Independence of Commissioners

The Committee notes that Part 2 of the Bill would establish order-making powers (akin to the super-affirmative procedure) for Scottish Ministers which would allow them to modify, confer, abolish, transfer, or provide for the delegation of, any function of a person, body or office holder listed in schedule 3. The powers may also be exercised to amend the constitution of these bodies, or abolish them completely, subject to specified exceptions.

As you are aware, the functions of the Office of the Commissioner for Public Appointments in Scotland (OCPAS) and the Scottish Parliamentary Standards Commissioner (SPSC) fall within the remit of the SPPA Committee. These bodies are among those listed in schedule 3 of the Bill.

The Committee recognises that the Bill includes a number of restrictions on the kind of change that could be made by order. For example, any functions that are modified or conferred on a body using the power must be broadly consistent with the general objectives and purpose of the body concerned. It will not be possible, therefore, to use the power to alter significantly the overall role or purpose of an individual body or to ask it to undertake functions inappropriate to its core functions. The Committee also notes that the order-making power could not be used to remove any necessary protections from an individual or organisation, unless equivalent or similar protections are put in place.

However, the Committee is particularly concerned about the inclusion of the SPSC in schedule 3. The role of the SPSC is to investigate, and, in appropriate cases where statutory tests are met, report to the Parliament on complaints that an MSP has breached the Code of Conduct for MSPs or the Interests of Members of the Scottish Parliament Act 2006. The SPSC is recruited by the SPCB, with the agreement of the Parliament. Given that the SPSC has an investigatory role in relation to complaints against all MSPs, including those who are also appointed as Scottish Ministers, the Committee is concerned that the independence of the SPSC would be perceived to be diminished by ability of Scottish Ministers to alter his functions by order.

The Scottish Parliamentary Standards Commissioner Act 2002 (“the 2002 Act”) reflects the desire of the Parliament to have complaints against MSPs handled in an independent and transparent manner. All of the legislation for existing Commissioners - including the 2002 Act - has provisions to protect independence: e.g., to prevent the Parliament or Ministers directing officeholders in relation to the specific inquiries, and powers to call for witnesses and documents. The Committee finds it inappropriate that the Bill proposes to give powers to Scottish Ministers which would allow them to alter this safeguard even by this form of
super-affirmative procedure, which, by its very nature, does not allow for the same level of Parliamentary scrutiny as primary legislation and provides that the Parliament can only accept or reject any provision without the possibility of amending it.

**SPSC functions and procedures**

The 2002 Act specifies many aspects of the procedures the Standards Commissioner is required to follow when investigating complaints, including the stages of investigation, timescales, admissibility of complaints and reporting requirements to the Parliament. In addition, there are a number of directions made by the Committee under the Act which expand on these procedures. The SPPA Committee has a number of specific responsibilities for directing or receiving reports from the Standards Commissioner, as well as being responsible for undertaking Stage 3 of the complaints process.

Any proposals to change these provisions would require SPPA Committee involvement since only the SPPA Committee can propose to the Parliament changes to the Code of Conduct. It is unclear how the role of the SPPA Committee would fit with the order-making power in Part 2 of the Bill.

The Committee is of the view that the functions set out in 2002 Act, Code of Conduct and directions should be safeguarded. The Committee would therefore not support proposals which would allow Scottish Ministers to change the functions of the Standards Commissioner by some form of super-affirmative procedure.

**OCPAS functions and procedures**

The Committee believes that it is important that key functions of OCPAS, such as the requirements to consult the Parliament over the Code of Practice, the power of direction over Ministers to delay making appointments and the requirement to report non-compliance by Ministers to the Parliament should be retained. The Committee therefore has reservations about allowing Scottish Ministers to alter these functions by secondary legislation.

Standing Orders specifically provide for OCPAS reports to be referred to the SPPA Committee and also require the SPPA Committee to act in relation to certain types of those reports. Again, any proposal to change these Standing Orders would require SPPA Committee involvement since only the SPPA Committee can propose changes to the Standing Orders to the Parliament. It is not clear how this relationship would operate in relation to any changes made by Scottish Ministers by order.

**Review of SPCB Supported Bodies (RSSB) Committee**

As you are aware, the RSSB Committee, which was established to consider proposals for changes to SPCB supported bodies, published its report on 21 May 2009. That report contained recommendations that the posts of SPSC and the Chief Investigating Officer (who deals with complaints about local councillors and
certain members of devolved public bodies) should be combined in a single post under the governance of the SPCB. The RSSB Committee also recommended that OCPAS should be joined with the Chief Investigating Officer and the SPSC in a new Standards Body.

The Committee understands that the recommendations of the RSSB Committee are to be implemented through a Committee Bill which has not yet been introduced. Given that this bill is likely to seek to change the structure and operation of the SPSC and OCPAS, it is not clear to the Committee how the Public Services Reform Bill can satisfactorily reflect the changes which will arise from the RSSB Committee Bill.

**Conclusion**

The Committee does not support the inclusion of SPSC and OCPAS in schedule 3 of the PSR Bill. Given the importance of the independence of these Commissioners, the Committee is of the view that it would be inappropriate for their functions to be altered by some form of super-affirmative procedure, despite the pre-conditions set out in the Bill.

Gil Paterson MSP
Convener
Standards, Procedures and Public Appointments Committee