Dear Ms Byrne,

I refer to your letter dated 4 September 2007 seeking the views of the Standards, Procedures and Public Appointments Committee (SPPA Committee) on whether the role of Commissioner ought to be covered by the Freedom of Information (Scotland) Act 2002 (FOI (Scotland) Act 2002) and particularly whether any consideration was given to this when drafting the Scottish Parliamentary Standards Commissioner Act.

The Committee considered the matter at its meeting on 2 October 2007 and thank you for the opportunity to comment.

The Committee in considering this matter weighed up the advantages and disadvantages of the Commissioner being included in the Schedule of the FOI (Scotland) Act 2002. The Committee is very much in favour of openness and transparency. In coming to a decision the Committee looked at the background to the Commissioners Act and his role.

The Standards Commissioner has very specific powers under the Scottish Parliamentary Standards Commissioner Act 2002. The Commissioner’s functions are to investigate whether a Member has committed the conduct complained about and report upon the outcome of that investigation to the Parliament.

In 2000 the Standards Committee gave consideration to different options for the investigation of complaints against members. In its Report, *Model of Investigation of Complaints*, 2000 SP Paper 186, the Committee recommended the appointment of a Standards Commissioner under an Act of the Scottish Parliament. The report also recommended the adoption of a four-stage investigative model, with the Commissioner carrying out any investigation independently of the Committee, with reports of the Standards Commissioner being referred to the Standards Committee.
At this time one concern that the Committee sought to address was the potential loss of reputation which a member could suffer as a consequence of a malicious or unwarranted complaint. The Committee concluded that in order to establish whether a complaint was of a substantive nature or not, there was justification for conducting the initial stages of an investigation in private. The Committee recommended if at Stage 1 the Commissioner considered that a complaint was inadmissible and did not warrant further investigation the complaint should be terminated. There should no disclosure of the details of the complaint outwith the parties concerned. The Committee considered this would offer some protection against speculative publicity and reduce the opportunity for interference with the investigative process. However, the Committee considered that the later stages of an investigation, including oral questioning of witnesses by the Committee, should normally be conducted in public. After consideration by the Committee (Stage 3 of the investigation process) a report would be made to the Parliament. The report would be published as a public document. Such a report would contain the Commissioner’s detailed report as an annexe. This process was adopted by the Parliament and formed the basis for the Scottish Parliamentary Standards Commissioner Act 2002.

The Standards Commissioner Act 2002 at section 16 places a restriction upon the Commissioner in regard to disclosure of information in relation to any information contained in a complaint or any information which is furnished to, or obtained by, the Commissioner in the course of an investigation. There are a number of exemptions –

- such information may be disclosed for the purposes of enabling or assisting the Commissioner to discharge any functions imposed or conferred upon the Commissioner by virtue of any provision in the Commissioner’s Act or in any other enactment or in the Standing Orders, including, in particular, the making of any report to the Parliament; or
- the investigation or prosecution of any offence or suspected offence.

The Commissioner also sought clarification from the Session 2 Standards Committee regarding his interaction with the media. On 22 December 2004 the Committee issued a Direction (under the powers in Section 4 of the Commissioner’s Act) to the Commissioner stating that in response to an enquiry about a complaint or alleged complaint, the Commissioner must not confirm or deny the existence of that complaint or alleged complaint. This is to prevent the inadvertent premature disclosure of information to the media.

In considering your consultation the current Committee also gave consideration to the terms of the FOI (Scotland) Act 2002 and the exemptions contained within the Act. Section 26 of the FOI (Scotland) Act 2002 provides for an absolute exemption for information, the disclosure of which by a Scottish public authority is subject to a prohibition on disclosure. Section 16 in conjunction with the Direction issued by the Parliament under powers in Section 4 of the Commissioner’s Act would appear to provide for a strong argument against the disclosure of information relating to any aspect of an investigation into a complaint. This of course has to be considered in conjunction with the fact that the Commissioner’s investigation reports are published and become public documents.

The Committee went on to consider whether there was merit in the non investigatory aspects of the Commissioner’s office being open to the provisions of the FOI
(Scotland) Act 2002. It is within the Committee’s remit to carry out scrutiny of the Commissioner’s office and to consider his annual report. In addition the Finance Committee carried out an inquiry into accountability and governance which covered the Standards Commissioner and the operation of his office, Finance Committee – 7th Report, 2006 (Session 2) and further Parliamentary scrutiny is possible.

In considering this matter the Committee is aware that there would appear to be a balancing act to be struck between raising public expectation on the type of freedom of information inquiry the public could instigate and the type of information that might be available given the exemptions contained in the FOI (Scotland) Act 2002. In coming to a conclusion the Committee also compared the position in Westminster and Wales where neither Commissioner is listed under the relevant legislation.

The Committee is satisfied that the correct balance is being struck at the present time. Complaints that proceed through all stages of the investigation process are published and are made public and the Commissioner is subject to Parliamentary scrutiny. There would appear to be very little further information that would not be covered by exemptions available for inquiry.

The Committee is aware that you have also contacted the Commissioner for his views and the Scottish Parliamentary Corporate Body, we therefore have not addressed issues of additional resources should the Commissioner be subject to the FOI (Scotland) Act 2002.

With regard to the second point of your request the post of Scottish Parliamentary Standards Commissioner (SPSC) was created under the Scottish Parliamentary Standards Commissioner Act 2002 (asp 16). The Act received Royal Assent on 30 July 2002 shortly after the FOI (Scotland) Act which received Royal Assent on 28 May 2002. We can find no record of any consideration being given to the role of Commissioner being covered by the FOI (Scotland) Act 2002 when the Commissioners Act was drafted.

I hope the information included in this letter assists your consideration of the issues and should you require any further clarification please contact me.

Yours sincerely

Keith Brown MSP
Convener
Standards, Procedures and Public Appointments Committee