



**SCOTTISH PARLIAMENTARY STANDARDS COMMISSIONER
ANNUAL REPORT
2005 – 2006**

Independent

Complaint

Conduct

MSP

Investigation

SCOTTISH PARLIAMENTARY STANDARDS COMMISSIONER

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21 September 2006

SPSC/2006/1



Introduction

1. This is my third annual report to Parliament. I have now begun my second term of 3 years. In March 2006 Parliament voted in favour of a motion from the Corporate Body to reappoint me. Having enjoyed the challenges of my first term as the first Scottish Parliamentary Standards Commissioner, I was pleased to have been given the opportunity to build on my experience in a second term and to go on contributing, as an independent investigator, to the maintenance of public trust in our politicians. I am conscious of the public responsibility carried by the role – democracy cannot function without public trust and confidence in elected members. Such trust and confidence is hard won and easily lost.

2. Having now completed a 3-year spell allows me to present data amalgamated over that period, which allows a better feel of the numbers and nature of complaints than does a single year's data, given the natural fluctuation in small numbers. This shows that complaints arise at a rate of about 25 a year or two a month. A few are withdrawn during the first stage and of those left around a quarter go on to full investigation (around five a year). My report gives information on the content of complaints and a number of issues arising,

including breach of privacy and the boundary between the Ministerial Code and the Code of Conduct for Members.

3. In the past year the number of complaints received (14) was around half the number received in each of the previous 2 years. Only one of these 14 involved an issue to do with financial interests and it was found inadmissible. Overall, the complaints data provides a reassuring view of standards of conduct of Parliamentary duties in Scotland.

4. It is now over 7 years since devolution and, as expected, developments are taking place in structures and procedures that were set up in the early stages. Parliament has now completed its own legislation on Members' interests and the Standards and Public Appointments Committee has now begun a review of the Code of Conduct for Members. The Finance Committee is making inquiry into the governance and accountability relating to Parliamentary commissioners and ombudsmen in Scotland. In my report I document my involvement in these processes.

5. I note that failing the test of relevance is a factor in over half of the complaints which are found inadmissible and do not go on to full investigation. This suggests that there is more work to do in making the public aware of my role and the complaints process. I will be reviewing how best to do this. I have said in this report as one of my future priorities that I am happy to accept invitations from groups and organisations to speak on these issues. I would remind people also of my website at www.spssc.co.uk.

6. I am grateful to all those who have assisted me to carry out my role in my first term. I look forward to the challenges of my second term which I trust will be overcome with their continuing help.

Dr J A T Dyer
15 August 2006

7. The legislation setting up my post and remit, the Scottish Parliamentary Standards Commissioner Act 2002 (“the Act”), requires in section 18 that I make an annual report to

Parliament “upon the performance of the functions of the Commissioner”. This is my report for April 2005 to March 2006.

Table 1

SUMMARY OF COMPLAINTS ADDRESSED			
1 April 2005 to 31 March 2006 (with previous 2 years for comparison)			
	2003/04	2004/05	2005/06
NO. OF COMPLAINTS RECEIVED	29	31	14
Withdrawn at Stage 1	2	4	–
ADMISSIBILITY CONSIDERED	27	27	14
Admissible	6 (22% of 27)	9 (33% of 27)	– (0% of 11 decided)
Still in Stage 1 at 31/3/06	–	–	3
Inadmissible	21 (78% of 27)	18 (67% of 27)	11 (100% of 11 decided)
ADMISSIBLE COMPLAINTS	6	9	–
Withdrawn Stage 2	1	1	–
Still in Stage 2 at 31/3/06	–	–	–
Completed Stage 2	5	8	–
INADMISSIBLE COMPLAINTS (GROUNDS)	21	18	11
Relevance: Section 6(4)	9	6	5
Procedural: Section 6(5)	1 (by direction of Standards Committee)	–	–
Substance: Section 6 (6)	11	4	3
Both 6(4) and 6(6)	–	8	3
SUBJECTS OF COMPLAINTS	22	24	13
Committee leak	1	1	–
MSPs complained about	21	23	13
MSPs with 1 complaint	13	20	12
MSPs with 2 complaints	6	1	1
MSPs with 3 complaints	–	1	–
MSPs with 4 complaints	2	–	–
MSPs with 6 complaints	–	1	–
NO. OF COMPLAINERS	27	24	14
Complained once	26	21	14
Complained 2 times (different MSPs)	–	1	–
Complained 3 times (different MSPs)	1	–	–
Complained 4 times (different MSPs)	–	1	–
Complained 5 times (different MSPs)	–	1	–
Complainers who are MSPs	4 (15% of 27)	–	–

Complaints

8. The summary in Table 1 shows data on complaints addressed between 1 April 2005 and 31 March 2006, with the previous 2 years for comparison. Fourteen complaints were received in the course of the year, about half the number received in the previous 2 years. This reduction was particularly welcome in the first part of the year when I was continuing to deal with a number of Stage 2 investigations in relation to some of the complaints received in the last quarter of 2004/05.

9. When I reported last year, eight complaints from 2004/05 were still having their admissibility assessed at Stage 1 and six had yet to complete Stage 2. Two of those at Stage 1 went on to Stage 2 so that, in all, eight complaints from 2004/05 went on to complete Stage 2. The figures in Table 1 are updated to reflect this. Four of the complaints related to the same Member and the same issues, so the eight complaints can be reduced to five cases. Of these, I concluded that there had been a breach or breaches of the Code of Conduct for Members, or the Members' Interests Order (MIO)¹ in two cases and no breach or breaches in three cases. Standards and Public Appointments Committee agreed in each case.²

10. Some of these complaints were high profile ones which attracted significant publicity. They included four complaints against a prominent Member alleging failure to register a gift and an overseas trip in relation to a shared foreign holiday.³ No breach of the relevant provisions was found in that case, nor in the case of a complaint against another prominent Member⁴ alleging paid advocacy in relation to his support of a motion relevant to the affairs of a client of the legal firm for which he worked.

11. The two cases in which a breach was found were briefly as follows. In one case⁵ a Member failed to register a gift within the required time period. The gift (value £330) was provided by a fast food firm in the form of hospitality, overnight accommodation and a match ticket in relation to a football event in Wales. In that case I suspended my investigation as I am required to do to report matters to the Procurator Fiscal (taking part in

Parliamentary activities without complying with certain provisions of the MIO is a criminal offence). The Procurator Fiscal on the advice of the Crown Office did not consider it in the public interest to prosecute in this case, taking into account the scale of the potential breach.

12. In the second case⁶ I found that a Member had not provided conscientious representation to a constituent who complained that, over a considerable period of time, he failed to get a satisfactory response to his concerns about a firm providing a service for pensioners under a Scottish Executive Scheme. Although some of the problems had arisen through unsatisfactory office procedures and errors, the Member's contribution to the problems and her overall responsibility as a Member led me to conclude that a breach of section 2.4 of the Code had occurred. A further element of the complaint was not upheld.

Admissibility

13. I assess the admissibility of complaints with reference to three tests set out in the Act, in sections 6(4) to 6(6). Of the 14 complaints received in 2005/06, three were still in Stage 1 at 31 March 2006. Of the 11 in which admissibility had been decided at that date, none were admissible. (Subsequently one of the other three was found admissible and two not – data in Table 3 take account of this). Five of the 11 were inadmissible on grounds of relevance, three on grounds of substance and three on both grounds.

Timescale for Stage 1

14. I am required to report to the Standards and Public Appointments Committee, and to the Member and complainer, if Stage 1 takes longer than the indicative period of two months. Decisions on all 11 cases were reached within the two-month period, the length of time ranging from 1 to 54 days.

Timescale for Stage 2

15. I am required to report to the Standards and Public Appointments Committee, and to the Member and complainer, if Stage 2 takes longer

¹ The Scotland Act 1998 (Transitory and Transitional Provisions) (Members' Interests) Order 1999 (SI 1999/1350)

² My reports on all cases which progressed to Stage 2 are published by the Standards and Public Appointments Committee as annexes to its reports, which are available to view on the Parliament website, on the Standards and Public Appointments Committee page.

³ See Standards and Public Appointments Committee 3rd Report 2005 (Session 2)

⁴ See Standards and Public Appointments Committee 8th Report 2005 (Session 2)

⁵ See Standards and Public Appointments Committee 4th Report 2005 (Session 2)

⁶ See Standards and Public Appointments Committee 7th Report 2005 (Session 2)

than the indicative period of six months. Eight complaints, received in 2004/05 completed Stage 2 in 2005/06. All were completed within six months (ranging from one-and-a-half to five months).

Subjects of the Complaints

16. The 14 complaints in 2005/06 related to 13 Members. One Member received different complaints from two separate complainers.

Complainers

17. The 14 complaints came from 14 separate complainers, none of whom was an MSP.

Content of Complaints⁷

18. Of the 14 complaints received in 2005/06, nine contained an element which might be described as relating to level and quality of service. In four cases this was the only element of the complaint while in five it was combined with another element. Such complaints are relevant to Section 2.4 of the Code of Conduct for Members which places a duty on members *“...to be accessible to the people of the areas for which they have been elected to serve and to represent their interests conscientiously.”* They are about alleged failures of Members to respond to correspondence or requests for meetings, or to respond timeously to these, or about alleged refusals of Members to provide representation in relation to particular issues, or to go on providing representation. All such complaints were found to be inadmissible in the past year. For further discussion of this issue see p.8.

19. Alleged breach of privacy continues to be a significant element in a minority of complaints, with three such cases in the past year. For further discussion of this issue see p.6.

20. Further elements of complaints included allegations of failure to act honestly (2), acting in an intimidating or threatening manner (2), failure to uphold the law (1), conduct at a meeting of a committee (1) and failure to register an alleged gift(1). Only one of the 14 complaints therefore (the last mentioned) potentially invoked the Members’ Interests Order.

Summary data over 3 years

21. With relatively small numbers, it is to be expected that there will be significant fluctuations

in the number of complaints received from year to year. It is now possible to give 3 years’ amalgamated data, which should provide a more meaningful picture, and this is provided in Table 2.

Table 2

SUMMARY DATA AMALGAMATED OVER 3 YEARS (1 April 2003 to 31 March 2006)	
NO. OF COMPLAINTS RECEIVED	74
Withdrawn at Stage 1	6
ADMISSIBILITY CONSIDERED	68
ADMISSIBLE	16 (24%)
INADMISSIBLE	52 (76%)
INADMISSIBLE COMPLAINTS (GROUNDS)	52
Relevance: Section 6(4)	20 (38%)
Procedural: Section 6(5)	1 (2%)
Substance: Section 6(6)	20 (38%)
Both 6(4) and 6(6)	11 (21%)

22. The rate of receipt of complaints is around 25 a year or two a month. A few are withdrawn during Stage 1. Around a quarter of complaints completing Stage 1 are considered admissible and go on to full investigation (around five a year). Of those considered inadmissible, in 38% the reason is lack of relevance, in another 38% lack of substance, and in 21% lack of both relevance and substance. **The finding that lack of relevance is a factor in the inadmissibility of over half of complaints which stop at the first stage suggests that there is an important continuing task for the Commissioner in making information available to potential complainers about his role and remit.**

23. Overall, 13 complaints have completed Stage 2 over 3 years. These can be reduced to seven cases, as in two instances there were four complainers making essentially the same complaints about the same Member(s). It may be of interest to show the outcome of these, including the degree of concordance between the Commissioner and Standards and Public Appointments Committee regarding a finding of a breach or not. This is provided in Table 3.

⁷ The numbers of topics here do not necessarily match the number of complaints, as complaints might have more than one topic.

Table 3

Findings of Breaches of Code or MIO by Standards Commissioner and by Standards and Public Appointments Committee				
		Standards and Public Appointments Committee		
		Breach(es)	No breach	Total
Standards Commissioner	Breach(es)	2	1	3
	No breach	0	4	4
	Total	2	5	7

24. In six cases out of seven, the conclusions of the Commissioner and the Committee agreed. In one case, I concluded that breaches had occurred and the Committee in its final judgment disagreed.⁸

Issues arising from cases addressed

Breach of privacy

25. In each year so far, a number of complaints have invoked section 2.5 of the Code of Conduct for members. This provides that: *“In representing people’s interests, members have a duty to respect individual privacy, unless there are overwhelming reasons in the wider public interest for disclosure to be made to a relevant authority, for example where a member is made aware of criminal activity.”*

26. Day-to-day constituency activity can give rise to such complaints. A constituent writes to or speaks to a Member about an issue of concern then later finds that the Member has written to a Minister about it or to a third party organisation, perhaps copying the constituent’s letter, where there is one. Disputes may arise as to whether the Member had the constituent’s consent to do this, and a complaint of breach of privacy may arise. When can the constituent’s consent to such action be implied from his or her approach to the Member? When might explicit consent be required?

27. It is not my role to give advice to Members (I am prevented from doing so by Section 3(6) of the Scottish Parliamentary Standards Commissioner Act 2002). I feel it would be helpful however to

point out that relevant sources of guidance exist that would be of benefit to Members. First of all, of course, the Code of Conduct makes it clear that Members may approach the Clerks to the Standards and Public Appointments Committee for advice on relevant matters. In relation to privacy issues, there are some other helpful sources.

28. In the UK, the protection of privacy in relation to data identifying living individuals is dealt with in the Data Protection Act 1998 (DPA), following a European Directive in 1995. The UK Information Commissioner issues guidance to assist in the interpretation of the requirements of the DPA.

29. The DPA deals with personal data, and distinguishes a further class of “sensitive personal data”. Personal data are data that relate to a living individual who can be identified either from the data itself or together with other information in an organisation’s possession. Sensitive personal data includes information about an individual’s racial or ethnic origin, political opinions, religious or similar beliefs, membership of a trade union, physical or mental health, sexual life or details about the commission (or alleged commission) of any offence and any related proceedings. At least one of a number of conditions has to be met for the lawful use, storage or transmission of personal data and sensitive personal data. For personal data the first condition is that the subject of the data has given his or her consent. For sensitive personal data, the first condition is that the subject of the data has given *explicit* consent.

⁸ See Standards Committee 5th Report 2004 and my Annual Report 2004-2005, p4

30. The UK Parliament passed subsidiary legislation in 2002⁹ specifically dealing with cases where elected members were undertaking action on behalf of a constituent or had written to other organisations seeking information in relation to a constituent who had raised an issue with them. This followed the expression of concern by members that the requirements of the DPA were unduly hampering them from carrying out constituency casework. The order permits the disclosure of sensitive personal data in certain circumstances associated with the member's work as a representative without the need for explicit consent.

31. The Information Commissioner issued guidance in 2004¹⁰ in relation to this Order, and this guidance also contains a section on non-sensitive personal data and the acceptability of implied consent.

32. While the above material in relation to the DPA applies to all elected representatives in the UK, the Scottish Parliament has also issued specific guidance to Members on the DPA. This is available on the Parliament intranet. It includes guidance on data use consent forms and the use of statements on Members' websites on how constituents' data might be used.

Members' Interests Order and its replacement

33. During 2005/06, Parliament worked on its own legislative replacement for the Members' Interests Order, which was a transitional provision made for the early days of the Scottish Parliament by Westminster through secondary legislation under the Scotland Act 1998. Dealing with Stage 2 of some complaints relevant to the MIO in the early part of 2005/06, particularly the complaints alleging failure to register a gift and an overseas trip in relation to a shared foreign holiday, caused me to appreciate that interpretation of some provisions of the MIO could be difficult.

34. I was therefore happy to respond to a request from the Convenor of the Standards and Public Appointments Committee to give written and oral evidence to the Committee in relation to the

Interests of Members of the Scottish Parliament Bill. I put forward suggestions in relation to paid advocacy, gifts and overseas visits which I hoped would aid interpretation in future.¹¹ My suggestions were also made available to the *ad hoc* committee set up to deal with the committee stage of the Bill. The Bill was passed by Parliament on 8th June 2006 and will come into effect following the next election in 2007.

Ministerial Code and Code of Conduct for Members

35. In my report on my investigation into the complaints alleging failure to register a gift and an overseas visit in relation to a shared foreign holiday,¹² I noted that a Member of the Scottish Parliament who is also a Minister is potentially subject to two Codes of Conduct. The Ministerial Code was drawn up by the Scottish Executive in February 2002 and provides guidance on Ministerial conduct. The Code of Conduct for Members of the Scottish Parliament was agreed by the Scottish Parliament on a motion of the Standards Committee in February 2000 (subject to some later revisions) and guides Members in the performance of their Parliamentary duties.

36. I have no remit in relation to the Ministerial Code. Complaints under the Ministerial Code are referred to the Office of the First Minister and Ministers may have to account for their actions to Parliament. It might be said in passing, noting that the issue has recently been a live one at Westminster, that it is not entirely clear how decisions are made in Scotland about investigating complaints regarding the actions of Ministers in their Ministerial capacity.

37. In my report I said, and I think it worth repeating, that: *"The boundaries and overlaps between the two codes are not in all respects as clear as they might be and I recommend that Parliament (when Standards Committee reviews the Code of Conduct), and the Scottish Executive, liaise to produce increased clarification."*

⁹ The Data Protection (Processing of Sensitive Personal Data) (Elected Representatives) Order 2002. S.I. No 2905

¹⁰ Disclosures to Members of Parliament carrying out Constituency Casework. Information Commissioner, 20 April 2004

¹¹ See *Official Report* for the 1st meeting of the Committee, 2006 and papers for that meeting [17 January 2006]

¹² See Standards and Public Appointments Committee 3rd Report 2005 (Session 2)

Level and quality of service complaints

Definition of "Parliamentary duties"

38. I will not repeat at length what I have said in my last two reports on these two subjects relevant to the Code of Conduct for Members. Over three years now the most common type of complaint has been about the level and quality of service provided by Members. I said last year: "Arguably the system in which I play a part was set up primarily to prevent and detect corruption and to encourage openness in making known interests, currently mainly financial ones, which might influence political actions, rather than to police the quality and quantity of Members' services to constituents. Furthermore, it is hard for me to judge what is reasonable accessibility and what is conscientious representation of interests. It may be contended that the quality of Members' service is a matter for the democratic electoral process. That is the position taken at Westminster, where the remit of the Parliamentary Commissioner for Standards specifically excludes complaints about a Member's decisions on how to handle a constituent's case."

39. I have also commented before on the need for a purpose-specific definition of Parliamentary duties since this concept defines the boundary of the applicability of the rules in the Code of Conduct.

40. The Standards and Public Appointments Committee has now embarked on a review of the Code of Conduct, and I believe it will give attention to these two issues, amongst many others, in the course of its review.

Workload

41. In the first 5 months of 2005/06 I was continuing to deal with the implications of the exceptional peak of complaints received in the last quarter of 2004/05 (25 of the 31 complaints received that year were in the last 3 months). I was employed at 60% of full time from April to July 2005 in order to assist with this.

42. Thereafter the workload settled down more to what had originally been envisaged (5 to 10 days per month). Over the year as a whole I worked

46% of full time, or 2.3 days per week or 10 days per month – less than the figure of 60% of full time for my first 2 years.

43. From my experience of 3 years to date, I would say that the work requires on average 2.5 days per week or 11 days per month. I am engaged by Parliament at 50% of the full-time rate. I have agreed with the Scottish Parliament Corporate Body (SPCB) that, at times of higher demand, it will be necessary to prioritise complaint investigations.

Reappointment of Standards Commissioner

44. My first term of office was for 3 years and it ended on 31 March 2006. On 16 March 2006, Parliament voted in favour of a motion to reappoint me for a second term. In February I had been interviewed by the Presiding Officer and members of the SPCB in order to determine suitability for reappointment, with the process being overseen by an independent assessor. This process generally followed that recommended by the Procedures Committee for Crown appointees in its report on Procedures relating to Crown Appointments published in March 2006 and later accepted by Parliament.

45. I enjoyed the challenges of my first term as the first Scottish Parliamentary Standards Commissioner. I was pleased to be given the opportunity to build on my experience in a second term and to go on contributing, as an independent investigator, to the maintenance of public trust in our politicians.

46. The experience of reappointment however made me reflect on the process and it reinforced my previously held view that the Standards Commissioner post in future, and possibly others in which the post holder may criticise actions of those who may subsequently vote for or against reappointment, should not be subject to a reappointment procedure. It would be preferable for future appointees to have one, longer, non-renewable term. This was the conclusion a few years ago of the Committee on Standards in Public Life¹³ in relation to the equivalent post at Westminster. They recommended that in future the Parliamentary Commissioner for Standards

¹³ Committee on Standards in Public Life. Eighth Report (Cm 5663, November 2002). *Standards of Conduct in the House of Commons*

should have a single term of 5 to 7 years. That post now has a single term of 5 years.

47. The main justification for this suggestion was that a short term followed by reappointment was an undesirable potential pressure on the independence, and perceived independence, of the post holder. He or she might feel a pressure to avoid antagonising those who might be involved in the reappointment process in the first term (though I would expect any such pressure to be stoutly resisted). Independence of operation should as far as possible be built into the institutional architecture of the post, rather than rely on the robustness and independence of the post holder. As well as being independent, the post holder must be seen to be independent. This could be achieved here by removing the question of reappointment. No longer having any possibility of being seen to have a personal axe to grind, being in my second and final term, I have made this suggestion to the Presiding Officer and to the Finance Committee inquiry into accountability and governance relating to Parliamentary commissioners and ombudsmen (see below).

Finance Committee inquiry into governance and accountability relating to Parliamentary commissioners and ombudsmen in Scotland.

48. During 2005/06, the Finance Committee of the Parliament announced its inquiry into the governance and accountability of a number of special posts related to Parliament, including mine, which had been set up following devolution.¹⁴ The post holders all have terms and conditions set by the SPCB (where they are not laid out in statute) and are funded through the Parliament budget. Appointment and removal from office also involves Parliament. In the latter part of 2005/06 I prepared written evidence for the Finance Committee which I submitted on 7 April 2006. This is reproduced below as Annexe 1. I subsequently gave oral evidence to the Committee but this and subsequent issues to do with the inquiry will be reported in next year's annual report. [On a related theme, I also gave

evidence in 2005/06 to Audit Scotland who were providing a report to the SPCB on Ombudsman/Commissioners Shared Services.]

49. The full appropriate governance framework was not all in place when these posts were set up one by one. There is an opportunity now to create a common approach to the posts where possible, and to do so in a new and exemplary way, while recognising that the posts perform very different functions. The inquiry was therefore welcome.

50. At the same time, I had some potential concerns about it. The Finance Committee appeared to have prioritised this work because of a view that the independence of operation of the post holders (built in to the legislation setting up the posts), together with the current arrangements for scrutiny of budgets, might carry a potential danger of uncontrolled spending.

51. In my evidence, I was concerned that the whole concept of governance should be explored, and not only the narrower, but legitimate and important, issue of accountability for spending public money. Governance includes the idea of how the link with Parliament can add value to the work of the postholders and also how Parliament can benefit from their work, how Parliament interacts with the postholders, e.g. through discussing annual and other reports, and how Parliament can protect the operational independence of the posts, which is necessary if they are to be credible and valuable. This brings in to question how issues such as appointment, removal and reappointment, which could be seen to impinge on independence, are decided. While Parliament pays the piper in these particular cases, it must be careful about calling the tune in relation to the day-to-day *operation* of the postholders, in complaints handling, for example, as opposed to in relation to overall *financial and efficiency issues*. This is particularly obvious in relation to my post since my entire role is to investigate the conduct of Members of the Parliament.

¹⁴As well as the Scottish Parliamentary Standards Commissioner, the posts include 4 Crown appointees: the Scottish Public Services Ombudsman, the Scottish Information Commissioner, the Commissioner for Public Appointments in Scotland and Scotland's Commissioner for Children and Young People

52. I trust that the Committee and Parliament will find a way to put a comprehensive governance framework in place which will not compromise operational independence and which will optimise the interaction between Parliament and the office holders to the benefit of all.

Unacceptable actions by complainers

53. I wrote on this topic in my two previous annual reports. I noted that, while it was important that the complaints process was thorough, fair and accessible, it was also important that it was available to be used for its proper purpose and that its resources were not unduly consumed and it was not brought into public disrepute through unacceptable actions of a very small minority of complainers.

54. I made relevant policy proposals to the Standards and Public Appointments Committee and in March 2005 I gave oral evidence to it.¹⁵ In May 2005 the Committee agreed a policy which I then put into operation. It is available to view on my website and is reproduced in this report as Annex 2. The policy deals largely with abusive and aggressive language and behaviour and with unreasonable demands and persistence on the part of complainers. While the use of the policy is rare, I believe it is right that it should be open for all to see.

Legal services

55. In September 2005 it was necessary to carry out a re-tendering exercise for the provision of legal services to the Commissioner. These services had been provided by Anderson Strathern for the previous two years. Invitations were sent out to six firms with offices in Scotland considered large enough to provide the range of services required. Three firms submitted tenders and were interviewed.

56. Anderson Strathern again emerged successfully from the process and have been reappointed for a further year from October 2005 with the option of a further two years extension. I find the provision of independent, authoritative and sometimes urgent legal advice to be a vital requirement for my role and I am pleased to be able to go on benefiting from the knowledge and experience the firm had built up in the first two years.

Involvement with other organisations

British and Irish Ombudsman Association (BIOA)

57. I continue as an Associate Member of BIOA, an organisation of Ombudsmen, similar post holders and those interested in their work, which seeks to develop and safeguard the role of the Ombudsman and publishes criteria which define the role. I have found it very useful as a source of information and contacts. I am a Member of the BIOA legal interest sub-group, which met twice in the last year. I attended the BIOA biennial conference in Coventry in April 2005, where I chaired a workshop on dealing with difficult actions by complainers.

Other Parliamentary Standards Personnel

58. I continue the helpful practice of comparing notes with other Commissioners/investigators in the UK and Ireland. I contributed to a 2-day standards seminar held at Holyrood in November 2005. I have also been pleased to meet a number of visitors to Holyrood from other Parliaments abroad who wish to know about our standards system, e.g. a group from the Parliament of New South Wales.

Talks etc.

59. I have addressed a number of meetings on the subject of my role, e.g. the Standards Commission for Scotland second Annual Conference for Monitoring Officers and Key Stakeholders.

60. This is an area of work that could be expanded to meet the aims of my Information Strategy. I will be pleased to talk to community groups and organisations about my remit as Standards Commissioner and how the complaints process works.

Finances

61. The post was set up with an annual budget of £100,000. The Accountable Officer is the Clerk of the Scottish Parliament. Expenditure from 1 April 2005 to 31 March 2006 is shown below, with data from the previous 2 years for comparison.

¹⁵ Standards and Public Appointments Committee, Official Report, 22 March 2005, columns 409 – 428

62. The main cost is the Commissioner’s salary (£38,533 p.a. plus employment overheads). For 2 months of 2004/05 I was paid at the full-time rate rather the usual half-time rate, and for the first 4 months of 2005/06 at 60% of the full-time rate (see section on workload). The post is home based, so there are no accommodation costs and to date I employ no staff. The employment costs for 2003/04 include sums paid to the Acting Standards Commissioner, Bill Spence, who carried on to completion a Stage 2 investigation after I took up office in April 2003.

63. The legal costs figure for 2003/04 relate to the 7-month period between September 2003 and March 2004. The costs for 2004/05 relate to a full 12-month period. During late 2004/05 there was an increase in workload and a number of important issues of interpretation of provisions were addressed. This is reflected in the increased legal costs. The 2004/05 figures additionally include costs of approximately £4,000 for services performed in 2003/04.

Table 4

Expenditure (£) (Unaudited figures for 2005/06)	2003/04	2004/05	2005/06
Salary costs (including National Insurance and pension contribution)	51,589	55,457	55,363
Legal costs	10,595	26,667	6,794
Other running costs	3,712	6,668	3,485
TOTAL	65,896	88,792	65,642

64. At present the budget is clearly sufficient to meet the needs of the post. This could change if the workload developed to the point where there was a need for staff and office accommodation. The budget for 2006/07 has been set at £90,000. The reduction reflects a change in allowing for contingencies, such as the cost of judicial review. Instead of a contingency sum being carried in my budget, there is now provision by the SPCB of a centrally held contingency fund from which Commissioners might draw.

Future Priorities 2006/07

65. I will continue in my information strategy to give accurate information to the public about my role. Following the results of a risk management exercise, I will review how this might better be done. I will make myself available to the Standards and Public Appointments Committee as required to offer any assistance required in their review of the Code of Conduct for Members, e.g. offering advice on sections of the Code which currently cause difficulty in interpretation. I am currently discussing the terms of a Memorandum of Agreement with the Crown Office and Procurator Fiscal service regarding the steps I should take in the event that a potential issue of criminality arises during one of my investigations and the steps the Crown Office and Procurator Fiscal service will take in the event that they commence an investigation where the accused is a Member. I will consult Standards and Public Appointments Committee about this and hope to have it in place during 2006/07.

66. I will contribute as appropriate to the Finance Committee Inquiry into accountability and governance relating to Parliamentary commissioners and ombudsmen in Scotland, and to the forthcoming Independent Review of regulation, audit, inspection and complaints handling of public services in Scotland, chaired by Professor Lorne Crerar. Exchange of information with other standards bodies and personnel in the UK, Ireland and elsewhere will be maintained.

Annex 1

SCOTTISH PARLIAMENTARY STANDARDS COMMISSIONER

Submission to Finance Committee re its Inquiry into Accountability and Governance

INTRODUCTION

1. I am pleased to submit written evidence to the Finance Committee's Inquiry into governance and accountability relating to parliamentary commissioners and ombudsmen in Scotland. As well as allowing me to comment on important issues of accountability and governance, both in relation to my own post and to these posts in general, it gives me a welcome opportunity to make clear just how low cost and good value for money is the service provided via my post. I would be happy to give oral evidence to the Committee if called upon.

BACKGROUND

2. I was appointed as the first Scottish Parliamentary Standards Commissioner by the Scottish Parliament Corporate Body (SPCB), with the agreement of Parliament, from April 2003. Parliament has recently voted to support an SPCB recommendation that I be reappointed for a second term from April 2006.

3. My role and remit are set out in the Scottish Parliamentary Standards Commissioner Act 2002 (the Act). I am essentially an independent investigator of complaints that a member has breached the Code of Conduct for members or the Members' Interests Order (MIO) (or whatever provision Parliament creates to replace that transitional order). The procedure for investigation is laid down in the Act and amplified by directions from the Standards and Public Appointments Committee. However the committee cannot direct me how to act in relation to a specific complaint (see section 4 of the Act). I have operational independence, and independent statutory powers to compel the attendance of witnesses and the production of evidence (sections 13 to 15 of the Act). Following investigation I report to the Standards and Public Appointments Committee of the Parliament.

4. The Act requires me to produce an annual report (see section 18) which is laid before Parliament.

5. The schedule to the Act provides that my terms and conditions of service are set by the Parliamentary corporation. It further provides that I may, with the permission of the Parliamentary corporation, employ staff and any person to provide services.

6. The Act allows for dismissal of the commissioner by the Parliamentary corporation so long as Parliament has voted in favour of this and the resolution is passed with the number of votes cast in favour being not less than two thirds of the total number of votes cast. The SPCB subsequently added to my terms and conditions of service grounds for dismissal by SPCB. These are that I have breached any terms and conditions of my appointment or that Parliament has lost confidence in my willingness, ability or suitability to carry out the functions of the office.

7. My post is part time and home based. I employ no staff. I perform my own typing, filing, etc. I receive modest administrative help from the Corporate Policy Unit of the Parliament. I am supplied with a laptop and printer, fax, etc., an ISDN connection and a mobile phone. Office space, electricity for equipment and lighting, and the cost of heating are supplied by me without reimbursement from the Parliament.

8. In the Financial Memorandum accompanying the Bill, the expected budget was set at £100,000 and it remained at that level subsequently. I have comfortably operated within that level. The budget for 2006/07 is set at £90,000 (a grand total of 1.5% of the projected SPCB £6 million revenue budget for ombudsmen/commissioners, a detail little noted in publicity about costs of these posts). The £90,000 figure does not represent a reduction: it derives from a more efficient way of dealing with contingencies by the creation of a central contingency fund for unexpected calls on budget, e.g. defending court challenges.

9. The bulk of my budget is made up of salary and related costs, with the next biggest item being the cost of independent legal advice. I have found it essential in terms of my independence and effectiveness to have legal advice from a commercial firm. A firm was selected by competitive tender in 2003 and the same firm won a further tendering exercise in 2005.

10. I am accountable to Parliament, specifically to the SPCB, by way of fulfilling the terms and conditions of my appointment and maintaining my suitability, willingness and ability to carry out my functions. I lay annual reports before Parliament though there is no formal method for Parliament to consider or debate these. I have discussed the contents on occasion with the Standards and Public Appointments Committee.

11. I also feel a considerable sense of responsibility, if not accountability, to the public, as I am under a duty to pursue their complaints fairly, objectively and robustly, without fear or favour. The *raison d'être* of my post was to provide an independent element to complaint handling that would give the public confidence that complaints against members were investigated impartially¹. In this context, it could be argued that my accountability to Parliament is excessive – in one sense I am not fully independent from the people I investigate since decisions on my reappointment and dismissal are ultimately made by members. This means that for the necessary goal of operational independence to be achieved, reliance must be placed on the robustness and integrity of the post holder rather than protection deriving from institutional arrangements alone. For my post, and perhaps for some others, having a single longer term of office of 5-7 years for future appointees, as recommended for the UK Parliamentary Commissioner for Standards post by the Committee on Standards in Public Life,² would reduce this problem.

FINANCE COMMITTEE INQUIRY – GENERAL COMMENTS

12. I welcome the interest taken by Parliament in the issues of accountability and governance of commissioners and ombudsmen. In addition to the Auditor General for Scotland, whose post was provided for in the Scotland Act 1998, five ombudsman/commissioner posts have been created since devolution whose appointment and removal from office involve Parliament and whose terms and conditions (beyond those set out in statute) are set by the SPCB.

13. A primary reason for the strong link with Parliament is to ensure that the posts, which might involve scrutiny of actions and provisions for which Ministers are responsible, are independent of the Executive. Where there are regulatory functions, it is necessary to ensure that the potential danger of interference by the Executive is not replaced by undue interference by Parliament (especially in the case of the Standards Commissioner, whose only role it is to investigate the actions of Members of the Parliament). There needs to be a proper balance between accountability to Parliament and institutional independence from Parliament.

14. Although the Scottish Parliamentary approach to such posts has been referred to by the Scottish Executive as “an acceptable and workable model”³, the posts “developed in a substantially unplanned way”⁴ with significant differences between posts in relation to issues which are important in terms of how independent the officers are, and might be seen to be, of those who are the subject of scrutiny by them. Such issues include method of recruitment, method of removal from office, grounds for removal, term of appointment, possibility of reappointment, grounds for a decision about reappointment and the setting and reviewing of pay and budgets. Some of these issues, including pay review and procedures for reappointments have been or are now being addressed.

15. There remains however a need, given the number of posts created and the possibility of future ones, to review and consider a common approach to these posts including such matters as independence accountability and financial control. In my view such a review should be conducted by Parliament and not, as recommended by the Justice 1 Committee⁵, by the Executive. A review should address the issue of how to define the boundary of posts suitable for this particular link with Parliament. Without this, the addition of more posts could prove unwieldy and burdensome and could dilute the concept of what Gay and Winetrobe⁴ refer to as “Parliamentary officers*”. Gay and Winetrobe extensively discuss issues relevant to the committee’s inquiry and I commend their paper to members.

16. In this context, it could be seen as unfortunate that the main impetus and focus of the current exercise is a financial one. This is not to decry the importance of the issue of accountability in responsible use of public money. It is to suggest that excessive pressure from a financial direction could lead to inappropriate restriction of the independence of the posts and insufficient attention being given to how best to promote and add value to the posts so as to improve the governance of Scotland. Gay and Winetrobe⁴ in their 2003 paper considered it too early for the current posts to be evaluated but offered the view that “The real test of their success will be whether the link with Parliament offers any real added value to their work.”

17. The committee needs to be mindful that members’ pronouncements tend to lead to negative press reporting (“soaring cost of tsars” and suchlike) with no counterbalancing statement from Parliament about why it created and/or voted for the posts in the first place and gave them their particular remits. Such coverage tends to give the idea that these posts were somehow foisted on the Parliament rather than voted into existence by it and commissioners are seen to be criticised for carrying out the very remits given to them by

members. In my view, Parliament and the SPCB should be more willing to explain the value of these posts and to support their intentions. It would help to explain more clearly that the posts are related to Parliament and its budget rather than to the larger budget of the Executive in order to avoid any interference by the Executive in their independence of operation (which might involve scrutiny of Executive action). (In my own case it is also because the role relates directly to Parliament.) Such posts are a recognised feature of mature democracies.

18. I wonder if it would help to see the posts conceptually as associated with the Parliamentary budget, or ancillary to it, rather than as part of it, even if technically they are part of it and under its overall financial control. In other words, Parliament is “hosting” or “sponsoring”, as a national service, these posts which are not a direct part of it. It might then be seen as misleading to refer to the cost of commissioners, etc. as 10% of the *Parliament’s budget*.

SPECIFIC QUESTIONS

How can budgetary control be balanced with independence?

19. It would clearly be wrong for any commissioner or ombudsman to be able to claim any size of budget irrespective of other claims on public spending and of the relevance to their remit. While one might expect that the recruitment of individuals to these posts would result in post holders who could be trusted to observe this, I accept the need for some sort of scrutiny and approval mechanism to ensure and demonstrate responsible use of public funds within the broad remit of the role.

20. At the same time, Parliament needs to delegate to some body the function of taking an interest in the work of commissioners/ombudsmen, explaining their role and needs to Parliament and protecting their independence against undue financial constraints.

* The term “Parliamentary officers” has not found favour in Scotland. An alternative though more unwieldy term is “Parliament-related public office holders”

21. It would be efficient for most of these roles to be held by the same body or committee, with the addition of specific reporting where necessary to a relevant subject committee. As an example, the Scottish Commission for Public Audit (composed of MSPs) examines the proposed budget of Audit Scotland and takes an interest in its work programme; and the UK Electoral Commission budget is overseen by the Speaker's Committee in the House of Commons.

22. Gay and Winetrobe,⁴ and Gay⁶ in another paper, point to the example of the New Zealand "Officers of Parliament" Committee, a specific committee designed to oversee constitutional officers on behalf of members. They recommend such a solution for the Scottish Parliament⁴. The committee could:

- agree the appropriate budget for each office holder and arrange for auditing of expenditure (except in my case where I come under SPCB auditing);
- ensure that the annual report of each office holder is debated in an appropriate committee;
- take responsibility for ensuring that there was regular communication between office holder and Parliament, usually through the medium of a relevant committee; and
- be responsible for the arrangements preceding the formal appointment of an office holder and be the forum for any proposals to create a new office holder.

23. However, it might be considered that the scope and extent of the committee system since 1999 has imposed a significant burden on Parliament, its members and staff, so I believe it unlikely that the suggestion of a new committee for Parliament-related public office holders would find favour. The alternative is for this role to be conducted by the SPCB, which already is carrying out some of these functions.

24. If the SPCB is able to carry out the above range of functions notwithstanding all the other demands on its time and resources, then that is the most realistic solution. If this is not so, then consideration should be given to the establishment of a new, dedicated committee.

25. As indicated above, office holders will also have a need to report to other relevant committees, e.g. the Standards and Public Appointments Committee in the case of both me and the Commissioner for Public Appointments in Scotland. Such committees should remain separate from the budget setting process. The office holder may at times need to take a position in public different from that of the Committee, in keeping with the independence of their role.

Is it possible to implement section B2 of the UN Paris Principles and retain suitable budgetary controls?

26. I am not sure that I would fit the definition of a national human rights institution as described in the Paris Principles, but the same considerations apply in any case. For all the posts in question, the relationship to Parliament achieves the aim of independence from Government. In this respect I am in sympathy with the response on this issue given by the SPCB to the Justice 1 Committee⁵ (Para 131). It is also necessary by analogy however, especially in my case, to protect from interference by Parliament those posts which may involve criticism of the action of Parliament or its members.

27. As laid out in the answer to the previous question, budgetary control can be provided so long as this is done in a sympathetic and informed way and not so as to impair independence of functioning.

What internal process occurs to establish your required budgets for each financial year in advance of scrutiny by SPCB?

28. I am invited by Corporate Policy Unit/Head of Financial Resources to submit a proposal which I then discuss with them. SPCB approval is specifically and directly required for particular issues, e.g. engagement of legal advisers. SPCB approves my budget.

Do you have any views on how the process for scrutinising your budgets works in practice?

29. I have encountered no difficulty to date; but then my needs have been simple and fairly predictable. Were my workload of complaints significantly to increase in future, I would need to employ investigative and office staff and rent premises, resulting in a significant increase in costs for which I would need to seek funds via SPCB. Were the effective performance of my duties to be impaired by financial restrictions, I would feel it my duty to make this known as strongly as possible within the Parliament and ultimately to the public if necessary.

Do you consider there to be any overlaps between your remit and the remit of any established or proposed independent regulatory or investigatory body?

30. In terms of my remit I do not. The case that was made by Parliament, first by the Standards Committee,¹ and then in carrying through a committee Bill, for a statutory, independent Standards Commissioner to deal exclusively with members of the Parliament, remains valid. The Standards Committee carried out a nine-month long enquiry before reaching its recommendation and it gave reasons for discounting the idea of merging the Commissioner role with another body such as the Standards Commission for Scotland. I do not see any significant overlap with a proposed Human Rights Commissioner; complaints to me are couched in terms of conduct of members as potential breaches of the Code and MIO, not in human rights terms.

31. In terms of premises and use of services, I have expressed the following views to the review currently being conducted by Audit Scotland for the SPCB.

32. As regards premises, I cannot share costs as Parliament has no accommodation costs in relation to me. I use a commercial legal firm as independent legal advisers and I value this service highly in assisting me in my role. The firm I use has particular experience and expertise in Parliamentary matters. Having worked with them for two and a half years, a lot of groundwork has been done and there would be a loss of cost efficiency in moving to any new firm, with which some issues would have to be addressed afresh. It was good in this context that the re-tendering exercise in 2005 led to a clear decision, even setting aside the cost benefits of continuity, to continue with this firm. While there may be an argument in theory therefore for sharing of legal services with other office holders, I would not see an advantage in my case, whether of cost or otherwise, in such a move.

Dr J A T Dyer
Scottish Parliamentary Standards Commissioner
7 April 2006

REFERENCES

1. Standards Committee Fourth Report 2000. *Models of Investigations of Complaints*.
2. Committee on Standards in Public Life. Eighth Report (Cm 5663, November 2002). *Standards of Conduct in the House of Commons*.
3. Scottish Executive Consultation paper, 4 February 2003. *The Scottish Human Rights Commission*.
4. Gay, O and Winetrobe, BK (2003). *Officers of Parliament – Transforming the Role*. The Constitution Unit, UCL, London.
5. Justice 1 Committee. *Stage 1 Report on the Scottish Commissioner for Human Rights Bill*.
6. Gay, O (2003). *Officers of Parliament – a Comparative Perspective*. Research Paper 03/77, Parliament and Constitution Centre, House of Commons Library.

Annex 2

SCOTTISH PARLIAMENTARY STANDARDS COMMISSIONER

Policy on Unacceptable Actions by Complainers

1. It is my aim to deal fairly, honestly, consistently and appropriately with all complainers, including the small minority who may act in an unacceptable fashion. I seek to ensure that, while the complaints process is accessible, it remains available for its proper purpose and is protected from abuse. I consider it helpful to make it plain to all complainers what actions might be considered unacceptable and how I will try to deal with them.
2. In this context, the following policy was agreed by the Standards and Public Appointments Committee on 31 May 2005:
3. *It is the intention of the Scottish Parliament that complaints about the conduct of MSPs are taken seriously. It is important that anyone with a complaint against an MSP is able to have that complaint fairly considered in order to maintain and strengthen public confidence in the complaints system.*

Defining unacceptable behaviour

4. *The Standards Commissioner should be able to work within an environment which is free from oppressive behaviour, such as the threat of or use of harassment, verbal abuse and physical violence. The Standards Commissioner will not view behaviour as unacceptable just because the complainer is forceful or determined. Actions and behaviour will be judged by the Commissioner on the basis of the nature and extent of the behaviour.*
5. *The Standards Commissioner will treat all individuals with courtesy and respect when carrying out his duties, and he should expect to receive similar consideration in return.*
6. *Wherever possible, the Commissioner will give the complainer the opportunity to modify their behaviour.*

Aggressive and abusive language

7. *Harassment through aggressive and abusive language may occur in a face-to-face setting, by telephone, in written or electronic communications.*
8. *The Commissioner should not be expected to put up with rude, abusive, derogatory, or threatening*

or harassing language and the Commissioner has the right to ask for the caller to use reasonable language. The Commissioner may warn the complainer that if they persist in using unreasonable language he will, where applicable, end the call or not respond to future communications couched in similar terms. (It is recognised that some people use bad language when they are in a panic or are frustrated. It is important for the Commissioner to determine whether this is the case or not.)

Harassment and aggressive and abusive behaviour

9. *As stated above, harassment and aggressive and abusive behaviour can take many forms. It may include unwanted physical or non-verbal conduct. It may occur in a face-to-face setting, by telephone, in written or electronic communications.*
10. *The Commissioner may warn the complainer that the threat or use of physical violence or harassment towards the Commissioner is likely to result in the ending of all direct contact with the complainer. Incidents may be reported to the police. This will always be the case if physical violence is used or threatened.*

Unreasonable demands and persistence

11. *It is recognised that some complainers may make unreasonable demands on the Commissioner. What constitutes unreasonable demands may depend on the circumstances surrounding the behaviour but could include demanding responses or action within an unreasonable timescale, continual phone calls or letters to the Commissioner or continuing refusal to accept a decision made in relation to a complaint.*
12. *Where the complainer repeatedly phones or sends irrelevant documents, the Commissioner may decide to only return calls from the complainer on a set time on set days or to return documents to the complainer. The Commissioner will explain to the complainer why he is taking a certain course of action.*
13. *If the complainer refuses to accept the decision of the Commissioner, the Commissioner may warn the complainer that future phone calls may not be accepted or correspondence on the same issue will be filed and a simple acknowledgement issued. The Commissioner will respond to the complainer if the complainer provides significant new information relating to the complaint.*

The Commissioner and the Role

The Commissioner is Dr Jim Dyer OBE, who became the Scottish Parliament's first Standards Commissioner in April 2003. He was appointed following open recruitment by the Parliament's Corporate Body, with the agreement of Parliament, for a three year term. Parliament subsequently agreed a second three year term from April 2006. The post and its remit were created by the Scottish Parliamentary Standards Commissioner Act 2002.

The Commissioner is an independent investigator of complaints that an MSP has breached the Code of Conduct, Members' Interests Order or other provisions. The Code of Conduct gives guidance to MSPs on the conduct of their parliamentary duties. It covers such things as:

- Accessibility to constituents
- Respecting privacy
- Registering and declaring interests
- Paid advocacy
- Lobbying and preferential access

The Commissioner does not:

- Decide on sanctions (Parliament does)
- Give advice on standards issues (the Standards and Public Appointments Committee clerks do)
- Deal with complaints re Parliament staff or MSP staff
- Deal with complaints about Ministerial action (these go to the Office of the First Minister)
- Deal with complaints about conduct in the chamber or committee (these go to the Presiding Officer or the Convenor of the committee), or about Cross Party Groups (these go to Standards and Public Appointments Committee)
- Deal with complaints about use of allowances (these go to the Scottish Parliament Corporate Body)

The Commissioner takes part in Stages 1 and 2 of a four part complaints process. The process can be summarised as follows.

Stage 1 – is the complaint admissible? It must be:

- Relevant
 - About the conduct of an MSP
 - Not an “excluded complaint” (ones dealt with elsewhere)

- It must involve a potential breach of Code (so it must relate to the conduct of “Parliamentary duties”)
- Procedurally correct
 - E.g. it must name MSP, identify and be signed by the complainer, be not more than one year from identifying the problem etc.
- Of enough substance as to warrant further investigation

Stage 2 – did the MSP carry out the conduct complained of, and did this mean that the code was breached?

- Investigation takes place in private
- The Commissioner has formal powers to compel witnesses and require production of documents
- Interviews are tape recorded
- The Commissioner reports to Standards and Public Appointments Committee. The Member is first given sight of the draft report and can suggest corrections.

Stage 3 – consideration by Standards and Public Appointments Committee

- The Committee considers the report
- It is not bound by the Commissioner's findings
- It may direct him to investigate further, or carry out its own investigation
- It may recommend sanctions to Parliament (from this stage on, the process is public)

Stage 4 – Parliament decides on sanctions

- The Member can be prevented or restricted from taking part in proceedings for a time
- In some circumstances, he or she may be excluded
- Rights and privileges may be withdrawn from the Member
- Some breaches are criminal offences – with the possibility of fines up to £5000 (by the Courts)

The above information, together with guidance on how to make a complaint is available in fuller form on a leaflet available from the Commissioner (also available in Gaelic).

Contacting the Commissioner

- *Write to*
The Standards Commissioner
The Scottish Parliament
Edinburgh
EH99 1SP
- *Telephone*
Direct Tel: 0131 348 6666
Mobile: 07909 872726
(RNID Typetalk calls welcome)
- *Fax*
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- *email*
standards.commissioner@scottish.parliament.uk
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