



The Scottish Parliament  
Pàrlamaid na h-Alba

## Official Report

# STANDARDS, PROCEDURES AND PUBLIC APPOINTMENTS COMMITTEE

Thursday 19 November 2015

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**Thursday 19 November 2015**

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**STANDARDS, PROCEDURES AND PUBLIC APPOINTMENTS COMMITTEE**  
**19<sup>th</sup> Meeting 2015, Session 4**

**CONVENER**

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

**DEPUTY CONVENER**

Mary Fee (West Scotland) (Lab)

**COMMITTEE MEMBERS**

\*Cameron Buchanan (Lothian) (Con)

\*Patricia Ferguson (Glasgow Maryhill and Springburn) (Lab)

Fiona McLeod (Strathkelvin and Bearsden) (SNP)

\*Gil Paterson (Clydebank and Milngavie) (SNP)

\*Dave Thompson (Skye, Lochaber and Badenoch) (SNP)

\*attended

**THE FOLLOWING ALSO PARTICIPATED:**

Joe FitzPatrick (Minister for Parliamentary Business)

Al Gibson (Scottish Government)

Colin Keir (Edinburgh Western) (SNP) (Committee Substitute)

Neil MacLeod (Scottish Government)

Bill Thomson (Commissioner for Ethical Standards in Public Life in Scotland)

**CLERK TO THE COMMITTEE**

Gillian Baxendine

Alison Walker

**LOCATION**

The David Livingstone Room (CR6)



## Scottish Parliament

### Standards, Procedures and Public Appointments Committee

*Thursday 19 November 2015*

*[The Convener opened the meeting at 09:18]*

#### Decision on Taking Business in Private

**The Convener (Stewart Stevenson):** I welcome members to the 19th meeting in 2015 of the Standards, Procedures and Public Appointments Committee. As usual, I remind everyone to switch off mobile phones, as they may affect the broadcasting system.

We have received apologies from Mary Fee and from her substitute Mark Griffin, whom I congratulate on his fatherhood—that is why he is not here as a substitute. We have also received apologies from Fiona McLeod. Colin Keir is substituting for her.

Agenda item 1 is a decision to take in private item 3, under which the committee will consider its work programme. Do members agree to take agenda item 3 in private?

**Members** *indicated agreement.*

## Lobbying (Scotland) Bill: Stage 1

09:19

**The Convener:** The second agenda item is to take evidence on the Lobbying (Scotland) Bill at stage 1. Our first witness is Bill Thomson, who is the Commissioner for Ethical Standards in Public Life in Scotland. I welcome Bill, who is, of course, a familiar face for all sorts of reasons.

Before I kick off our questions, you may want to make an initial statement—although my question will lead to one anyway—on your general views on the bill and the implications for you in particular.

**Bill Thomson (Commissioner for Ethical Standards in Public Life in Scotland):** Thank you, convener. I am not going to express any views on the policy behind the bill, which I have looked at from the point of view of someone who may be asked to investigate complaints.

I remain convinced of the importance of ensuring as far as possible that the requirements are clear, because vagueness may give rise to complaints, make it very difficult to investigate complaints satisfactorily, and lead me to reporting to you that something may or may not be a complaint. I would prefer to avoid that position.

I am aware that the drafters of the bill have as far as possible followed the investigation and reporting procedures that are set out in the Scottish Parliamentary Standards Commissioner Act 2002, which established the post that I am now in. In the application of that process to the regime under the bill, there is quite a risk of its becoming quite bureaucratic, which would be time consuming and expensive from my point of view. I do not think that that is what the Government is setting out to do in the bill.

I am also aware that the process could be ameliorated or moderated by the Parliament's issuing directions to me under the powers that are in the bill. There are specific areas where that might be helpful. If the committee is interested in the detail, I could run through a nightmare scenario that would involve four or five reports to the Parliament that dealt with a single complaint, which strikes me as a bit silly.

**The Convener:** That would be extremely helpful. It would help us to get our mind around things if you could give us a scenario, however unlikely it may be, that might play out in a way that was unhelpful to everybody.

**Bill Thomson:** I will do that.

I have raised before the other issue that troubles me slightly. At the moment, three of the types of complaint that I have to investigate may also be

about criminal offences. Under my existing powers, if I come across something that may be a criminal offence, I report it immediately to the procurator fiscal, as that is obviously the system by which potential criminal offences are investigated.

I cannot see anything in the bill that would change that. In other words, quite a lot of the complaints that might come to me could be about criminal offences, and I would have to report them to the procurator fiscal. I am not clear what the attitude of the procurator fiscal or Crown Office would be to dealing with those. At the very least, a bit of a delay in my being able to conclude an investigation would be involved. As members will be aware from the bill, if I am unable to conclude an investigation within six months of the complaint being deemed admissible, I have to report to you again.

That is just another risk. I am not saying that it will arise, but the process could be quite clumsy. Therefore, it does not seem to me that the bill necessarily achieves the light-touch approach that I understand was the objective.

There is one point of self-interest. Paragraph 49 of the financial memorandum says that I am satisfied that any costs “can be absorbed” within my existing budget. That is not what I said, and I do not know how that ended up in that format in the financial memorandum. That is just not the position.

**The Convener:** The Finance Committee has written to us and made precisely the point that there are differences in what we have received from different parts of the system. We will seek to address that.

In a different area—in the Interests of Members of the Scottish Parliament (Amendment) Bill—we are seeking to get something from the Lord Advocate that might help us in minimising the occasions when things automatically have to go to the Lord Advocate. It certainly seems on the face of it that this is perhaps a case of ensuring that you are not placed in the position of having to refer everything when it is relatively evident that the matter will not lead to prosecution. I suspect that that may be the answer.

You suggested that you would give an example in which there might be five reports. In your initial remarks, you gave us an example of where a report would be derived that clearly was only prescribed administratively but would serve no useful purpose. Perhaps it would be useful to hear the other ones that you have in your mind.

**Bill Thomson:** I apologise, but I will inevitably have to go into detail here.

**The Convener:** Yes, please.

**Bill Thomson:** If a complaint is received that does not meet the conditions for admissibility that are set out in section 23(3) of the bill and it is of a sort that is identified in a direction from the Parliament, I have to report to the Parliament—for example, that the complaint is not signed. In other words, there are formalities that may not be complied with and, under the bill, I am supposed to report before I consider whether the complaint warrants investigation, which is the second stage.

Therefore, assuming that I report and I am directed by, I presume, this committee of the Parliament to proceed with the complaint, I have to look at whether it is worth investigating. If it merits investigation, I will report again. That would be the second report on a single complaint in probably fairly quick succession. As I have mentioned, there may be a delay because of an overlap with the criminal system, for example. There may not be a delay, but if there were a delay in those circumstances and it ran beyond six months, I would have to report again.

Another possibility is that the complaint would be withdrawn. Again, I would have to report to the committee.

Although I appreciate the need for parliamentary oversight of the process, it strikes me that that is verging on overkill and is certainly bureaucratic in that sort of situation. That would take up quite a lot of everybody’s time.

**The Convener:** Yes. It is helpful to spell that out, because it is sometimes on those bureaucratic issues that the integrity of the process can be compromised or appear to be compromised.

**Bill Thomson:** If the direction-making powers that are given to the Parliament under section 31 are used in a particular way, it will be possible to avoid the need for repeated reports in such circumstances. I hope that that is the position that we will reach.

**The Convener:** Without necessarily taking the sense of my colleagues on the committee, we have listened to that point very carefully. Just to be absolutely clear, this committee will not determine the guidance that is given to you. We will recommend to Parliament, which will give that.

**Bill Thomson:** Indeed.

**The Convener:** To be absolutely clear, we carry the responsibility for asking Parliament, but we do not decide.

There are one or two specific issues. In section 21 there are offences relating to information notices, and in section 42 there are offences relating to registration. How well do those parts of the bill work with your general power to investigate?

**Bill Thomson:** I am not sure whether I fully understand your question. I do not think that there is any restriction on my power and duty to investigate other than, as I have already said, where there is the possibility that something that is reported to me as a complaint could be criminal and therefore would have to be considered under the criminal prosecution system before I was able to do very much with it. There might be slight awkwardnesses in how much of the preliminary work I would conduct under section 23 before deciding that something had to go to the Lord Advocate or the procurator fiscal, but I am sure that that detail can be worked out.

09:30

**The Convener:** Similarly, and we are talking about perhaps the relatively minor mechanical things that may happen, I take it that, if the directions that you were to receive from Parliament ensured that you were able to return minor complaints to the clerks rather than dealing with them in the first instance yourself, that would not be a matter that would be likely, subject to the content of the direction, to cause you any concern.

**Bill Thomson:** It would not. Although I admit that I had not until recently given the matter sufficient thought, I believe that there is scope under section 31(2)(b) to set out circumstances in which certain types of relatively minor failures, which could be dealt with by an information notice, could be specified. It would put me in the position where, if that was the reason for the complaint, I could refer it to the clerks to be dealt with under that procedure. That would be really helpful.

**The Convener:** Certainly, at the core of our consideration of this whole issue has been our desire not to create a punitive regime for small organisations, in particular, who lobby Parliament quite properly. Those organisations might not have access to the same level of professional advice as bigger organisations and might not have people who know at the outset the rules and the fact that there is an opportunity to interact with the clerks in the first instance in order to seek help, guidance and advice before any failure to respond to matters means that the case would land in your in-tray.

**Bill Thomson:** I am in danger of straying into policy, which I am very wary of doing, but, given my more than 18 months' experience of investigating complaints of various sorts, I think that one thing that might help would be some way of dealing with fairly minor issues without going through the full panoply. I do not think that that necessarily needs to be restricted to the smaller organisations that you are describing. If an organisation—even a large one—has just missed out a detail, it seems unfortunate to have to go

through the whole potentially complex complaint procedure if there is a better way of dealing with it.

**The Convener:** That is helpful. What I take from that is that, if the directions from Parliament touched on that issue, that would not be a red line for you.

**Bill Thomson:** Not at all.

**The Convener:** You would look at the detail of the directions, and therefore it ought to be possible for us to come up with directions with which you would be comfortable.

That opens up the wider question of whether you think that the powers in section 31 are sufficiently flexible to enable us to work out a proportionate regime that operates with a light touch when the issues are not huge and can be sorted out quite quickly but still leaves you with appropriate powers to deal with the more serious and recalcitrant people who might be part of this regime.

**Bill Thomson:** They should be. I am by nature an optimist and I see no reason why, given the right approach, that should not be achieved.

**Dave Thompson (Skye, Lochaber and Badenoch) (SNP):** Good morning, commissioner. I have a general question. Your office has been altered and changed in recent years and you have been in the post now for 18 months. Are you confident that any additional workload that would come from an act following on from this bill is capable of being absorbed into your current workload? Do you have sufficient resources?

**Bill Thomson:** I am confident that we will deal with it but we will not do so without additional expenditure. My confidence is based on an assumption that the number of complaints will be relatively low. I am aware that the Government's estimate of the potential number of registrants varies significantly from 255 to 10 times that number. I have assumed, for the purposes of estimation, that the number of complaints that require to be investigated fully will not exceed a handful. Even if that is the case, there will be extra costs. If they do not exceed that small number, I think that the workload will be manageable in terms of the resources that are available to me. Of course, we are speculating about what else happens in the future. If we were approaching nirvana, the number of other complaints that I deal with would be reducing. I am not certain that that will happen.

**Patricia Ferguson (Glasgow Maryhill and Springburn) (Lab):** Overall, the idea is that the approach is meant to be what is described as educative and light touch. From what you have been saying, it seems that you think that the bill

perhaps has a way to go to ensure that that is absolutely the case.

**Bill Thomson:** That is correct. My experience of investigations is that they tend to lead to people, not surprisingly, becoming reasonably entrenched in their positions and arguing their corner, because somebody is investigating and therefore questioning what they have done and the propriety of it. Therefore, I am keen—as I detect that certain members of this committee are—to avoid having to go down a fairly formal investigative process if there are ways of dealing appropriately with issues that could be picked up by other means.

**Patricia Ferguson:** You mentioned in your introduction that you were concerned that, as things stand, some cases might have to be referred directly to the procurator fiscal. I think that I understand the kind of scenario that you are thinking of, but could you tease that out a little for the record?

**Bill Thomson:** At the risk of being unduly simplistic, three of the criminal offences under section 42 are also matters on which complaints can be referred to me under section 8(1), section 9 and section 11 of the bill. On the face of it, any of those sorts of complaints would bring the risk that they could also be criminal. I do not know whether I can go into any more detail.

**Patricia Ferguson:** No—that is helpful.

**Gil Paterson (Clydebank and Milngavie) (SNP):** With regard to members of the Scottish Parliament, when there is a breach in registration, there is an automatic referral to the procurator fiscal. I know that, sometimes, your office investigates the matter and says that it is just a minor thing—I know that that is not what the statement actually says, but that is what it means, reading between the lines.

In that regard, you were talking earlier about referrals to the procurator fiscal's office, which my colleague raised. Would it cause you any embarrassment or problems if you had some discretion? After all, it might be that the matter could be referred, but you would have already investigated it and looked at it in detail. Do you think that, with regard to minor breaches, referral should not be automatic and you should have the discretion to say to Parliament that the matter is so minor that we might be effectively wasting the time of the Procurator Fiscal Service if it were referred to it?

**Bill Thomson:** I am a bit uncomfortable about that on grounds of principle. As you know, I have no role at all in the system of criminal prosecution. I fear that, if I or any successor of mine were to have that sort of discretion, it could be seen as effectively usurping the role of the Crown Office and the procurator fiscal with regard to whether a

potential offence should be prosecuted. It might seem to be a trivial thing, because the particular issues that we are talking about are very minor, but I think that the principle is quite important. At the very least, I would want to know what the attitude of the Crown Office was to that suggestion. It makes me a bit uncomfortable, perhaps because I have a legal background and I have grown up with a particular approach to criminal law. Certainly, as of now, I would not be comfortable with that suggestion.

**Gil Paterson:** I may as well say that I always thought that trivial matters should be left with you. However, I then thought about it more and realised that it might make you uncomfortable for the reasons that you have stated. It is good to get that on the record. As far as I am concerned, it puts my mind at ease. I came to that conclusion myself, eventually.

**Bill Thomson:** It is not strictly part of this evidence session, so I do not wish to waste time on it, but there might be circumstances in which, when you are looking at investigation and enforcement regimes generally, you take account of the fact that a range of approaches can be taken, as is the case with members' interests and political donations, which go to the Electoral Commission. I am not arguing for those approaches; I am merely pointing out that they exist.

**The Convener:** I think that that concludes the areas that we wanted to cover with you. Is there anything further that you wished to say to us?

**Bill Thomson:** I would like to elaborate slightly on a point that I made at the beginning about certainty. The schedule identifies types of communication that are not lobbying, one of which seems to be a little problematic. Paragraph 5 talks about communications that are

“made in the course of a meeting or other event arranged by or on behalf of a member of the Parliament”

or a minister. I am conscious that there are frequent events held in this building, usually of an evening, that are sponsored by members of the Parliament. I accept that some are held at the request of another individual, which would mean that they would be covered by paragraph 6. However, I wonder whether it is right that any communication that takes place in the course of one of those events should be exempt from being considered to be lobbying. It strikes me that, if I were a lobbyist, I would regard those sorts of events as quite a good opportunity.

**The Convener:** It would be fair to say that that is one of the issues that the committee will be considering with the minister and in our discussions. Without our having taken a formal position—I do not speak on behalf of the



committee in saying this—it seemed to us that it was what happened that mattered rather than at whose initiative it was happening. That is one of the areas that we will definitely be pursuing, so it is interesting that you have highlighted that to us as, indeed, others have.

**Bill Thomson:** The other point that strikes me as slightly giving some potential for vagueness is the exemption for journalism, which is not very well defined. Obviously there are all sorts of forms of journalism and types of publication, and certainly there are some—certain trade journals or professional journals, for example—that at times adopt a line that could be thought of as lobbying. I am slightly concerned at the prospect of having to determine whether a communication that was connected to one of those publications was to be treated as journalism, without any further explanation of what journalism means.

**The Convener:** One of my regular purchases is “Rail”, which is a regular publication. I think that it would be fair to say that the editor of that certainly uses his column to lobby Government, so I think that the point that you make is a good one.

**Bill Thomson:** I have nothing further to add.

**The Convener:** And there is nothing else that my colleagues wish to ask. Thank you for attending and for being so helpful and fulsome in your comments.

**Bill Thomson:** My pleasure—thank you.

**The Convener:** I will suspend the meeting while we change over witnesses.

09:44

*Meeting suspended.*

09:46

*On resuming—*

**The Convener:** Our next witness is Joe FitzPatrick, the Minister for Parliamentary Business. He is joined by Al Gibson, who is the bill team leader, Parliament and legislation unit, and Neil MacLeod, principal legal officer, Scottish Government legal department. Let me welcome you all to the meeting. We have a number of areas that we are going to ask questions on and I am going to kick off by throwing the baton to Cameron Buchanan.

**Cameron Buchanan (Lothian) (Con):** Sorry—I am just looking in my papers.

**The Convener:** If we come to you in a moment, that will give you time. Minister, do you want to make opening remarks?

**The Minister for Parliamentary Business (Joe FitzPatrick):** Very briefly. First, thank you very much for inviting me, convener, and good morning, members. The bill is parliamentary in nature so, in introducing it, we have been keen from the outset to work closely with the committee to ensure that its views were reflected in our proposed legislation. The committee report in February was pivotal in helping to shape the bill that is now in front of you. Of the 17 recommendations in that report, 12 fell within the scope of the bill and all of those have been reflected in whole or in part in our bill. Of course, we have consulted more widely in the spirit of seeking to achieve a broad consensus and the bill pulls in and reflects some of the views from stakeholders as well.

Throughout the development of the bill, we have been guided by three underpinning principles. The first is that there cannot be any erosion of the Parliament’s principles of openness, ease of access and accountability. The second is that the register of lobbyists must complement, not duplicate, existing transparency measures. The third is that the new arrangements need to be proportionate and simple in their operation and command broad support within and outwith Parliament.

Those principles have been broadly welcomed by all stakeholders and are at the heart of the bill that I have presented to Parliament. They continue to guide my thinking as the bill proceeds through its parliamentary stages. The bill seeks a balance between the interests of a wide range of stakeholders. It similarly seeks not to create unwelcome imbalances that could work against the Parliament’s interests.

The Government will continue to listen to views on how to improve the bill, but it is important that any changes must still ensure that the register is proportionate and simple and does not place an unnecessary burden on those seeking to engage with elected representatives. The same is true in meeting the committee’s firmly expressed views that the upkeep and oversight of the register should have a very limited impact on the public purse. I am pleased to take questions from committee members.

**The Convener:** Thank you very much. We will now move to Cameron Buchanan’s questions.

**Cameron Buchanan:** Good morning, minister. I am concerned that lobbyists who wish to conceal their activity will surely shift to other forms of communication. They might not reveal activity. If a non-governmental organisation had paid employees and unpaid employees, could it switch those people around so that unpaid employees were not registered and paid employees were? That is a double question.

**Joe FitzPatrick:** I watched the meeting last week, when there was a fair bit of discussion of that issue. Our approach has been to develop a proportionate framework that commands broad support, as I said. We have had to form a view about what the trigger should be for registration. Like the committee, we want a proportionate system that increases transparency but does not discourage participative engagement.

Our starting point was what the committee stated in paragraph 91 of its February report:

“Lobbying activity still places great value on face-to-face communication over emails, phone calls or teleconferencing of any kind.”

The committee came to that conclusion after taking evidence and we thought that it was an important starting point. It strikes the right balance in improving transparency without placing so great a burden on those seeking to engage with members of the Scottish Parliament or ministers as to become a barrier.

In coming to that position, we reflected further on the committee’s report. In paragraph 103, you recognised the ease of registering details of face-to-face

“meetings or events when compared to the prospect of registering details of all communication.”

You followed up on that point in paragraphs 107 and 109, which led to the conclusion in paragraph 111, which lays out the committee’s vision of a register that specifically refers to

“meetings that have been pre-arranged by the organisation with MSPs”

and

“events, including meals, arranged by the organisation”.

In coming to a conclusion on where to draw the line, we were mindful of the committee’s extensive engagement in coming to the conclusions in your report. We are of course aware that there is a spectrum of views that range from those who concur with the committee’s report in the early years of the Parliament, which concluded that there was no need for any legislation in this area, to those who are lobbying quite effectively for a much more heavy-handed regime. We think that the proposals in the committee’s recent report struck an appropriate balance; that has largely been the basis of the bill that we have brought before you.

On Mr Buchanan’s specific point about shifting activity—whether that is about types of person or types of communication, with communication shifting from face-to-face meetings to emails, for example—we need to remember the context in which the bill has been introduced. I think that we are all agreed that lobbying is deemed to be a positive contribution to our democratic process.

Rather than being about probity, this is about transparency, so I hope that those who are lobbying will embrace that increased transparency as a good thing that values their contribution to our democratic processes rather than something that they will try to avoid.

We should remember that the bill is part of a larger transparency framework that would almost certainly flag up a shift of behaviour, as the question implies might happen. In those circumstances, I would have thought that the Parliament would want to look at the framework and consider whether changes needed to be made to strengthen the regime as appropriate.

However, there is no indication that those involved in lobbying in the Scottish Parliament are seen in anything other than a positive light—as contributing to the knowledge that we have and contributing to our work as MSPs and as ministers. I see no reason why those lobbyists would try to hide that activity in any way.

**The Convener:** I will just come in on our report. The first paragraph that you referred to was paragraph 91. We as a committee were seeking to make a distinction—it was more or less in what you quoted—between what activities might constitute a trigger for registration and what might thereafter appear in the register, which might encompass other activities beyond the activity used for registration. You will probably get a certain amount of questioning about the two. You referred to paragraph 111, in which we carefully used the word “including”. In giving a list of what might appear in the register, we were not seeking to exclude things that did not happen to appear on the list.

**Joe FitzPatrick:** You are absolutely right—there is a difference between what might be a trigger and what might be recorded.

**The Convener:** I will return the baton to Cameron Buchanan.

**Cameron Buchanan:** If people really wanted to conceal their activities—this is definitely about emails, which you mentioned, rather than writing—how would we handle it? Have we put enough restraints on people who really want to hide what they are doing by bringing different people to the table or doing things through different organisations? Certain organisations are quite similar on these sorts of things.

**Joe FitzPatrick:** I do not think that that is the framework that we are in. That is not the atmosphere that we are in with lobbying now. The danger of that becoming a problem would arise only if we were to bring in an onerous framework. There could then be a danger of people trying to avoid the requirements of that framework.

We are going through a process, so I am still listening to the views that the committee will bring forward, but if we manage to maintain a proportionate, light-touch, educative framework regime, I see no reason for anyone to try to avoid that, because lobbying is a good thing and it is positive. We are proud of our engagement with stakeholders of all sorts, which I think we all value.

**Cameron Buchanan:** I agree. So you do not think that we will put people off, as long as there is a light touch.

**Joe FitzPatrick:** Whatever changes happen to the bill as it goes through, as long as we maintain a light-touch regime, I see no reason for people to be put off. Even for stakeholders who feel quite strongly that there is no need for a regime because they have voluntary codes or they do not see a problem, if they feel that the Government's proposed regime and the proposal that came forward from the committee are both light touch enough and that the case has been made by others, they will be prepared to accept that and work with it. The danger would arise if we brought in something that was onerous.

**The Convener:** If we were to extend the range of information that was required to be recorded in the register to include numbers of emails, letters and publications—that is not intended to be a complete list—would that constitute a problem? I say that in the context of not seeking to change the qualifying requirement. I am speaking about the registrant and perhaps, to some extent, about the register itself.

**Joe FitzPatrick:** There are two significant changes that could be made to include other communications. I noted that, in last week's meeting, it was implied that it might be possible to include more communications without increasing the number of registrations. It would depend on where a change was made. If a change was made so that an email was a trigger, that would significantly increase the number of people who would have to register.

As MSPs, if we just look at our inboxes, we can see that a number of organisations contact us by post or by email on various issues; that would be caught by such a trigger, although we would have no further engagement with most of them. We might sometimes respond by email if that was deemed necessary. Including such a trigger would have a significant impact.

The other approach would be to include written communication that related to an already registrable event. The bill already proposes that a face-to-face meeting would be a trigger, and there might be communications around that. Clearly that would not increase the number of registrations, as you have implied, but it could increase the amount

of information that such a registrant would need to provide. They are two different things.

We need to be careful of how onerous it would be on the lobbyist to provide that level of information and how onerous it would be on the clerks of the Parliament to administer such a scheme. If we were to go down that route, we would need to tread carefully to make sure that we were not putting up a barrier and saying to people, "We're not going to engage any more, because it's not worth it."

We have therefore provided in section 15 a power for the Parliament—it is absolutely a power for the Parliament and not for the Government—to carry out at some future date an inquiry on whether it would want to make such a change and have this extension to the regime. That power is in the bill as it stands.

10:00

**The Convener:** Patricia Ferguson has a question about the broadening of communications.

**Patricia Ferguson:** As a general point, it is quite important to be careful about language. Engagement and lobbying are very different things, and it is lobbying, not engagement, that we want to catch on the register. We all need to be very careful about that.

I wonder how it will be possible to capture or demonstrate who initiated contact. Has that been thought about?

**Joe FitzPatrick:** We had to decide how we could get to a point where we were not making it difficult for MSPs and ministers to seek information from external sources that they deemed important. The aim is not to hide anything but to preserve the ability for MSPs and ministers to get external third-party policy information without the person whom they have asked to come in being required to register. I suppose that there would be a degree of self-regulation, in that the MSP or the minister would know if they had initiated the meeting.

I point out that if, for instance, someone were to casually ask me for a meeting, such a request by a third party would be caught by the bill. We have drafted it in a way that excludes any underhand ways of requesting a meeting, to ensure that we have maximum transparency of meetings. If those sorts of meetings are initiated by a minister, they will be covered by the proactive release of information about ministerial meetings. We are trying to strike a balance to ensure that we are not debarring anyone, making it more difficult for people to engage with MSPs and ministers or blocking access to factual information.

**The Convener:** Before I return the baton to Patricia Ferguson, I should say that one of the

things that has been raised with me in the past 24 hours is the fact that, for someone who is required to register, there is a prescription as to what they register. It might well be that, when a minister or MSP initiates the conversation for their benefit, the lobbyist who is engaging in that will want to register that meeting. However, as the bill is drafted, that does not appear to be permitted; it appears that only a voluntary registrant is able to register that. I am getting the sense that that is not the reading that officials have; if so, it would be helpful to get an indication that it would be perfectly possible for a registrant to register additional information beyond that which is required, of which this would be only one example.

**Joe FitzPatrick:** I hope that that is right, but I will get Neil MacLeod to answer the question.

**Neil MacLeod (Scottish Government):** As you have noted, convener, there is provision for voluntary registration in section 14, but that is not what we are talking about here. Section 7 contains provision on additional information. In the general scheme, where somebody is required to register, they will do so; in doing so, they have to provide certain information, but they also have the facility to provide additional information that the clerk can include in the register as they see fit.

**The Convener:** That is exactly the wording that is causing slight concern. When you talk about the clerk including something as they see fit, it sounds as if the clerk has to be persuaded. I know that that is probably just a legal construct, but it would be helpful if you could put it on record that, subject to things being legal and not libellous and to all the tests that would routinely apply, you see it as entirely proper for a registrant to submit additional information.

**Neil MacLeod:** Indeed. Although it is necessary for the clerk to have some discretion, the intention behind the provision is certainly to allow the submission of additional information. The bill also contains the ability for the Parliament to issue guidance on the operation of the regime. It is a matter for the Parliament, but that is the sort of thing that that guidance might properly deal with.

**The Convener:** That is helpful.

**Patricia Ferguson:** I wonder whether it matters who initiates the conversation. I am aware from the evidence that we have had that Canada had such a provision but changed it after a few years because it was becoming seen as a loophole that allowed lobbyists to act without that having to be recorded.

**Joe FitzPatrick:** We looked at the international situation with regard to the provision. Of the 10 models that we are aware of, only three do not have such a provision, which suggests that it is overwhelmingly considered to be appropriate.

Al Gibson will correct me if I am wrong, but I think that the only three models that do not have this provision are those in the United States of America, Canada and Slovenia. The reason for it is to ensure that we do not make it more difficult for MSPs to say to an organisation, "I need to pick your brains to get information about this question I am going to ask," for Opposition MSPs to challenge a Government on an issue or for ministers to develop policy. If we did not have some way of accepting such contacts, we might contact an organisation and say, "Could you please come and help me with this piece of work or this policy direction I am trying to develop?" and when it said, "Yeah—that's great," we would have to tell them, "Oh, and by the way, you are going to have to register." There is a danger that we would lose that contact. It is all about trying to strike a balance.

I do not think that in the current atmosphere people are going to try to avoid the register. I was interested in the comments made by Professor Chari last week about the Canadian cancer charity that tries to get as much information as possible on the register, because it sees that as a positive way of making its organisation's impact clear. I hope that this register, too, will be seen as a positive tool.

**Patricia Ferguson:** There seems to be something slightly contradictory about the bill. Section 44(3) says:

"In this section, 'lobbying' means making a communication of any kind to a member of the Parliament in relation to the member's functions."

That seems to be considerably broader.

**Joe FitzPatrick:** That relates to the code of conduct.

**Patricia Ferguson:** Yes.

**Joe FitzPatrick:** That is intentional, because the bill is dealing with registered lobbying and the code is dealing with all lobbying. It is therefore appropriate for the code to go wider if the Parliament seeks to do so in, for example, providing guidance. There is an intentional difference between the two things—they have a different purpose.

**The Convener:** Just to be clear, does that mean that the code of conduct would cover people who would be eligible for voluntary registration but who might or might not have chosen to register voluntarily? Is the intention for the code to cover that category?

**Joe FitzPatrick:** The code will cover all lobbying activity, so it is appropriate for it to go much broader.

**The Convener:** So it will cover three categories of lobbyists: those who are required to register, those who voluntarily choose to register and those who do not register at all.

**Joe FitzPatrick:** Yes. The bill contains pretty wide powers for the Parliament to determine how to ensure that we cover everything and get the maximum amount of transparency. That is in line with the principle of complementing existing frameworks. There is regulated lobbying, which the bill deals with, and unregulated lobbying, much of which is dealt with in other frameworks.

**Patricia Ferguson:** I understand what the bill is trying to do but, in effect, section 44(3) almost provides a definition of lobbying. It would worry me if that turned out to be different from something elsewhere in the bill, and I just wonder whether the issue might be looked at.

**Joe FitzPatrick:** We are happy to continue looking at these issues, but the purpose is to make clear the lobbying that is regulated by a statutory regime and the lobbying that is the subject of guidance that the Parliament makes provisions for. I also point out that this can tie in with the MSP code of conduct, ministerial codes and other such frameworks. The provision has been written to give the Parliament the flexibility to use the powers in a way that it sees fit.

**Patricia Ferguson:** I think that the section needs to be looked at again.

**Joe FitzPatrick:** We will consider your view.

**Dave Thompson:** I want to make a small point that you can consider and comment on if you wish. One of the exemptions is communications in cross-party groups, but it is quite often the case that, after a discussion, a group will communicate in writing with a minister or cabinet secretary or indeed a health board, a council and so on. We therefore need to consider not only the communications within cross-party groups, but what impact a cross-party group might have in writing to ministers and so on. I wonder whether the provision needs to be broadened out a wee bit to cover that point.

**Joe FitzPatrick:** The committee has recently strengthened the framework for the operation of cross-party groups, and this is all about striking a balance and not duplicating other matters. If, say, a minister were to come to a cross-party group, that would obviously be on the record and in the public domain. I am not even sure who would register the fact that the cross-party group had a meeting with the minister—and I am not sure that it would add any transparency. This committee has made some inroads into improving the transparency surrounding the framework for cross-party groups in the Parliament, and I remind members that one of our three principles is to

make sure that we do not duplicate other frameworks and procedures that are already in place and that we do not cross over.

**Dave Thompson:** Thank you for that, but the issue is not so much what takes place at a cross-party group meeting, but what might take place after it. For example, the cross-party group might pick up on an issue about the number of physiotherapists in the country and then decide to write to the minister, asking that the convener, secretary, treasurer or whoever—perhaps a wee delegation—meet the minister to consider those matters. It is that next stage that I am talking about.

**Joe FitzPatrick:** I will ask Al Gibson to come in, but first we need to understand who is meeting here. If the convener of the cross-party group met the minister, that meeting would not be covered, because it would be an MSP who was having that meeting. I will bring Al Gibson in to talk about what would happen if the secretary of the cross-party group had the meeting and they happened to be—let us take the extreme example—a lobbyist working for a big pharmaceutical company.

**Al Gibson (Scottish Government):** The exception as currently drafted seeks to capture engagements within a meeting of a cross-party group, recognising—as the minister has said—that there are separate rules in place governing the probity or activity of CPGs. In the situation that you appear to be envisaging, if there was a written communication on the back of a CPG, the bill as currently drafted would not capture that. The issue is whether there were a face-to-face meeting. I assume that if there were to be a face-to-face meeting—Neil MacLeod will correct me if I am wrong—it would be separately registrable, as it would no longer be happening in the course of the CPG forum.

10:15

**Neil MacLeod:** That is correct.

**Joe FitzPatrick:** That would be the case if the meeting is with a lobbyist of some sort.

**Dave Thompson:** So the intention is that, if a CPG requests a face-to-face meeting and folk who are non-MSPs meet a minister, the CPG would need to register as a lobbyist?

**Joe FitzPatrick:** No—not the CPG.

**Dave Thompson:** Who would register? Would it be the people who were meeting the minister? How would that work?

**Neil MacLeod:** The exception is designed to carve out communications that take place at a meeting of a cross-party group. It is intended that communication during a meeting of a cross-party

group will be not a trigger. If there are then meetings between members of the cross-party group and ministers or MSPs, we go back to the starting point and that will be registrable unless any of the other exceptions apply.

**Joe FitzPatrick:** I confirm that it would be registrable by the organisation that the person represents.

**Dave Thompson:** However, the person who was delegated to meet the minister to take the matter forward would be representing the cross-party group. If a cross-party group decides that it wants to pursue an issue, how will that work? That might be something for further consideration.

**Joe FitzPatrick:** Okay. I think that they are covered by the organisation, but we will take your point away and confirm that.

**The Convener:** It might be useful if I express a view from the chair at this point. Some cross-party groups schedule a meeting and have a meeting but it turns out not to be quorate. Although it has the appearance of a meeting of a cross-party group and operates as if it was one, it does not meet the definition of a meeting of a cross-party group. I just put that on the record as cross-party groups might care to note that the bill might widen some of the implications of their meeting when they are not quorate. That point would bear further examination on another occasion. It is an important point for cross-party groups to note.

**Joe FitzPatrick:** Education is always going to be an important part of taking the matter forward.

**Gil Paterson:** Did the Government consider whether other individuals such as civil servants, parliamentary officials and senior agency staff should be included in the definition in addition to MSPs and ministers?

**Joe FitzPatrick:** Yes. We considered whether there were other appropriate bodies that we would want to include. Again, it came down to striking the right balance. The bill reflects the conclusions that were reached by the committee and backed up by the Scottish Parliamentary Corporate Body, which made clear to the Government the need to consider the impacts of any register model that might create a resource burden greater than that which was envisaged in the report in February. We had to look at that very carefully.

In discussing the inclusion of ministerial special advisers and MSP senior advisers, I draw the distinction that, whether advisers are advising MSPs or ministers, they advise, whereas the decisions are ultimately made by the MSPs or the ministers. That is why we think that we have the correct balance. Any move to widen the definition in the bill of people who are lobbied would result in a greater number of registrants and returns,

particularly if the range of communications that trigger the requirement to register and report lobbying was expanded as well.

It is about striking the right balance and having proportionate registration. Ultimately, however, the reason for the decision is that MSPs and ministers make decisions whereas special advisers and MSPs' senior advisers advise.

**The Convener:** I want to get a technical point out of the way. Given that the civil service is the United Kingdom civil service, is it correct to say that this Parliament does not have the power to legislate directly in relation to civil servants, albeit that we could legislate in respect of lobbyists who are engaging with civil servants? Is that a correct and fair distinction that you would want to make clear to us?

**Neil MacLeod:** The civil service is reserved under schedule 5 to the Scotland Act 1998. As with many things, it comes down to an application of the purpose test, so we would have to consider that.

**The Convener:** So there would be a vires issue—which we will not attempt to resolve here—if we were to get ourselves in the position of legislating about the civil service?

**Neil MacLeod:** The civil service is reserved under schedule 5—

**The Convener:** That is all right. I just wanted to get that technical point out of the way.

**Gil Paterson:** I understand that point, although I was not aware of it until the convener raised it. It is fairly certain that lobbyists make inroads to and discuss matters with civil servants on behalf of the Government. If a lobbyist made contact with and had discussions with a civil servant, would the minister be required to register that because the Government might make a decision based on the information? In a way, the person is lobbying the minister.

**Joe FitzPatrick:** We had to look at where a line would be drawn, and the committee's conclusion was the same. The committee's report stated—we concurred—that face-to-face direct lobbying is of a different scale to any other type of lobbying. We are not saying that there are no other types of lobbying, which is why the code looks at unregulated lobbying, but face-to-face lobbying where one can see the whites of somebody's eyes is of a different scale.

**Gil Paterson:** My next question is in a similar vein. In other jurisdictions, there is a cooling-off period for people who were members of Parliament or who worked for the Government in some capacity, and that period applies before they can engage with Parliament or Government in

lobbying. Did the Scottish Government consider that?

**Joe FitzPatrick:** Yes. From the evidence that the committee took last week, it seems that Ireland included something like that in its legislation. That might be because Ireland does not have another framework in place to deal with those situations, whereas we do. Civil servants who leave the service are covered by the business appointment rules. Again, the matter is reserved to the UK, unless they are covered. That provides for scrutiny of appointments that former Crown servants propose to take up in the first two years, so there is a two-year period for civil servants. Special advisers are also covered by the business appointment rules for civil servants. For senior special advisers, the period is two years, and for other special advisers it is one year. In effect, those are cooling-off periods.

The ministerial code also provides that a minister who leaves office is prohibited from lobbying Government for two years, and ministers are also covered by the independent Advisory Committee on Business Appointments in relation to any appointments or employment that they wish to take up for up to two years.

Those periods are not in the bill, but they exist within the overall framework that we have. The bill is not intended to be the one piece of legislation that provides transparency and probity in Scotland. The intention is for it to complement the frameworks that we have in place.

**Gil Paterson:** I can well understand that answer from a Government and civil service perspective. Will you comment on MSPs and folk who were never involved in Government but were senior advisers in a political capacity and were paid for by the Parliament through the allowances system? Should there be a cooling-off period for them?

**Joe FitzPatrick:** Speaking personally, I do not think so. They are on a different scale and I think that that would be disproportionate. We are not in control of our fate in these matters, and we can imagine somebody who has stood for election and done a fantastic job as an MSP for whatever party then finding that they are out of work.

**Gil Paterson:** Thank you for that.

**Patricia Ferguson:** I have a question, but I am just reflecting on what the minister said latterly. I have a feeling that the public appointments legislation restricts former MSPs in the positions that they can accept—

**The Convener:** In certain public roles.

**Patricia Ferguson:** Exactly. It might be worth taking a look at that to ensure that there is synchronicity there.

**Neil MacLeod:** I am not personally aware of that.

**Joe FitzPatrick:** We will look into that. There may be more than I—

**The Convener:** I think that Patricia Ferguson is absolutely correct. There is a cooling-off period for appointment to certain public roles.

**Patricia Ferguson:** It applies to appointments to boards, agencies and that kind of thing.

**Joe FitzPatrick:** I bow to the member's experience.

**Patricia Ferguson:** Going back to my colleague Gil Paterson's questions about the categories of people who are caught by the bill, if that is the right word, I wonder about the chairs of agencies, non-departmental public bodies and the like. Was consideration given to their being subject to the bill? Another category is parliamentarians such as parliamentary liaison officers, who have quite a lot of access to ministers and might be the conduit for lobbying. It might be important to ensure that there is transparency there.

**Joe FitzPatrick:** The parliamentary liaison officers will be caught as MSPs. The one big difference between the bill and the legislation elsewhere in these islands is that it includes MSPs—again, on the committee's recommendation. Parliamentary liaison officers are caught by that, so people will not be able to use them as a back door to get to ministers. That will not be possible because meetings with all MSPs are caught by the bill.

Chairs of NGOs will be caught if they are paid in their role. There might be a small number who are not paid in their role, but in general they will belong to organisations that are of such a size that the organisation will already be registered, so voluntarily adding the information for a senior unpaid person will not be onerous and that could be encouraged.

**Patricia Ferguson:** I am not convinced about the PLO issue, because they have a specific role over and above their role as an MSP. In a sense, it is the same argument that we make for including ministers as ministers rather than just as MSPs. We recognise that there is a specific role there. I would be anxious if PLOs were not covered by the bill, as lobbyists might see them as almost fair game as a conduit to ministers.

**Joe FitzPatrick:** That is certainly not the intention, but we will go away and check to ensure that we have not inadvertently created a back door to lobbying. I do not think that we have, because the intention is that all MSPs be covered, and that includes parliamentary liaison officers, but let us take that away.

**Patricia Ferguson:** I am sorry, minister. I am not suggesting that the bill does not include PLOs as MSPs. I am saying that it does not include them in their capacity as PLOs.

**Joe FitzPatrick:** I understand your question. We will take that away and ensure that we have not missed something.

**Patricia Ferguson:** Thank you.

**The Convener:** We move on to thresholds and triggers. For lobbying to be regulated requires there to be payment or, more broadly, reward to the person who is undertaking the lobbying. What consideration did you give to other definitions and why did you end up with that one?

**Joe FitzPatrick:** We want to have a level playing field so that everyone is treated equally, and it was about finding that mechanism. There were two serious possibilities for taking that forward. One was to have a threshold—that was the committee's preference—and the other was for paid lobbying to provide a threshold. We considered both possibilities seriously.

10:30

We were concerned that having a threshold of a number of meetings over a year would provide a significant potential loophole whereby an organisation could manage the number of meetings in order not to trigger that threshold. Even if there was no intention not to trigger the threshold or to avoid it, an organisation could fail to register significant acts of lobbying. There could be one meeting that was of great significance and which would not require to be registered. That was our concern.

We consulted on taking both proposals forward, of course. Both proposals tried to achieve the same aim of finding a proportionate way forward in which we did not catch minor acts of lobbying and miss significant lobbying. The consultation was overwhelmingly in support of paid lobbying being the test.

**The Convener:** If we consider NGOs—particularly big NGOs—that will employ people whose duties include lobbying, those individuals will be paid and caught by the definition. I do not choose the RSPB for any particular reason, but it has six-figure numbers of members, if I recall correctly—it maybe has even over a million members. Of course individual members who are not paid to lobby can nonetheless be a very significant part of lobbying activity, but it appears that their activity will not be caught, even though they would be acting on behalf of an organisation. Is that understanding correct? Is that the right way of dealing with the matter?

**Joe FitzPatrick:** I absolutely think that that is right. It does not matter what somebody's job description is. Let us be clear. If the RSPB employs somebody who does not have a title that says that they lobby, but they lobby, they will be caught, and so they should be. However, it is not correct that a member of the public who happens to be a member of the RSPB and wants to engage with their MSP on an issue that the RSPB is lobbying on should be caught. It is correct that the bill does not catch members of the RSPB or the Boys Brigade who want to lobby on behalf of their organisation.

**The Convener:** I was seeking to take the discussion to a slightly different domain, not specifically the issue of a constituent engaging with their own MSP on behalf of the RSPB, but perhaps the issue of a constituent coming to Parliament and engaging with a range of MSPs, many of whom do not represent them.

**Joe FitzPatrick:** Those individuals should not see any hurdle in engaging with the Parliament or the Government. Those are exactly the sort of people whom we want to ensure that we do not put any barriers in the way of.

Last week, Neil Findlay raised the quite useful example of organisations that have been involved in the equal marriage debate. There were two organisations, and I think that he pointed out that both had strongly held views. Both would have been caught through their organised lobbying. Both had people who were paid to lobby, and those people would correctly have been caught. It would be wrong if we had a bill that would have made it difficult for the supporters of both campaigns to engage with MSPs and ministers in the debate that we had. Any barrier for those individuals would be wrong. They are exactly the sort of people whom we want to ensure that we do not catch.

**The Convener:** Nonetheless, it is the organisation that is the registrant, not the individuals. The case has been made to us that all activity on behalf of the organisation that it requires because it undertakes regulated lobbying activity should be caught by the register, notwithstanding the fact that some of that will be undertaken by people who do not receive any reward for doing it. I would be interested to hear your reasoning on that.

**Joe FitzPatrick:** I feel quite strongly that those people should not be caught. There are a number of reasons for that. To stick with Neil Findlay's topic, I had a particular position during that campaign, but I engaged with a large number of constituents. I do not think that the two organisations will have known who engaged with me. Therefore, we would be putting in place a complexity that would be very difficult for us to



manage. There would be the strong potential for an organisation to say, “You cannot do that unless you let us know first.” I do not think that anyone should have to get permission to engage with a democratic process. That is the lobbying that we want to encourage, and we should not shy away from using the word “lobbying” for that type of activity, because that is what it is, and it is appropriate and is to be welcomed.

**The Convener:** It is helpful to get that on the record, minister. Thank you.

There is another thing in respect of which there is a bit of a head of steam among some people out there. Probably the majority of the public feel that the level of expenditure that is undertaken would be an appropriate trigger. What consideration did you give to whether that could be used as a trigger? Why did you end up dismissing that?

**Joe FitzPatrick:** Using the level of expenditure as a trigger would have been pretty easy for third-party lobbyists and consultant lobbyists. They will have a line and will know exactly how much they have spent on a particular campaign, so using that would be dead easy for them, but it would probably be slightly more difficult for the in-house lobbying of big organisations, and it would potentially be quite onerous for some smaller organisations. I am not sure that it would be terribly helpful.

**The Convener:** So your focus is really on the activity of lobbying and whether reward is associated with undertaking that activity. You are seeking to argue that that is a more clear-cut and unambiguous definition than simply a financial one.

**Joe FitzPatrick:** In order to find a regime that is simple to understand, either of the two methods—the one with the number of meetings that the committee suggested or the paid method—would both work in terms of that test.

**The Convener:** You are also suggesting that the financial test might bear disproportionately on middle-ranking organisations and the small ones that did not pay at all.

**Joe FitzPatrick:** I think that it would potentially impact on smaller organisations. Bizarrely, it would be easiest for the consultant organisations, because they will not have to do any work. They will know exactly how much money they have spent on a campaign.

**The Convener:** Just for the sake of argument and to choose just one example, do you recognise that the public might have a perfectly reasonable interest in how much the drinks industry is spending to resist the agreed policy of minimum pricing that we have in the Parliament?

**Joe FitzPatrick:** If we are sticking with the trigger as is, the bill allows for Parliament—after consideration, I would have thought—to extend the details that are on the register. The bill will provide a framework whereby a future committee could say that it felt that information was information that the clerks were in a position to register. To maintain the system that had that information, we need to ensure we have a system that works and is useful and proportionate to the public. All those considerations would need to be taken into account. In the framework of the bill, we have provided the power for the scope to be extended in that way in respect of the information that is registered.

**The Convener:** Quite a lot of lobbying organisations are charities and are therefore already regulated by Office of the Scottish Charity Regulator. Is the approach creating dual registration for such bodies, and difficulties through that?

**Joe FitzPatrick:** No, it does not do that. OSCR’s role is very different from what is in the bill. It would be important for us to ensure that there was no duplication, but there certainly is no duplication in respect of OSCR’s role and what the bill is trying to achieve.

**Patricia Ferguson:** I want to talk about the content of the register in a wee bit more detail and, in particular, I want to reflect on the discussions that we had in the round-table session last week. There were suggestions about other things that should be included. For example, an organisation’s expenditure was seen as being quite important in reflecting the level of concern that it might have on an issue. There were suggestions that banding might be quite helpful. We could have a band to protect commercial confidentiality. Another suggestion was around the employment history of lobbyists. Sometimes it is not the seniority or the position of the person in the organisation that matters, but their contacts that result from previous activity. What about those issues and any other issues that you have thought about?

**Joe FitzPatrick:** The section 15 powers are designed to offer the Parliament full flexibility on the operational aspects of the register, so it would be within the Parliament’s powers—again, I stress the Parliament’s powers, not the Government’s powers—to change what is required to be there. I would have thought that Parliament would want to do that very carefully and ensure that we did not put an overly onerous burden on people that would provide a block to engagement with the democratic process. That would need to be taken forward carefully, but we have provided the power to allow that to be added. The bill is designed to

provide a flexible framework that can evolve, as the Parliament sees fit.

**Patricia Ferguson:** Another issue that we discussed last week was the idea of a six-monthly return. A variety of views were expressed about that. Most of those who were what we would understand normally to be lobbyists already have systems in place that allow them to record contacts, because that is what they are about and that is very important to them. There were suggestions that there should be registration maybe once a year rather than every six months. Others thought that the register should almost be like a rolling register. Why was six months arrived at?

**Joe FitzPatrick:** We had to find a figure that was balanced, but the reason for a rolling six months rather than a six-month cut-off on a set date—a census day almost—was that, if there was a census day, that would put an unnecessary burden on the Parliament through all that information coming in at one time, whereas if people did it at their own time, that would be spread out over the year. I hope that that could be managed more easily by the Parliament. That was the main reason for that.

**Patricia Ferguson:** It was a practical decision.

**Joe FitzPatrick:** I listened to what was said last week. I can see how that approach might be helpful to organisations, but it might put a burden on the Parliament that would not help too much.

**The Convener:** I want to be clear. It is not the intention that the bill will prevent an early update where the registrant thinks that that is appropriate.

**Joe FitzPatrick:** No, of course not.

**Patricia Ferguson:** That is helpful.

We also discussed the information about lobbying activity. As I understand it, we currently talk about the purpose of the lobbying. It was suggested that perhaps that needs to be a little bit more specific, and perhaps we need to talk about the outcome that the lobbyist hopes to achieve. That is perhaps a subtle difference, but perhaps it is an important subtle difference.

**Joe FitzPatrick:** I think that the bill is written in a way in which that could be added. Does Neil MacLeod want to add anything?

**Neil MacLeod:** You are absolutely right. Because of the way that the bill is currently framed, one of the bits of information that has to be provided is information about the purpose of the lobbying. There are different formulations in other legislation that refer to purpose and outcome. The purpose can be construed fairly broadly. Parliament has the ability to issue guidance about the operation of the regime that

can add colour to the bill's provisions, if I may put it in that way. Certainly, it is currently about the purpose of the lobbying. That is the way that the legislation is framed.

**The Convener:** Just to be clear, section 15 would allow us to prescribe not simply in guidance.

**Joe FitzPatrick:** Indeed.

**Neil MacLeod:** The section 15 power gives Parliament the power by resolution to change bits of the framework, including the bit that prescribes what information has to be provided.

10:45

**The Convener:** Yes—and that goes beyond mere guidance.

**Neil MacLeod:** Indeed.

**The Convener:** I just wanted to be clear technically on that point. Cameron Buchanan has a question on flexibility.

**Cameron Buchanan:** I am concerned about the flexibility of the Lobbying (Scotland) Bill, in respect of powers to alter its provisions. There are provisions to alter some of its provisions, but not enough. What do you think of that?

**Joe FitzPatrick:** We have tried to give maximum powers in the operation of the bill, but the core principles should be decided as the bill goes through Parliament. If there were to be a major change to the core principles, it would be appropriate to alter the primary legislation.

**Cameron Buchanan:** Do you mean using what we used to call a sunset clause?

**Joe FitzPatrick:** No. I am simply saying that it would be appropriate for Parliament to consider more regularly the operation of the bill. A committee similar to this one will probably want to look at how the bill and the registration scheme are working in order to see whether we have it right. Changing the basis of who has to register would be more significant and the Parliament would rightly want to look at that in a future bill.

**Cameron Buchanan:** Who would have the responsibility for lodging such a bill?

**Joe FitzPatrick:** It would be whoever sought the changes, so it could be a committee bill. Are you asking about changes to the powers?

**Cameron Buchanan:** Yes.

**Joe FitzPatrick:** Parliament needs to set out the operational powers in standing orders. We might expect that a committee would look at that similarly to how it looks at other standing orders, such as the members' interests statute. Obviously, it is for Parliament to take a view, which is why I am being a bit coy about saying something

definite. It is for Parliament to decide how to take that forward, but I would have thought that standing orders would be changed to give that role to this committee.

**The Convener:** It might be helpful to say that the clerks have given some early consideration to changes to standing orders, the “Code of Conduct for Members of the Scottish Parliament” and a range of things that the bill provides for. At the moment, the expectation is that it will be for this committee or its successor to bring forward such changes in due course, and for Parliament to approve or reject them, of course.

**Cameron Buchanan:** Yes. Could Parliament be lobbied to make those changes?

**Joe FitzPatrick:** Such lobbying would be recorded.

**Cameron Buchanan:** Yes, of course.

**Joe FitzPatrick:** That could be recorded. One of the great things about this committee is that it would be quite resistant to such actions and members base decisions on evidence. I imagine that its predecessor committees have been the same way, as will the committees that follow.

**Dave Thompson:** The Commissioner for Ethical Standards in Public Life in Scotland has concerns about oversight and enforcement, and outlined a nightmare scenario in which he would have to report back on numerous occasions because of his duty to report any criminal matter to the procurator fiscal. The policy memorandum says that the bill takes a light-touch approach, and that it is educative and so on. If someone reports to the commissioner before the clerks, for instance, have had a chance to deal with something, he has to put it to the procurator fiscal and so on. Can you comment on those concerns?

**Joe FitzPatrick:** First, it is very important that we have that legal basis to the bill. Without it, it would be difficult for clerks to do their job in terms of education and getting people to register properly. The purpose is absolutely to have an educative and light-touch regime.

There is no requirement in the bill for the commissioner to report to the procurator fiscal. That is not the intention. Al Gibson will give more background.

**Al Gibson:** Under members’ interests legislation or, more correctly, the Scottish Parliamentary Standards Commissioner Act 2002, directions could be made. I understand that one was made on how the commissioner should handle certain matters such that if a matter came to his attention, and in his eyes there was reason to refer it to the procurator fiscal, he could do so, and await a decision on whether a prosecution was required. Given that this is meant to be a

light-touch regime, we purposely did not include any such requirement in the bill. However, under section 31, other statutes could be mirrored; we could have a direction-making power so that Parliament could direct the commissioner to act in that way. We thought that that was not appropriate in this statutory framework.

I take the point about members of the public. As with any offence, members of the public can approach the police or whoever and seek prosecutions or put complaints to the commissioner. On direction, we have discussed whether the commissioner would be unduly caught up with matters of lesser significance that did not warrant investigation, but were still about the integrity of the registrable information. We suggest that Parliament could use the power under section 31 to direct the commissioner on how to act in such cases, so that such issues could be referred back for consideration by the clerk.

**Dave Thompson:** Is the intention that the commissioner will be given clear guidance and direction to ensure that trivial matters do not end up before the fiscal and cause delays and so on? The commissioner will very clearly know and understand what he can send back to the clerks.

**Al Gibson:** Yes—there is no requirement for the commissioner to report to the fiscal.

**The Convener:** Equally, it might be a matter of putting the relationship between the commissioner and the Lord Advocate, as the head of the prosecution service, on a formal basis. Of course, that would depend on the Lord Advocate’s view of what is appropriate, in some instances, as well.

**Joe FitzPatrick:** We are creating a criminal offence, so there has to be clarity.

**Neil MacLeod:** Clearly there will be a need to manage the relationship between the Crown Office and Procurator Fiscal Service and the role of the commissioner, but I agree with what the minister and Al Gibson have said. The bill confers functions and gives the commissioner a particular role. There is no requirement for him to escalate things, but there is the facility for Parliament to issue directions to the commissioner in whatever terms it sees fit. One particular type of direction that could be issued would be to allow the commissioner to refer matters to the clerk, in the first instance.

**The Convener:** There is no question of directing the Lord Advocate about what his attitude might be.

**Neil MacLeod:** No.

**The Convener:** That is self-evident.

**Patricia Ferguson:** Earlier this morning we took interesting evidence from the commissioner. One of his points was that among the communications

that are specifically excluded in the schedule is journalism. His feeling is that the definition is very broad and he made the valid point that there are different forms of journalism. There are house magazines, for example, or trade magazines, that might use their publications for lobbying. He asked whether the definition is as helpful as it might be.

**Joe FitzPatrick:** One of the points to note is that the product of journalists tends to be very much in the public domain. Neil MacLeod can talk about the definition.

**Neil MacLeod:** The exception is

“A communication made for the purposes of journalism.”

We have thought about that. Paragraph 18 of the explanatory notes for that particular exception refer to particular case law in which the legal concept of journalism is discussed—the Commissioner of Police of the Metropolis v Times Newspapers Limited—in which there was a discussion of the concept of journalism in law. That is what we are trying to get at in framing the definition.

**The Convener:** It would probably be helpful at some stage in the bill process to make sure that we have appropriate comment on the record that could be referred to by courts at a later date to help to understand our intention. Alternatively, would you consider whether the quite straightforward definition in the schedule might be looked at again? I think that Patricia Ferguson has made a reasonable point.

**Joe FitzPatrick:** We will certainly look at it to make sure that in legal terms the definition that we have is doing exactly what we expect it to do, and not something else.

**Patricia Ferguson:** Thanks.

**The Convener:** Finally, I have received correspondence from the Finance Committee. There appears to be a bit of a discrepancy between what the financial memorandum, the Scottish Parliamentary Corporate Body and the commissioner say about the estimates for costs. I wonder if the minister might care to comment on that.

**Joe FitzPatrick:** The Commissioner is not challenging the costs, though, is he?

**The Convener:** Let me just quote from the letter from Kenny Gibson, convener of the Finance Committee:

“the FM accurately reflects the indicative costs and assumptions provided by the Parliament’ which the SPCB believes to be ‘reasonable and accurate’.

However, the submission draws the Committee’s attention to the Bill’s potential cost implications for the Commissioner for Ethical Standards in Public Life ... On the basis of figures provided by the Commissioner, the FM

estimates that he would incur additional costs of ‘between £0 in the case of no investigations and £70,000 in the case of 10 complex investigations’.

The FM further states that ‘the Commissioner does, however, believe that any additional investigations arising as a result of the Bill can be absorbed within its existing resource.’”

The SPCB says that essentially there will be extra costs for the commissioner.

**Joe FitzPatrick:** The financial memorandum states that the extra cost would be from zero upwards, depending on the number of cases, but it is probably worth putting on the record of that there was on our part a misunderstanding of what the commissioner meant in terms of absorbing that cost. We accept that the commissioner is saying that the costs that the Finance Committee says are accurate are additional costs.

**The Convener:** Can I therefore take it that we will see a restatement of the financial memorandum at some point, preferably before Parliament is—

**Joe FitzPatrick:** The figures in the memorandum are correct, but—

**The Convener:** The figures are correct, but the commentary needs to be adjusted: is that what you are saying?

**Al Gibson:** We can investigate that and we are happy to put on record that there has been a misunderstanding, as the minister said. I think that there was, in respect of the financial memorandum, confusion around the commissioner’s explanation to me and colleagues about whether lobbying complaints in themselves were capable of absorption, or whether it was the fact that the additional functions—on top of what we understood to be enhancements to the commissioner’s remit—would no longer be absorbed at some point in the future. As the minister has said, we are very happy to accept that that was a misrepresentation in the memorandum and we will seek to—

**The Convener:** Can I seek a commitment from the minister, that by the time Parliament gets to considering a financial memorandum—I am not sure one will be required, but it might—we will have a version of it that no member will wish to challenge on this basis?

**Joe FitzPatrick:** We have today accepted the commissioner’s position and are putting that on the record.

**The Convener:** I am taking that just a notch further, and asking you to consider reissuing the financial memorandum.

**Joe FitzPatrick:** We will check what the process is.

**The Convener:** I accept that you have put that on the record now, but I suspect that reissuing it would be helpful.

**Joe FitzPatrick:** We will check what the process is.

**The Convener:** That is fine. I think we have covered the ground that we wanted to cover. Have you concluding remarks, minister? Are there any issues that we have not covered that you wish to draw to our attention?

**Joe FitzPatrick:** No. Thank you very much. We appreciate how the committee has taken this work forward and I think that we are moving forward in the most appropriate way on a bill that is, as I said at the start, largely parliamentary in nature. It is appropriate that we continue to listen to the committee as the bill moves through Parliament.

**The Convener:** Thank you, minister, Mr Gibson and Mr MacLeod for attending and being helpful in your answers. We move into private session.

11:01

*Meeting continued in private until 11:31.*



This is the final edition of the *Official Report* of this meeting. It is part of the Scottish Parliament *Official Report* archive and has been sent for legal deposit.

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