



The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

LOCAL GOVERNMENT AND REGENERATION COMMITTEE

Wednesday 21 November 2012

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LOCAL GOVERNMENT AND REGENERATION COMMITTEE
26th Meeting 2012, Session 4

CONVENER

*Kevin Stewart (Aberdeen Central) (SNP)

DEPUTY CONVENER

*John Wilson (Central Scotland) (SNP)

COMMITTEE MEMBERS

*Stuart McMillan (West Scotland) (SNP)

*Anne McTaggart (Glasgow) (Lab)

*Margaret Mitchell (Central Scotland) (Con)

*John Pentland (Motherwell and Wishaw) (Lab)

*Stewart Stevenson (Banffshire and Buchan Coast) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Stuart Allan (Public Standards Commissioner for Scotland)

David Sillars (Commission for Ethical Standards in Public Life in Scotland)

CLERK TO THE COMMITTEE

David Cullum

LOCATION

Committee Room 3

Scottish Parliament

Local Government and Regeneration Committee

Wednesday 21 November 2012

[The Convener *opened the meeting at 10:00*]

Subordinate Legislation

Town and Country Planning (General Permitted Development) (Fish Farming) (Scotland) Amendment (No 2) Order 2012 (SSI 2012/285)

The Convener (Kevin Stewart): Good morning. I welcome everyone to the Local Government and Regeneration Committee's 26th meeting in 2012. As usual, I ask everyone to ensure that they have switched off mobile phones and other electronic equipment.

Agenda item 1 is consideration of a negative statutory instrument. The Subordinate Legislation Committee has considered the order and has no issues to draw to the committee's attention. As members have no comments, are we content to make no recommendations on the order?

Members *indicated agreement.*

Commission for Ethical Standards in Public Life in Scotland Annual Report 2011-12

10:01

The Convener: Item 2 is consideration of the annual report 2011-12 from the Commission for Ethical Standards in Public Life in Scotland. I welcome Stuart Allan, who is the Public Standards Commissioner for Scotland, and David Sillars, who is the senior investigating officer at the Commission for Ethical Standards in Public Life in Scotland. I ask Mr Allan to make opening remarks.

Stuart Allan (Public Standards Commissioner for Scotland): Thank you for your warm welcome, convener. I am delighted to be here and to report on the work of the Public Standards Commissioner's office in relation to councillors and members of public bodies.

As you say, I am the Public Standards Commissioner. This is the first occasion when I have reported formally to the Scottish Parliament. Until now, we reported to the Scottish ministers. As a result of the Scottish Parliamentary Commissions and Commissioners etc Act 2010, we now report to the Parliament.

Members have a note that lists the main items that I am happy to talk about. The first area of work relates to the codes of conduct for councillors, for members of devolved public bodies and for MSPs. On the code of conduct for MSPs, I report directly to the Standards, Procedures and Public Appointments Committee.

Appended to my note is a set of complaints procedures. That document explains how we deal with complaints—the *modus operandi* for the process. I do not intend to go through that but, if members have any questions about the process, I am happy to answer them.

Also attached to my note is the commission's annual report, about which I will make a couple of points. Table 1 in the report gives an idea of the number of public office-holders for whom we are responsible. There are some 2,700 public office-holders—councillors, members of public bodies and MSPs—who are obliged to comply with the various codes of conduct.

Table 2 shows the number of complaints about councillors and members of public bodies. In the year 2011-12, that number dropped by something like 7.5 per cent from the figure two years before. That is an indicator—although it is no more than that—that standards of conduct in public life are increasingly high. I have no doubt that I will return to that in answering questions.

Table 3 sets out the types of complaint that we receive. We continue to have a fair number of complaints about the registration and declaration of interests and about planning.

Table 7 shows the outcome of completed complaints, and the breaches on which we have reported to the Standards Commission for Scotland are set out in table 8. Only some 3 per cent of complaints end up in a breach report to that commission.

On pages 19 to 23 of the report, I provide a summation or review of the year. I want to make a couple of points about that, the first of which is to emphasise again the importance that I attach to the continuing reduction in the number of complaints that we receive, which I think indicates high standards. Secondly, as I have made clear in earlier reports, councillors in particular must attach greater importance to the code of conduct provisions on declaration of interests. Local authorities themselves can assist their members in taking greater cognisance of those provisions.

Finally, with regard to continuing public service reform, I am sure that the committee is aware that the Government and Parliament have agreed to promote later this year an order under the Public Services Reform (Scotland) Act 2010 to combine the posts of Public Standards Commissioner and Public Appointments Commissioner into a single commissioner, which I think will lead to increased efficiencies in both offices.

I am very happy to take questions on any matters that members might wish to raise.

The Convener: Thank you very much, Mr Allan. You suggested that the reduction in complaints shows a driving up of standards, but is there any evidence that the number of complaints has reduced because people do not feel that their complaints are being dealt with properly?

Stuart Allan: I do not think that that is an issue, convener. It is interesting to look at the general statistics, which show a reduction over the past five years. I am pretty confident that that has happened because councillors in particular are very aware of the code of conduct provisions and therefore conduct themselves to a higher standard in public office.

As for the second aspect of your question, which is whether people are losing confidence in the system, I simply do not think that that is the case. We attach huge importance to ensuring that people who submit a complaint receive a thoroughly reasoned judgment to ensure that they understand precisely why we have decided that there has been a breach or, as is often the case, that there has not been. We get a significant amount of feedback from complainants who, although they might have preferred a different

outcome, appreciate the thorough and fair way in which the process has been conducted. That is certainly very much our experience. Of course, certain people will remain dissatisfied, but I am afraid that that is just part of the wider regulatory process.

The Convener: At this point, I should declare an interest as a former councillor who has been complained about to the commission. I should also make it clear that the complaint was not upheld.

I am sure that, on a number of occasions, it quickly becomes clear that a complaint does not stack up. Why can it take quite a long time to get back to the complainer and the person being complained about with your findings?

Stuart Allan: Your question raises a number of points. As part of the process, we undertake an initial investigation of the complaint and if we feel that the complaint does not meet the key tests of relevancy or admissibility we will dismiss it at a comparatively early stage by letter, albeit a letter that sets out our reasons. The large majority of complaints are dealt with in that way.

Complaints that require further investigation inevitably take longer, because it is essential that there is a complete and thorough investigation. There are a whole range of reasons why matters can drag on. Mostly, it is because the ingathering of the key evidence takes longer than we would like. We have to interview the key parties involved, take evidence from them and then reach a conclusion on that.

Table 15a in the annual report shows our targets against how quickly we have concluded investigations. One of our targets is that 40 per cent of complaints must be completed within three months or less, and our performance is 76 per cent. We have a target of completing 75 per cent of complaints within six months, and our performance is 94 per cent. The other target—

The Convener: Mr Allan, my point is that, if someone is not guilty of something, they know that they are not guilty of it, but they still have the sword of Damocles hanging over them for a period of time, with the press and public thinking, “Is this person guilty or not?” That can lead to a huge amount of media coverage. If it is shown at the beginning that there is nothing to answer for, why can cases not be dealt with more quickly?

Stuart Allan: Let me deal with that last point up front. You said that there might be nothing to substantiate. In my view, that shows at least some disrespect to the complainant. Very few complaints have no substance to them, and there are next to no complaints in which we can tell from looking at the page that there is nothing to answer. That is the first point.

Secondly, two parties have an interest in a complaint—the complainer, of course, and the respondent. The thing to do is to come to a decision as quickly as possible given all the circumstances of the case. If we can do that, and we write a reasoned note that people can then rely on, the press can pick up on the full reasons behind the complaint and the reasons for its dismissal. All that we can do is to do that as quickly as possible.

I will finish on this point. If people choose to use the complaints system for, say, personal or political motives, there is next to nothing that I can do about that. That is part of the political process and part of the democratic process. It is not possible to say that, rather than go through a thorough investigation, we will take a view prematurely on whether a complaint has substance.

The Convener: A number of colleagues want to come in. I call Anne McTaggart, to be followed by Stuart McMillan and Stewart Stevenson.

Anne McTaggart (Glasgow) (Lab): On the same point, Mr Allan, the report states that 76 per cent of complaints are dealt with within three months or less. I think that three months is a long time. Dealing with complaints effectively and efficiently ensures that they do not grow arms and legs and that stress is not created for the complainer and the person who is being complained against. Three months is a long time, and I know that some complaints go on for nine months or more.

10:15

Stuart Allan: It is difficult for me to say that those figures are unreasonable. I think that they are exceptionally good figures. Compared with other regimes in Scotland or other ethical standards frameworks throughout the United Kingdom, they are exceptionally good figures.

You say that three months is a long time, but the figure is for complaints that have been completed within three months, so not all of them have taken as long as that. Each complaint needs to be considered and then passed on to the respondent, who must be invited to give his or her views. At least, an initial investigation needs to be conducted, which involves going to the local authority—usually to the chief executive or monitoring officer—to find out what the background is. Some interviews might need to be carried out as part of the process. To do that in significantly less than three months is just not realistic.

Anne McTaggart: I tend to disagree.

Stuart McMillan (West Scotland) (SNP): Good morning, gentlemen. I have one question and one point for clarification. On page 16 of the report, the second-last line in table 10 is “Engagement and liaison with constituents”. What does that mean? Obviously, I am not looking for any specifics of the cases.

Stuart Allan: That relates to complaints about MSPs—

The Convener: Can I stop you there, Mr Allan? Mr McMillan has moved on to complaints about MSPs, which is the responsibility of the Standards, Procedures and Public Appointments Committee. In the main today, we are looking at the council aspects of the report. If Mr McMillan wants to frame his question around the council aspects, that is fine, but we need to steer away from the MSP scenario.

Stuart McMillan: I was just seeking clarification, because I do not understand what that line in the table means. That was all.

The Convener: Perhaps Mr Allan can clarify the point.

Stuart Allan: Table 10 is about the performance of MSPs as perceived by constituents who feel that their MSP has not been performing adequately. There can be issues relating to the code of conduct, but in those circumstances I do not have jurisdiction as Public Standards Commissioner, as such matters are for the Presiding Officer.

Stuart McMillan: I also have a question. In this annual report and in previous ones, has there been an increase in complaints around or just after a local authority election? Have you noticed a spike in complaints at those times?

Stuart Allan: That is an interesting question. The numbers can vary from election to election. Sometimes we have had a significant rise—usually in the five months before an election—and sometimes we have not. Last year, we had a limited rise in complaints, but not an appreciable rise. I am afraid that I do not have a ready answer as to why there was not such an increase at the most recent election. I am afraid that that is it.

Stuart McMillan: Thank you very much.

Stewart Stevenson (Banffshire and Buchan Coast) (SNP): As someone who has been complained about, I can speak highly of the process, and not just because the outcome was what I expected it to be—the poor soul who complained was someone with mental health problems, which I think was the origin of the complaint.

Looking at the numbers, I think that all of us who are involved in public life should probably pat

ourselves on the back, because the number of complaints that are upheld is extremely low. In the light of that observation, are you able to make any comparisons with other jurisdictions in the UK or internationally? It strikes me that, although there is considerable public debate about standards in public life, the figures before us suggest that we are operating to very high standards. Is that suggestion justified when you look at other jurisdictions?

Stuart Allan: The ethical standards framework in Scotland is widely embraced by members of Parliament, councillors and members of public bodies, and it is part of our ethos in public service these days. I am not sure that that approach is entirely shared elsewhere, even across the United Kingdom.

We start off on the basis that we have adopted the Nolan principles, readily adopted our code of conduct, and adopted the process. The process itself could easily become part of a problem. It is important that we do things proportionately, fairly and effectively. The regime can become part of the problem, as it did in England, where it was too bureaucratic and took far too long to make decisions. I think that stakeholders gave limited respect to the Standards Board for England's work.

In Scotland, we have tried to bring a huge amount of common sense to the process. I know that the phrase "common sense" is not used much these days, but we have tried to look at complaints with a great deal of it and to adopt a proportionate approach to dealing with specific complaints. I think that that has given us a degree of credibility that has not been shared in other parts of the United Kingdom.

I will give a practical example. In Scotland, at a very early date, we were faced with complaints about councillors that really related to their conduct in private life. At that early stage, we said that the code relates purely to councillors' conduct as part of their duties. Just because someone is called Councillor Bloggs from day to day, that does not mean that he always has his council hat on. That is why, at that early stage, we said that private conduct is not caught by the code. In England, a different view was taken, and private conduct was drawn into the investigations that the Standards Board for England undertook. That is one example of how we have dealt with matters in a more straightforward and appropriate way.

If members look back at the cases that have gone through the courts in England, they will find that the courts have favoured the Scottish approach. That has been said at High Court level in England. We have approached matters generally and, I hope, with a great deal of support from the local authorities and public bodies for

what we have done in promoting the codes. I think that we have achieved a pretty high level of satisfaction. Regulators can never get much more than that. If people are reasonably satisfied with what we do, I would be satisfied with that performance.

John Wilson (Central Scotland) (SNP): Good morning, Mr Allan. I have a couple of questions.

I am interested in the report and some of the figures in it. You are saying that figures seem to be going down, but it is clear from table 3 in the report that complaints about failures to declare interests have increased by over 100 per cent year on year. There were 19 such complaints in 2009-10 and 19 in 2010-11, but the figure jumped to 42 in 2011-12. Has any analysis been done of why there was such a large year-on-year jump? Given that that was at the end of the five-year cycle of councillors' elected positions, what happened?

Stuart Allan: You have raised a very fair point. I think that it comes back to declarations of interests, which I mentioned in my opening remarks.

Let me take a step back and look at the matters with which the code deals. I always regard it as a pyramid, at the top of which are the really important issues such as registration and—at the very top—declarations of interests. After all, those are the areas where the public expect to see that their elected members have acted with all due integrity and propriety. At one time, in local government, failure to register or to declare interests was a criminal offence. In fact, it was the only matter in relation to councillors that was regulated by statute until the codes of conduct were introduced and such issues became subject to civil law.

Last year's statistics disclosed a higher than usual number of complaints because there were a couple of multiple complaints relating to two or three councillors. Nevertheless, the number of such complaints is unacceptably high. Often councillors do not properly perceive how their interests might cause problems in a debate, or that members of the public might see them as influencing their conduct in the chamber. Councillors should be much more open in seeking advice from senior officers—chief executives or monitoring officers—but too often they wait until they are in the chamber before they look for advice. By that time, it is too late.

It is also too late to go to the chief executive or director of law two minutes before a meeting starts and say, "By the way, can you give me some advice on this matter? My Auntie Jeannie owns the house next to the site that's up for planning permission" and expect to get proper, reasoned and sound advice. The lesson that I try to get

across to councillors is that if they think they have a problem they should act on that and get advice from their senior officers.

The second issue is what councils themselves should be doing. In our previous two reports, we have said that councils should be more proactive in talking to their councillors and showing them how they should consider issues in which they might have an interest to declare. I do not, however, think that all authorities are doing enough in that respect.

Finally, I should say that this year we and the Standards Commission for Scotland have embarked on tours around Scotland and have been to local authorities to explain the code in more detail. We have been encouraged by the very good response that we have received and, in fact, have set a target for meeting all local authorities. The approach gives us the opportunity to have one-to-one talks with councillors about this important area, and to embed in their minds the importance that they must attach to their private interests.

John Wilson: You said that the increase in 2011-12 to 42 complaints might have been the result of a number of multiple complaints.

Stuart Allan: That is right.

John Wilson: How many multiple complaints are we talking about?

Stuart Allan: I can get the figures for that. In any case, I think that one can entirely accept that, overall, the figures for 2011-12 were higher than those for the previous year.

John Wilson: Would a multiple complaint have been made because, say, a decision was about to be taken at a council planning committee meeting and a number of the committee members had met the developer but had not declared that prior to the meeting? Of course, that is a hypothetical situation; I am not saying that councillors have regular meetings with developers.

10:30

Stuart Allan: I certainly want to dispel that notion right away and make it clear that there is no suggestion that that is happening regularly. Meetings with developers usually happen through the offices of the planning department. As for the year in question, I should say that there was no such element to the complaints that appear in table 3. There were issues about failing to register and declare interests in relation to planning matters; in fact, one of our breach cases involved a failure to deal with a planning application properly and led to a suspension and so on.

As far as the statistics are concerned, I point out that three separate complaints about one councillor are, statistically, logged as three complaints, even if they relate to the same issue, because there could be three outcomes. Equally, if a single complainant reports on three councillors, that, too, is counted as three complaints, for obvious reasons. I am happy to give the committee a breakdown of those statistics, if it so wishes.

The Convener: That would be useful.

John Wilson: Mr Allan mentioned monitoring officers and chief executives of local authorities. Would they have enough information to be able to give correct guidance to elected members? After all, it is elected members, not council officials or employees, who are dealt with under this process. Do councillors receive enough advice from the moment they are elected and right through their involvement with the council's business to ensure that they do not breach standards later?

Stuart Allan: Yes. Almost all local authorities have for those who are elected an induction process that deals very fully with the code of conduct and matters such as interests.

The Convener: You say that such matters are "very fully" dealt with at induction meetings. Have you attended any such meetings of late?

Stuart Allan: No—but from all the discussions that I have had with elected members and chief executives I am satisfied that they have put in place a full process. Usually, as part of that process, there is a session on the code of conduct. Of course, that happens in the first two or three months after an election. After that, there is no regular feedback on those matters and, in the course of time, councillors become less than aware of their responsibilities. As a result, it is important to refresh their knowledge, particularly with regard to interests. That is where I think local authorities could step up a little bit.

John Wilson: Have you analysed the number of complaints prior to 2007, since when, of course, elected council members have received remuneration for their duties? As the appendix to the report makes clear, some members have been suspended from attending council meetings for up to three months. However, while a member is suspended from attending full council meetings and committee meetings, their constituents will still expect them to carry out their duties as an elected member and to deal with constituent complaints and inquiries. Under the guidance and the code, how does that relate to an individual's loss of remuneration? While an individual is suspended from attending committee meetings and full council meetings, they are still carrying out their

other duties. Their only source of income might be their remuneration for undertaking that work.

Stuart Allan: A member who is suspended as a result of a Standards Commission decision still receives ordinary remuneration. If they are entitled to a special allowance—because they are the chairman of a committee, for example—the commission's guidance is that the local authority reconsider whether they should receive such remuneration. However, the basic allowance is still paid to the councillor, in the consciousness that he or she still has a fairly heavy workload as a constituency councillor.

Margaret Mitchell (Central Scotland) (Con): I wanted to ask about training, but you have covered that fairly well. The induction is all very well to give a pointer to issues, but I still question how much new councillors take in at that stage, given the volume of work that they face. It might be worth revisiting that not just in two or three months' time but reasonably regularly, as issues that relate to declarations and the code of conduct will arise in various committees. However, I am encouraged that you are conscious of that and that such recommendations are being made.

Stuart Allan: Such issues were very much in our mind after the previous elections. We knew that, after May 2012, induction sessions were to be held across all 32 local authorities. However, the Standards Commission, along with us, felt that we should go a step further and try—if we could—to encourage all the members of every local authority to come along to a session about the range of matters that the code covers, and particularly about interests.

We are more than halfway through that process—David Sillars will go to East Renfrewshire Council next week and I will go up to Moray Council and so on. The sessions have been really helpful. We used to have regional meetings, to which a number of local authorities came and which a small percentage of councillors from each local authority attended. Going out to each local authority is having an impact, which is good. We must keep doing that. Those matters are very much behind our thinking.

Margaret Mitchell: As I said, that is welcome, especially as people can be elected in by-elections.

I see that Mr Sillars wishes to comment. Will you cover the devolved public bodies, which might also involve councillors in one way or another?

David Sillars (Commission for Ethical Standards in Public Life in Scotland): I reinforce what Stuart Allan said about the layered approach to improving training and awareness. I was reflecting on the earlier discussion about stakeholders in the public sector buying into

ethical standards. Being a little more out in the councils, I think that the framework is now pretty much wallpaper of which people are aware. That has done a great deal to raise standards generally.

As for the specifics, how we have reorganised our contribution to councils and the fact that we meet them individually has really improved the amount of interface between us and councillors, to be frank. That has been good.

I cannot speak about councils universally, but there certainly is good practice in councils. Monitoring officers and chief executives have encouraged that by emphasising to members the need for early transparency, about which Stuart Allan talked. That facet of the process is very much designed to protect members. I appreciate that you would probably expect me to say that, but it is important. As Stuart Allan said, it is absolutely no use if a member says, as an official sidles into the council chamber, "I was wondering if I could speak to you about my friend." However, from what I can see, in the past four or five years, the situation has improved and it continues to improve, not least because people have bought into the process.

That was what I wanted to say in relation to the generality, but I think that you had a further point.

Margaret Mitchell: It was about training for members of devolved public bodies.

David Sillars: We take the same general approach to devolved public bodies. There is a great deal less activity in relation to the code and devolved bodies but, along with the Standards Commission, we are involved in regular meetings with the standards officers from the devolved bodies and we try to take the same approach to them. As I say, we have significantly less business relating to devolved bodies—no doubt that is simply because of the nature of the beast and the higher profile of the political activity in councils.

Margaret Mitchell: If it is found that no breach has taken place and a complaint is not upheld, is the note of decision retained?

Stuart Allan: Yes; the note of decision is retained indefinitely. That goes back to the point about councillors often feeling when they have been the subject of a press story about an issue that they have not been able to respond adequately because they are under the cloud of an investigation. We try to write the note of decision as clearly and articulately as possible to explain what we have considered and how we have come to the conclusion that the respondent—the councillor—did not contravene the code. That is then put into a summary version that still contains all the reasoned arguments and is put on the web. That often appears, in a form, in

the press. To an extent, the councillor is vindicated, if that is appropriate, by being the subject of a press article that is based entirely on our conclusions. Any imbalance as a result of the press suggesting that the councillor was doing something wrong is, to an extent, redressed by the reasoned note, which is available on the web.

Margaret Mitchell: I have mixed feelings about that. Part of me thinks that publishing the notes deals with the situation, but I wonder about retaining them for posterity, because people might think that there is no smoke without fire and so on. I wonder about the fairness of that.

Stuart Allan: That is a fair point. There is an issue about how long we keep the notes. To an extent, we have kept notes of decision and web summaries in order to build up case law on ethical standards. The information is widely sought by officials in local government and is looked at a lot. That is important. However, the issue is whether we have to retain all the information about individual people.

As an example, I will move to MSPs just for a second, if I may, convener.

10:45

The Convener: Could you do so briefly, Mr Allan? You might get me into trouble with the Standards, Procedures and Public Appointments Committee.

Stuart Allan: With MSPs, nothing appears on the web; there is no publication of no-breach decisions, because that is what the parliamentary act requires. That is not part of the process in local government, which is more open and transparent in that respect. One thing is for sure: we need to publish decisions or to make them available on the web in order to redress the imbalances that are created by inaccurate reports in the press that have been led by complainants. That is necessary to ensure that matters are resolved to the public's satisfaction.

Margaret Mitchell: I have a final question. The sanctions that are available to you when a breach is upheld are censure, suspension and disqualification, which are all very punitive sanctions. I compare them with some of the sanctions that are open to the Scottish Public Services Ombudsman. An area that I have a particular interest in is apologies. If it was possible to get an apology in which the incident was acknowledged, regret expressed and lessons identified that could be learned, would that give complainants more closure and satisfaction that something had been done to take the issue on board and to ensure that it did not happen again?

Stuart Allan: The short answer is yes. We do get complaints when we say to ourselves, "If only the councillor had apologised for what he did." If it is still timeous to do that, we encourage the councillor to do it. We tell them to go up and see Mr and Mrs So-and-so, apologise to them and get things sorted out. That is proportionate.

Councillors can sometimes be very slow to acknowledge that they have done wrong. It can often be extremely late in the investigative process when they acknowledge that they have been in error. Even then, acknowledging that they were wrong and apologising fully to the complainant would have a significant mitigating effect.

Margaret Mitchell: Thank you. That was helpful.

The Convener: Stewart Stevenson has a wee supplementary.

Stewart Stevenson: I just wanted to pick up on the point about retention of records. Given that the media will retain records in their clippings libraries for as long as they choose to do so—which, in general, means for ever—do you think it important that the objective facts of decisions continue to be available indefinitely as a potential source of rebuttal for what may be less-than-objective material that is held in media libraries?

Stuart Allan: Yes. At the moment, I take the view that, unless there is legislation to the contrary, the decisions are formal decisions of the regulator and must be left on the table, as happens with court decisions. I think that it would require legislation to say that we should get rid of your decision. Overall, I do not think that that would be in the public interest. Matters that are brought before courts are there for all time; I see no reason to depart from that principle.

John Pentland (Motherwell and Wishaw) (Lab): I think that Margaret Mitchell and Stewart Stevenson have opened the door for me. Do you believe that there is an unfairness in the process under the code of conduct for councillors in comparison with the process under the code of conduct for MSPs? I know that we do not want to talk about MSPs, but it is quite important to say that, under the code of conduct for MSPs, there are admissible and inadmissible complaints. If the same sort of process went on with complaints about councillors, we might not have lengthy waiting times of between three and nine months. Under that process, a quick decision is taken that a complaint should not be taken forward because it is purely an allegation. Is there an element of unfairness? Does the legislation need to be changed to give the councillors' code of conduct the same footing as that of the MSPs' code of conduct?

Also, regarding the point at which a decision is made and it is on the record for ever and a day, although I can fully understand it being on the record, it is always good to reference casework. For example, if you think about when an allegation has been made against you and it is totally unfounded, it does not matter how many times people look at the fact that the allegation is unfounded. If they look at the allegation hard enough, the mud starts to stick.

Should the process for councillors be more aligned with that for MSPs? First, it would help the councillors process to be that wee bit quicker and secondly, it would take away an unfounded allegation that would have to appear somewhere.

Stuart Allan: Superficially, you could say, “Why not have exactly the same investigative regime and the same reporting system and the same sanctions for all the public bodies in Scotland?” However, a regime has been shaped and fashioned and designed for local government—that is basically what the code of conduct for councillors is all about. It suits the responsibilities of councillors.

A completely separate thinking process went into the code of conduct for MSPs and a very adequate framework was shaped for members of the Scottish Parliament, who are involved in the legislative process.

The council process involves councillors making hard decisions day in, day out that relate to individuals and specific matters: planning permissions, housing applications, closing schools, social work cases, roads with potholes and so on. Those issues are what people get upset about and they often involve quite complex complaints.

At the end of the day, I am pretty satisfied that although we have slightly different regimes for the two strands in public life, that has been done deliberately and there is still merit in keeping them separate. Although there might on the face of it be some merit in drawing them together into a single process, we might be throwing out the baby with the bathwater if we were to do that.

John Pentland: I would like Mr Allan to write to the committee outlining the view that he has just expressed about why the processes should still be separate, because I believe that the code of conduct is there for elected members and that perhaps the processes should not be different in that respect.

When a councillor has contravened the code—again, this is purely hypothetical—he has time to make representation. How long does he have to make representation and how long does the commission have to respond to that? Secondly, also hypothetically, if that contravention was

identified near the end of the councillor’s term and the time span that you apply for coming back goes into the next time for election, what happens then?

Stuart Allan: As far as an alleged contravention of the code is concerned, when we have had an investigation and we are clear that there has been a contravention, the report is drafted. It then gets given to the councillor and he is given a couple of weeks to respond. If he wants more time, he will get more time.

The councillor’s representations then form part of the report. Sometimes I might change parts of the report to accommodate what he has said, but I tend to make only minor points of clarification. I cannot remember an instance when I changed a material conclusion as a result of representations.

The report goes to the Standards Commission for Scotland, and it is then for the commission to decide whether to hold a hearing. Of course, the respondent has the opportunity to be legally represented at the hearing, at which it must be decided whether the case that I put forward is proven, on the balance of probabilities.

John Pentland: Who sets the penalty for the contravention?

Stuart Allan: The Standards Commission. The commission decides whether to uphold a report in which I conclude that there has been a contravention. Once it has decided to uphold the report, the commission must decide to do one of three things: censure, suspend or disqualify. That is the function of the Standards Commission for Scotland.

Stuart McMillan: What happens if a complaint is made against Councillor X in the final six months of their term of office, and Councillor X has indicated that they will not seek re-election? Given the time that it takes to undertake your investigations and determine whether the councillor is guilty, is there any point in undertaking the investigation?

Stuart Allan: If a complaint is received prior to an election and it is known that the councillor will not stand again, we normally consider that it would be a waste of public resources and not in the public interest to investigate the complaint. There is one real exception: if we think that the allegation is so significant that it might, if proven, lead to disqualification, we will proceed with the investigation. That has never happened, so in almost all cases in which someone is standing down we explain to the complainant that, in the public interest, we are not investigating the complaint.

Stuart McMillan: In the scenario in which you have decided not to undertake an inquiry because the individual is standing down, what happens if at

the very last minute, on the final day before close of nominations, the councillor decides to put their name forward, because another person has pulled out or for some other reason?

Stuart Allan: We wait until the close of nominations before we issue a formal decision that we will not proceed further.

Stuart McMillan: Right. Thank you.

John Wilson: Table 4 shows types of complainant. Just over 3 per cent of complaints came from an officer of a local authority. What is the role of the council's monitoring officer in relation to a complaint about an elected member that is made by a senior officer of the council? How would you advise that the case should proceed? If the monitoring officer carries out functions on behalf of your organisation and provides a report, but it is a senior official of the council who has made the complaint, is there a conflict in the council structures?

Stuart Allan: The short answer is yes. If the complaint came from a specific officer—let us take your example of the monitoring officer—the contact officer for the purposes of our investigation would normally be the chief executive. We would not communicate with the monitoring officer, other than in his capacity as complainant, to seek explanations in relation to his complaint. We would normally go directly to the chief executive and ask him to be the contact point for the purposes of the investigation.

11:00

John Wilson: I am trying to draw out the point that there might be a conflict between the role of monitoring officer and that of the chief executive. I am not sure how monitoring officers operate in each of the 32 local authorities but if, as you say, they were to make a complaint about an elected member, surely they would not do so without seeking the approval of or running it by their chief executive. As a result, even if you bypass a monitoring officer who has complained about an elected officer and go to the chief executive, the decision has been predetermined.

Stuart Allan: We have to investigate the matter and be absolutely satisfied about the facts of the case. We contact monitoring officers only to facilitate the investigation—it is no more than that.

As far as I can recall, the only occasion that a monitoring officer has submitted a complaint to me has been on the instruction of his own council. He did not do it off his own bat—

John Wilson: That is the point that I am trying to make.

Stuart Allan: The council had made a decision on the matter. In writing to tell us that a complaint had been made against a certain councillor and so on, the monitoring officer was simply carrying out his job.

John Wilson: As I said, that is my point. In most cases, monitoring officers would not act on their own initiative but would seek the approval of—

Stuart Allan: Actually, it tends to be the other way around. The council has already formed a view and has instructed the monitoring officer to make the complaint.

John Wilson: In that case, can you define what you mean by "council"? After all, councils have two strands—their officers and their elected members—and it would be useful to find out how you determine who the council is when a complaint is made against an elected member. After all, they, too, are part of the council in some respects.

Stuart Allan: In the specific circumstances that you are talking about, we would regard the council as the complainer if it was a recorded decision of the council itself. If we received a complaint from a particular head of department or chief executive without council authority, we would regard that as a complaint by an officer.

John Pentland: I have a brief question for Mr Sillars. I assume that, as investigating officer, you will deal with the monitoring officer on any complaint or allegation. Have you at any given time reported back to the commission that, having spoken to the monitoring officer, you found the complaint or allegation to be inadmissible and recommended that it should not be taken forward?

David Sillars: At all stages, we are careful about assessing the relevance and admissibility of all complaints. Harking back to an earlier part of our discussion, I repeat that we try to do that very quickly and the report contains information about how that is done. If the monitoring officer's information or any of our initial inquiries flagged up that a particular complaint was inadmissible or not relevant, we would close it down.

Margaret Mitchell: The statutory offence not to declare and indeed the criminal offence not to register financial interests were not included in the Ethical Standards in Public Life etc (Scotland) Act 2000. Should that be reviewed?

Stuart Allan: As far as I recall, in the 40 years prior to the Local Government (Scotland) Act 1973 being repealed there were no criminal prosecutions in Scotland for that matter—none. There was therefore an issue about whether anything was being achieved by having a criminal offence in that regard.

The Convener: Our discussion is on the record, and there are murmurings around the table about whether or not there were prosecutions. The committee probably needs to get clarification on whether there were prosecutions over that period of time.

Stuart Allan: You are certainly welcome to do that, but in my 40 years in local government, as far as I recall there were no such criminal prosecutions. There was an issue about what was the appropriate way in which to regulate the matter. Parliament was very clear that it was important to decriminalise it and to bring in a civil regime, which the code of conduct is. There has been a range of issues relating to declarations of interests, which have been looked at by the commissioner and the commissioner's office, and the Standards Commission in cases where there have been breaches. I think that that has been the proportionate way of dealing with the issue. It is a proportionate approach to an important issue.

Margaret Mitchell: I mentioned it only because there was some disquiet that perhaps there had not been sufficient discussion of the issue prior to the bill being passed. In terms of post-legislative scrutiny, perhaps that aspect could be looked at once a track record has been built up.

Stuart Allan: I noticed that in the notes that you had, but with respect I do not entirely agree with that. The issue was given considerable thought, because at that time—those of you who were in local government may remember this—it was decided not only to decriminalise the law on declarations but to remove surcharge powers. Those things were done together quite deliberately. However, that was done on the back of having an alternative regime, which is the code of conduct.

Margaret Mitchell: Thank you.

John Pentland: I have a question for Mr Sillars. Are complaints that are inadmissible included in your overall figure for complaints against councillors? If a complaint is inadmissible, does it become part of the public record that an allegation was made against an individual?

David Sillars: We include in our figures complaints that are made against councils and so on. However, as you will see in table 2 of the report a number of complaints are “outwith jurisdiction”. Those complaints will be, for example, against an officer as opposed to a member of a council or a devolved body, so it will be apparent on the face of the complaint that it is outwith our jurisdiction. That will be an end of the matter, and the complaint will be categorised as “outwith jurisdiction”.

There are also complaints in which further investigation is warranted to determine whether

the complaint is such that we would take it further. For instance, we would not usually investigate an anonymous complaint, a complaint in which the circumstances had arisen more than a year ago, or a complaint in which it had not become apparent to the complainant that there was something to complain about more than a year ago. Those examples—and they are just examples—are not situations for which we can decide immediately whether a complaint is admissible, so further consideration needs to be given to them.

As Stuart Allan said earlier, we would not normally embark on investigating an anonymous complaint unless it was enormously significant or unless there was a way of determining a link with the complainant.

A complaint's admissibility may be apparent from the complaint itself, or it may require some desktop investigation or other investigation or contribution from the complainant. We often write to complainants to ask them to focus on the specific part of the code that they feel has been breached.

The Convener: Gentlemen, earlier this morning I declared a very tenuous interest. I was previously in the habit of declaring tenuous interests as a councillor, because I think that it is best to be as open and transparent as possible. Under the new regime, a declaration means that you have to leave the meeting at that point. Do you think that some of the changes mean that there is less transparency than there once was?

Stuart Allan: I do not think that the regime change, with the new code in 2010, has meant that there is less openness and transparency. In fact, one of the principles behind the review was to ensure that the code was still fit for purpose and satisfied the key Nolan principles.

The Convener: However, you will not get those tenuous declarations that many members used to give. If they do not have the ability to do that, you may get fewer complaints than you do currently.

Stuart Allan: I was about to say that councillors have to be very guarded in making declarations just because they think that there might be some very tenuous connection to an item of business. As you say, particularly in the case of financial interests, that leads automatically to a requirement to leave the room.

The Convener: In my opinion, a financial interest could never be tenuous. However, there are other things that obviously ire people. That may be a very simple little thing, such as the fact that you attended an event with someone else, but you then find that someone is very unhappy because you have done that and they think that it may have influenced your decision. Some folk

declared such things previously in open session, but they no longer declare them because doing so would mean that they would have to leave. That real level of transparency that some of us have always sought to have is no longer there for some people—indeed, it is no longer there for anyone.

Stuart Allan: The new code introduced a bar of where the interest is remote or insignificant, and that applies even to financial interests. It was important to do that to avoid people having to declare absolutely everything, no matter how remote the matter was from the subject under discussion. However, it is very difficult for me to give a view on specific matters without being aware of the whole circumstances of the individual case.

The Convener: When witnesses such as yourself appear in front of the committee, there is quite often a level of interest among the general public. As is always the case, I have received communication on certain aspects of registration itself. What is your opinion on expanding what is registrable? Should folk have to register membership of organisations such as the masons, which they do not have to register under the current legislation?

Stuart Allan: First, you will not be in the least surprised to hear me say that such decisions are for the legislature, which in this case means the Scottish Parliament. However, let me make one general point. Historically, the only interests that people have had to declare have been financial interests. That was the case in local government and it is still the case that members of the Scottish Parliament need to register only financial interests.

11:15

In local government, we now have a system in which significant non-financial interests have to be registered, but by the nature of the beast, they are very difficult to determine. It is not easy to say what a relevant non-financial interest and a non-financial interest that is not relevant are. Things will often depend on the circumstances behind the item of business that is being discussed. I am not the keenest person on non-financial interests being registered because there is a real difficulty in being sufficiently clear about what we are trying to catch in defining the term. If a person has a non-financial interest that is material to an item of business, it should be apparent to them, and they should declare it at the council meeting in which it is intended to discuss that item. Therefore, there is a fallback in the public interest and to protect the public. If someone has a material interest in a matter, he should declare it.

John Wilson: I would like to follow up on the point that the convener made about membership

of organisations. I have the Scottish Parliament information centre briefing that we received. I take it that you have seen it, Mr Allan, as you referred to it in response to a question from Margaret Mitchell. If there are things in it that you disagree with or which are not clear enough, would you be so kind as to advise the committee clerks and SPICe what they are?

Stuart Allan: Absolutely.

John Wilson: MSPs have clearly looked at that briefing. I am looking at the guidance on the registration of interests in the code of conduct, which was published in 2010. The guidance refers to the 12 months prior to taking up office and to non-financial interests, including membership of clubs and voluntary organisations. That is in the 2010 code. The convener asked about the membership of a particular organisation. Would that not be declarable under the new code?

Stuart Allan: You really need to read the code fully in respect of how it defines non-financial interests, rather than—with great respect—the SPICe briefing. The code puts the matter in full context. It is not appropriate to be drawn into giving you a view on whether membership of a specific organisation should be registered. That is a matter for the individual councillor to consider, given the context and the definition of non-financial interests in the code.

John Wilson: I would welcome Mr Allan's further response to that question. As a member of the Local Government and Communities Committee in the previous session, I scrutinised the code when it was approved in 2010. I have a copy of it and have marked it, and I regularly refer to it. Where Mr Allan sees that there may be omissions or inaccuracies in the SPICe paper, he could notify the clerks of them, and that could be circulated to members. I leave that offer open to him.

Stuart Allan: I would be very happy to do so.

John Wilson: Thank you.

The Convener: That would be grand, Mr Allan.

I thank Mr Allan and Mr Sillars for their time. As agreed, we move into private session.

11:19

Meeting continued in private until 12:52.

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