us. Do members have any concerns about how the code is worded or any comments on it?

I have a couple of questions on the code. My recollection is that we wanted to ensure that there was an opportunity—not repeated opportunities—for representations. I seek some clarification from the clerks and, perhaps, our legal adviser. Paragraph 3 of paper ST/S2/04/7/4b talks about giving

"the member an opportunity to make representations".

The paper then goes on to spell out the code of conduct. However, on page 8 of paper ST/S2/04/7/4c, we are told that the parliamentary standards commissioner

"will give the Member and the Complainer the opportunity to make representations".

The phrase "the opportunity" could be interpreted as meaning a single opportunity, but it might be interpreted as meaning more than that. The phrase "an opportunity" is clearly singular.

I also have a slight concern about the word "any" in proposed paragraphs 10.2.32 and 10.2.33 on page 9 of paper ST/S2/04/7/4c. The word "any" might imply that there could be no representations, one representation or several representations. If we took the word "any" out, the meaning would be clearer, as it would refer back to other references to "an" or "the" opportunity for representations—I prefer the word "an" because it is clearly singular. I am happy to receive guidance on this and I invite Catherine Scott to join us. Perhaps I am being paranoid. However, although the committee agreed that there would be the opportunity for representation—I used the word "the" then—our intention was that it would be an opportunity rather than repeated opportunities.

Catherine Scott (Scottish Parliament Directorate of Legal Services): Can you please take me back to the first point?

The Convener: Oh, gee whiz—that is rotten of you.

Catherine Scott: I was not quite following your references to the page numbers.

The Convener: Okay. The first reference is in paper ST/S2/04/7/4b, which is headed "Scottish Parliamentary Commissioner Act 2002". In paragraph 3, on the second-last line of the first page, it is stated that the commissioner

"shall afford to the complainer and the member an opportunity".

I am quite happy with the use of the word "an". However, on page 8 of paper ST/S2/04/7/4c, where essentially the same wording is used, the phrase is slightly different. In the second-last paragraph, we are told that the commissioner

"will give the Member and the Complainer the opportunity to make representations on the draft report."

As that is to be in the code, I would rather it reflected the other reference and had the word "an" in it.

Catherine Scott: That is a fair point. That can easily be amended.

The Convener: Let us move on to proposed paragraphs 10.2.32 and 10.2.33, on page 9 of paper ST/S2/04/7/4c. The second line of proposed paragraph 10.2.32 includes the phrase "and any representations". Again, that opens up the possibility of repeated representations. Of course, "any" allows for there being no representations. There is not a problem with that, but the word "any" almost implies that there might be repeated representations. Removing the word "any" from paragraphs 10.2.32 and 10.2.33 will retain the sense and will allow for no representations to be made, while making it clear, in reference back to paragraph 10.2.30, that there is an opportunity to make a representation. It would then be reasonable to allow the commissioner to interpret what "an opportunity" is, whereas anything less explicit than that would leave things open to challenge, which I do not think that we want. I do not think that that was the committee's intention.

Catherine Scott: On what you say about paragraphs 10.2.32 and 10.2.33, the wording is in the code as it currently stands, so there would be an amendment to those paragraphs of the code as they currently read.

The Convener: As we are amending the code, I suggest that there should be a consequential amendment arising from what the committee agreed. The committee was quite clear that there should be an opportunity and, although the word "any" could be interpreted in the singular, it might be used by those who are seeking to challenge as an opportunity to make repeated representations. I suggest that, as a consequence of the committee's decision, we should remove the word "any" for clarification.

Catherine Scott: I do not see any particular objection to that proposal, but obviously the matter is for the committee to decide.

The Convener: It is being pointed out to me that paragraph 10.2.31A should then read "Representations received from the Complainer … will be made available to the Standards Committee" rather than

"Any representations received from the Complainer … will be made available to the Standards Committee."

Mr Macintosh: To clarify matters, we are not encouraging repeated representations.

The Convener: That was the only point that I was trying to make. I want to ensure that there is no opportunity in the letter of what we produce that would leave the commissioner or us open to interpretation and challenge. That is the sole motivation behind what I am saying.

Catherine Scott: It would be possible for the committee to focus the minds of complainers or MSPs who are complained against on the timing and format of submissions or representations in guidance that it issues, even in the form of a letter to the persons concerned in a complaint at any particular stage.

The Convener: Would there be any problem or difficulty in doing what I have suggested, or do you want time to consider the matter?

Catherine Scott: I do not see any difficulty in what you have suggested, but I do not think that it would change the meaning of the paragraphs terribly much or that it would make a great deal of difference. However, a fine nuance is involved and if the committee feels more comfortable by removing the word "any", I do not think that that would be a particular problem.

The Convener: I wanted to remove the potential for challenge on the basis of fine nuance, so that it is the commissioner who makes decisions. The committee also agreed that things should be up to the commissioner. However, I am hogging the debate and other members want to take part in it.

Karen Whitefield: I agree that it is important that there is no dubiety. As well as ensuring that everything that the commissioner does is correct, we must be conscious of how we manage the expectations of the complainer who is being given the opportunity to see the draft report. I want to ensure that there cannot be a protracted period in which the complainer can continue to make further representations to the commissioner either because they are unhappy or because they want to have any recommendations strengthened that they do not think go far enough. We must be very conscious of that matter. It is important to take the convener's suggestions seriously and to act on them.

Donald Gorrie: As I understand it, convener, you wish to ensure that the people who are complained about and the complainers get one kick at the ball.

12:45

The Convener: Yes. If there is to be any flexibility in that, it ought to be in the hands of the commissioner. I would wish to let the commissioner interpret the word "opportunity" and, if we include the word "an", then that allows the commissioner to interpret it as meaning a single event. The words "the" or "any" would allow the members who are complained against, the complainers or their representatives to deal with things in nuances. I had the impression that the committee wanted the commissioner to be in control of that and of what appears in the annexes to his reports. I am trying to be helpful by clarifying that referring to "an opportunity" rather than "the opportunity", and by removing the word "any" before "representations".

Catherine Scott: The paragraphs that we are focusing on—where the word "any" is discussed—refer to representations that are made to the committee at stage 3. They do not refer to representations that are made to the commissioner earlier, on the draft report.

The Convener: I think, in the light of our experiences, that the same principle applies. However, I am happy to be corrected on that by other members.

Alex Neil: In any case, the committee is free to decide whether or not it hears representations in each case.

The Convener: The important thing is to leave things in the hands of the commissioner in the first instance, on matters relating to him, and, secondly, in those of the committee, on matters relating to it—but not in those of the other participants. The intention was to shut down persistent and repeated efforts while leaving discretion with the commissioner and the committee to hear what they felt they should hear.

If there are no difficulties with that proposal, and if members are content with it, can we leave it to the clerks and the legal adviser to tidy up the principles concerned, including the points that we have just been making? I am sure that those will be addressed. Is that fair? Are we agreed on that?

Members *indicated agreement.*

The Convener: We now come to item 5, and I ask the public, the media and the official report to leave the room in order to allow the committee to conduct the last item on the agenda in private.

12:47

Meeting continued in private until 13:52.

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Printed in Scotland by The Stationery Office Limited

ISBN 0 338 000003 ISSN 1467-0178