

Accountability Scotland Conference

Proceedings

Making Scottish Public Services Accountable

The Scottish Parliament Committee Room 3 - Monday 16th Sept 2013

With financial support from the Glasgow Human Rights Network

Introduction:

Fiona Macleod – Sponsor

The sponsor's introduction is awaited. It will cover her interest in Governance in Public Bodies.

Denis Canavan – Patron

The patron's opening remarks about the need for accountability in Public Service are expected within a week.

Part One: Lack of Accountability of Public Bodies - The Evidence.

NHS Scotland - Cover up Culture

Rab Wilson

A Registered Mental Nurse - 27 years as staff nurse, mostly in acute psychiatry. Now retired and full time poet, writer and health activist/campaigner.

NHS Ayrshire and Arran: Rab Wilson tried to honestly report a work related scandal to his employers – they tried to sack him. After a six year battle he was vindicated on the front pages of national press. He is currently battling for accountability in the NHS.

His Evidence

I was nurse in charge of a psychiatric intensive care unit on a nightshift on the 26th September 2006. The fact that I was on duty on that night changed my life irrevocably and forever. A dangerous patient had absconded due to incompetence on the dayshift. This had gone unnoticed. I discovered he was missing and managed the whole critical incident. NHS Ayrshire and Arran then held a critical incident inquiry into this event. I was the main witness. I was not called to the inquiry. Thus began a six year odyssey that has been an Orwellian/Kafkaesque nightmare for me and my family.

I asked for a copy of the critical incident report. This was denied to me. I eventually legally obtained an un-redacted copy of this report. The report was a whitewash and a cover-up, framing and blaming an innocent nurse without her knowledge of this. This was now almost a year after the original incident. I decided to report this to the managers who led the inquiry. My reward for this? I was fitted up and framed and accused of 'bullying, harassment and intimidation'! My crime? I was accused of carrying out my own 'personal investigation'!?

After three months suspension I threatened to go public with my story to the newspapers and the whole matter was mysteriously dropped. I took NHS A&A to a Stage 3 Grievance to make them admit I should have been given a copy of the report. My Grievance was not upheld.

This was four years after the original incident. I then decided to ask for copies of all Critical Incident reports and their action plans going back for five years. I did this via Fol. NHS A&A told me that they 'held no action plans' and refused to give me the reports. The Scottish Fol commissioner Kevin Dunion instructed NHS A&A to give me the material. NHS A&A then, months later, said that the action plans had suddenly turned up!?

A famous and landmark Decision Notice was published by the Fol commissioner. This was the most damning report of his seven years in office. The event was front page news and I was completely vindicated. One of the happiest days of my life.

There were more than twenty deaths of patients in these reports. No organisational learning took place from any of the critical incidents. No disciplinary action has yet been taken by anyone to hold the directors responsible to account for this catastrophic and fatal scandal despite an equally damning report by Health Improvement Scotland, the government watchdogs. The new CEO of NHS A&A said no individual was to blame because the whole thing was 'a systems issue'.

I took an early retirement package from NHS A&A. I now campaign as an NHS whistleblower. In the light of Hillsborough, Mid-Staffs and most recently the Morecambe Bay Trust scandal I am pursuing justice at NHS A&A. I have recently provided Sir Stephen House and Police Scotland with a massive dossier of evidence and a detailed statement containing my allegations. My story can be seen and heard on You Tube under Rab Wilson NHS Whistleblower.

It is my hope is that if there is any justice left in our land senior directors and managers at NHS A&A will be indicted and will face charges of possible involuntary manslaughter due to criminal negligence. The question is though, why should a battle so vitally important as this be left to one publicly minded individual?

Dr Jean Turner MB ChB DA, Executive Director of The Scottish Patients Association

She is an ex general practitioner of wide experience an ex anaesthetist and ex MSP. She was lured to seek political office due to a proposed cut to services at Stobhill Hospital. She now fights for patient's rights through the SPA.

Many factors lead to lack of accountability in the NHS: Management becomes increasingly diffuse; ill-qualified people on the front line making decisions; often there is lack of continuity in patient care; a reluctance to change inaccurate information in patient notes; telephone contact with responsible medical staff is frequently difficult; private companies employed by the Health Service proliferate - not subject to FOI, they are unaccountable so can away with almost anything. A designated independent inspectorate is suggested to ensure openness and transparency.

Scotland Patients Association's (SPA) Perception

The NHS needs inspirational leaders who value individual Responsibility requiring Accountability.

Over the past seven years SPA is finding the same complaints and concerns still present throughout Scotland. All complaints and concerns arise from a lack of communication and poor attitude amongst NHS Staff and between them and patients and their relatives. If the NHS complaints system had been learning from these concerns and complaints we would have hoped to see a dramatic change with faith and trust being restored.

The NHS could become more cost effective and user friendly if it addressed these two main issues of communication and attitudes and in addition listened to the concerns and complaints of its patients and staff. Instead fear reigns and as a result many serious issues are never addressed because patients will not let their relatives complain fearing the consequences and staff fear for their jobs if they try to share concerns regarding patient or staff care.

If the climate is impossible to raise concerns within an organisation and its regulators then what is left but to whistleblow. SPA would fully support this latter action if it is the only way to find out the truth. Would we have known as much of what has gone wrong in the care of people if it had not been for whistleblowing?

The Francis Report shocked the country but may not have happened if it had not been for a patient's relative who exposed what was bad within the Mid Staffordshire Hospital. Now she is being persecuted for her action and that is equally shameful. Who in authority has been held accountable?

The Country needs to ask itself how much it values the NHS and how it can retain it to provide the best care available. Governments over the past 25 years have been advised by many and thrown money in the direction of the private sector in order to achieve quick fixes but I would suggest that in many cases the NHS has been ill advised and now finds itself stuck with the unintended consequences of the actions of others.

Who would have thought it was a good idea to think up NHS 24 which enticed G Grade nurses to work on the end of a phone with algorithms and then even this standard faded into call handlers. I would suggest that the best of clinicians are at a great disadvantage if they give advice without seeing the patient for themselves and the outcomes for the patient will also be disadvantaged.

We have had a great tendency to substitute doctors work by nurses and that of nurses by care assistants and now we are going to put a great deal of faith into telehealthcare which is great as an add-on but could never replace direct patient/clinician contact; dilution of standards continues.

The way NHS staff have to work to meet targets coupled with the fact that we have seen beds reduce in number, despite the knowledge of an aging population living longer with more complex conditions, means that patients have to move from place to place to be seen and treated and this along with poor communications, staff attitudes and reduced need on their part to be responsible, in some cases, causes continuity of care to become a casualty with poorer outcomes for patients. Boarding of patients is unfair to them and to the staff who has to care for them and can lead to poor outcomes and an increase of formal complaints which is not satisfactory or cost effective to anyone.

SPA have examples of people being seen by one specialist who need to be transferred to another with an urgent appointment being lost for months and in one case a year, perhaps with tragic results. What if these patients had not looked out for themselves? They certainly could not depend on the NHS to check

their progress through the system. Excuses such as someone was on holiday and that is the reason you cannot get your results for weeks or months, even though carried out in record time, is a disgrace.

If incorrect information is written up in medical records and proved to be so it should be corrected not least for the sake of the patient, as any future treatment will depend on accuracy. We know of one patient with the help of her GP, SPSO and ICO has not managed to achieve having their record corrected. SPSO and ICO need greater powers to hold people to account as ordinary individual patients do not have the luxury of time or funds to go to court. This patient has also had other complaints in the past from the same health board regarding accuracy of information within medical records; some regarding the giving and dispensing of drugs. (Over many years)

Trust is eroded when concerns and complaints are not dealt with efficiently and lessons not learned so that mistakes will not happen again. Matters are not helped when patients are told that letters will be filed and nothing more done by the communications officer of the health board about their complaint and that the patient should not take advantage of the good nature of their MSP in this matter. Also within this same health board, MSP letters to the CEO do not merit the signature of the CEO when he replies. It is easy to get the impression that health boards feel they can do as they like. Unless health boards are held accountable they will be free to do as they please irrespective of public involvement and therefore we are grateful to Health Environment Inspectorate who helps health boards maintain standards of care regarding ways of working including infection control and now the care of older people in hospital. If health boards are doing their best then they should welcome inspections. SPA believes that all inspections should be unannounced to be cost effective.

If we are to hold on to our NHS we need to understand what our rights and responsibilities are and we would urge all NHS staff and patients to read the Charter of Patient Rights and Responsibilities. It is a sad indictment that few know about it.

Since the Francis Report proved that patients suffer when responsibility and accountability are ignored by those who should respond we need organisations to listen and learn from concerns and complaints and to make sure that all should be accountable for their actions from the porter to the CEO. When there is no transparency and an honesty trust fades, rarely to be restored and patients fear for their safety.

Dr John Womersley PhD FFC, Public Health Commentator

After careers in physiology and public health now an advocate for disabled people and for Improved management and less waste in the NHS.

Betraying Our Trust: Evidence-gathering and high-flown statements of purpose have become a mask for disturbing developments that the public are unaware of and NHS Board members and politicians outside Government are unable to influence.

Introduction

Donald Berwick, Health Care advisor to president Obama and now David Cameron identifies

1. quality,
2. feedback from patients and carers,
3. training staff to be 'expert improvers', and
4. absolute transparency

as key elements for achieving a culture of learning and improvement in the NHS.

Leadership, motivating staff and greater accountability should replace reports, inspections and targets. He said responsibility in the NHS is too diffuse: "when responsibility is not clearly owned, with too many in charge, no-one is."

Most people of course have a perfectly satisfactory experience of the NHS. I will give some examples where this was not the case: These are detailed in full in the accompanying booklet, together with an analysis of the problems identified.

Life threatening over-hydration at Glasgow Royal Infirmary No one person responsible.

Contemptuous mistreatment of patients at the Southern General Hospital Glasgow, ignoring their complaints

Computer 'algorithm' used by NHS 24 doesn't recognise serious bleeding as an emergency How can a 'call handler' using computer software be more effective (or cheaper) than a nurse or doctor immediately able to reassure, and able to extract essential details without wasting any time?

Sham public 'consultations' No requirement to respond to views expressed.

Misleading Statements

The Scottish Health Council website states "our aim is to improve how the NHS listens to you, values your

views and experience, and ensures that patients, carers and the public are able to influence the planning and delivery of NHS services.” But it is prevented from doing “anything that promotes or opposes changes in the policy adopted by any governmental or public authority in relation to any matter.” Rather limiting!

Cited in favour of 100% single room hospitals “Patients consistently express a preference for single rooms; single rooms minimize the risk of infection; they promote dignity and privacy” These statements are untrue or misleading, and there is no mention of the needs of those who feel unsafe and isolated in a single room.

In May 2010 the Health and Sport Committee of the Scottish Parliament reported “staff being employed in jobs of no productive value; things being allowed to drift; inadequate scrutiny of and accountability; fundamental weaknesses in NHS management; and endless articulation of what needs to be done rather than doing it.” In response to a letter from me Cabinet Secretary for Health Alex Neil replied “As you will appreciate, there have been many changes in the NHS in Scotland since the Health and Sport Committee sat in 2010. The Government and NHS Boards take very seriously the advice of my parliamentary colleagues. I can reassure you that action has been taken to strengthen and improve our health service.”

NHS quangos and other bureaucracies have mushroomed over recent years and there has been no attempt to rationalise or prune them. NHS Boards are a particular concern. Board membership has increased greatly, and chairs and members are often repeatedly re-appointed or rotate between similar posts in other public bodies. Often the relationship with the executive is too cosy with the Board merely rubber stamping what has already been decided by the executive.

Progressive privatisation of the most profitable public services

Provision of ‘clinical triage software’ for NHS 24. Why was ‘triage software’ preferable to a health professional? Use of this software was made a prerequisite for the provision of out of hours services, thus putting local general practices and cooperatives out of contention.

“Our most profitable public services are being progressively replaced by an industry dominated by multi-national organisations to the virtual exclusion of small, efficient innovative providers. Private companies are not accountable to NHS management; their boards meet in private and are not subject to the Freedom of Information Act. Contracts are often set up to make comparison of outcomes with traditional providers difficult or impossible” (NHS SOS).

Is the government able to assess and monitor the efficiency, effectiveness and probity of private providers? The risk of commercial companies winning NHS contracts is well illustrated by the £7m compensation payments made to the under-performing private company Clinicienta (owned by Carillion) for withdrawal of its contract in Stevenage.

Non-Profit Distribution: Scotland’s Private Finance Initiative

“Transaction costs are extremely high, the level of competition is low and the procurement process is designed in such a way as to allow the private sector to pursue monopoly pricing. In current market conditions private finance is extremely unlikely to deliver good value for money.” (Prof Allyson Pollock)

Conclusion

Ever more centrally-driven bureaucratic processes are being created rather than providing the leadership necessary for radical cultural change.

Harmful events and excessive waste will continue in the NHS until its focus shifts to meeting the needs of patients and taxpayers, with patients and front-line staff at the centre of a culture of transparency and continuous improvement. I see no evidence of any willingness to change. The resignation of Derek Feeley, Chief Executive, should be an opportunity to establish the dynamic leadership necessary to transform the culture of the NHS in Scotland. But the appointment of his successor is entirely in the hands of the Scottish Government, so any change is most unlikely.

Education

John Stuart - Deputy Convener Accountability Scotland

Retired teacher of English and learning support who retains a keen interest in education.

Tales from the front line: One unaccountable inspector can ruin head teachers’ lives, causing unfair suspension, illness and even suicide (Scottish Review, 21 May 2013.) Very small schools are particularly vulnerable. Headteachers cannot get administrative justice through the SPSO.

School inspection complaints and the Scottish Public Services Ombudsman

This paper is about the Scottish school inspectorate, HMIE, now within the Government executive agency, Education Scotland. The agency has an important role in ensuring standards and promoting quality but to

what extent is it accountable for its very considerable powers?

In 2008 a headteacher died at her own hand shortly after her school's inspection, distraught at the feedback she had received about her own personal professional qualities. Yet at the following fatal accident inquiry, the sheriff presented as formal finding that she had "proved herself to be an outstanding headteacher". Following considerable media coverage a freedom of information request asked for figures on complaints of school inspections and the proportion which were upheld. HMIE replied stating, "I am unable to provide you with the detailed information you have requested."

In another case, a complaint about a school inspection placed in March 2007, taken to the SPSO in August 2008, took a further 17 months inside SPSO, only to be deleted without an investigation report, in December 2009. Yet at an internal meeting a few days before, including both the case investigator and the ombudsman in person, the investigator had minuted: 'I felt that there was a claim of injustice arising from maladministration at the core of the complaint in relation to HMIE not following due process...' That, however, was only revealed by Freedom of Information enquiry.

In May 2013 The Mail on Sunday reported on a Scottish headteacher who had not worked for three years, suspended on full pay in August 2010 solely on the basis of inspection commentary, but not at any time subject to investigation or disciplinary procedures. She had not even been present at her one-teacher school during its inspection, having been off sick. The inspection report made personalised criticism of her in her absence. She complained to the school inspectorate. Her case was taken to the ombudsman.

In March 2012 the SPSO dismissed the case without an investigation report, this time with the significant statement that, 'My view is that the substance of complaints about HMIE/Education Scotland inspection reports is not within my office's jurisdiction...' Yet the revised Education Scotland complaints system of 2012 states, "If, after receiving our response to your complaint and you remain unhappy, you can ask the Scottish Public Services Ombudsman to consider your complaint." The 2012 SPSO annual report states that the SPSO was consulted on its drafting. Significantly the stage of independent adjudication of the former complaints system was removed from the revised scheme leaving the SPSO as the only independent recourse available in the procedure.

So, what if a headteacher is not present during the inspection, of a single-teacher school? What if an inspection does not follow proper procedures? What if a report is found subsequently to criticize adversely what was not actually observed or to contain what appears to be blatant fabrication? These formed the basis of the complaints referred to.

The Ombudsman would appear to regard such maladministration as opinions of the inspectors that he cannot question. What, then, is the role of the Ombudsman with regard to school inspections? What aspects of maladministration would the SPSO investigate or report on in regard of school inspections? Lacking case decision reports on these complaints we do not know.

The principal point is that the school inspectorate has the power to ruin the lives of teachers and disrupt school communities with no independent avenues of complaint or adjudication available to the victims.

The system is clearly not fit for purpose.

Summary

Schools are inspected by Education Scotland, which has incorporated the former HMIE.

School inspection reports can seriously disrupt both schools and the lives of teachers.

The SPSO appears to regard any maladministration by inspectors as opinions that he cannot question.

No other body has the power to investigate in regard of inspections.

Ian Thow - Ex-SQA Examiner

For 30 years Principal Teacher of Religious, Moral and Philosophical Studies (RMPS) in a secondary school. Developed many teaching innovations, including new national assessment and examining processes in Scotland.

Bureaucratic Unaccountability: The SQA has a monopoly of setting and marking examinations. It is not accountable for its errors. Recent experience of unanswered complaints of maladministration and service failure by the SQA has demonstrated that they have an unacceptable and unjustified protected status. The lack of accountability for such errors and the limitations of the SPSO to resolve these issues allied to the failure of the Minister responsible for the SQA to investigate these complaints are a cause for serious concern which raises the issue of the need for an independent regulatory body for the SQA.

The Scottish Qualification Authority's (SQA) Maladministration of And Lack of Accountability In Higher Religious, Moral And Philosophical Studies (RMPS) Examinations during Academic Sessions 2009/10 to 2012/13:

A Case Study

a) My initial analysis of these Examination Arrangements during academic session 2009/10

While teaching the RMPS Higher Course during session 2009/10 it became apparent that there were significant problems with the SQA Higher examination. These involved significant numbers of questions which candidates were being asked which were neither part of the content of the Course nor reflective of the specified criteria which had been set out in the SQA Examination Arrangements. (I have provided details of these issues in a separate document which is part of your papers for the conference.)

b) What I then did

After discussion in school, we submitted, in an extensive document, a detailed analysis of these assessment errors to the SQA and asked them to explain why they regarded these questions and many accompanying marking instructions as valid, reliable and consistent with the Course Arrangements. As this was clearly not only a complaint but also a professional critique of the assessments, we expected a detailed and professional SQA response.

c) The SQA's response

The initial SQA response was that our submission had been "considered" by the Higher Examination team and they had come to the conclusion that, and I quote, "the questions in this year's paper were valid, reliable and consistent with current Course Arrangements." This appears to be the standard default position of the SQA when complaints are made about their assessments. Consequently, none of the 179 questions (out of around 480) which we believed were inconsistent with the Course Arrangements was answered.

Over a subsequent period of 15 months the school was engaged in correspondence with the SQA as we sought to receive answers to our questions. In the early stages of correspondence we received a further response from the SQA claiming that they had discussed the "feedback in full" (note, not the professional criticisms we had made) at their annual Assessment Panel meeting and "confirmed that the questions were valid and appropriate in relation to the Course." When I later received the minutes of this meeting (under FOI) I noted that the Principal Assessor had "dismissed the majority of the content of our submission" but gave no reasons or explanations for this. Subsequently, also under FOI, I requested the SQA to provide details of why the content of my submission had been rejected and received a response stating that "(the SQA) can confirm that they do not hold any further information associated with the decision taken." This was despite the fact that the same Principal Assessor was still in post and should have been able to provide answers and explanations for his decisions. Our suspicions of the SQA attempting to "cover up" significant maladministration and service failure thus increased.

The school then wrote to Dr. Janet Brown, SQA Chief Executive Officer, expressing complete dissatisfaction with their failure to answer our questions. Dr Brown's responses over a four month period ranged from stating that the delay in her response was "due to the complex issue and that the SQA were currently gathering the required information in order to make a full response to your query." Note again, not our professional criticism. Eventually, we received another brief letter from Dr Brown which simply repeated the SQA mantra that "assessment materials undergo rigorous quality assurance processes and that the SQA regards the Higher RMPS assessment materials as being fit for purpose." No full response or explanation was offered as Dr Brown had previously stated. Now even the SQA Chief Executive Officer was refusing to be accountable for her organisation's alleged maladministration and service failure in the light of our professional criticisms. Far from being open and transparent in their dealings us, the SQA were clearly demonstrating a culture of secrecy and lack of accountability through the entirety of the organisation, including the Chief Executive herself.

We continued to pursue answers over the following 5 months and finally received a letter from the SQA's Director of Qualifications Development (whom I believe not to be a subject specialist in RMPS) which was presumably the SQA's "full response". Not surprisingly, it was a complete whitewash. Not only was none of our 179 questions answered yet again but what was contained in the letter was largely irrelevant to such questions and principally concerned with describing how the SQA operates in relation to its assessments.

However, we had not requested a revision course in SQA procedures, we wanted answers. The letter also attempted to justify this lack of detailed response to our questions by stating that this was to "assist understanding for a non-specialist rector (who, of course had sent the many communications to the SQA on our behalf). The SQA were now clearly clutching at straws as they obviously had no rational or evidential justification for failing to answer our questions or any intention of admitting these significant errors in the examinations. The culture of secrecy and non-accountability embedded in their responses was, once more, plain to see.

It was our view that the SQA wouldn't or couldn't answer our questions because the admission of such errors in all aspects of the Higher RMPS Course would have seriously exposed their very significant deficiencies and lack of competence in setting and marking examination scripts. They were not going to admit their failures. As can be seen from the accompanying fact sheets in the conference papers, this

problem is not confined to this subject only and similar responses have been given by the SQA in other subject areas.

Unfortunately, under the present system in Scotland, the SQA are clearly able to fail to be accountable with impunity. This is why my petition to the Scottish Parliament calls for an independent regulator for national examinations set by the SQA so that appropriate investigation of such issues can be carried out.

The situation as it currently stands is unfair in that it lacks transparency and accountability from those who commit these practices of maladministration. These issues must be immediately addressed if an open, fair and democratically accountable SQA is to be achieved in the future.

The Failure Of The SPSO and the Government Minister with responsibility for the SQA to resolve issues of Maladministration and Service Failure In Higher RMPS

The aftermath of the failure of the SQA to be accountable for these errors

After having spent 17 months corresponding with the SQA with no resolution of the problems, I presented my case to the Ombudsman. After a further period of 15 months' correspondence the SPSO was unable to resolve the situation as my complaints were apparently beyond the remit of the 2002 Scottish Public Services Act. The SPSO currently has no executive powers to resolve such situations so the SQA's position is thus protected by default. The only decision the Ombudsman reached was to require the SQA to produce a letter of apology for the manner in which the SQA had handled the complaints and the timescale involved. There was no indication in the Ombudsman's decision nor reference in the letter of apology from the SQA's Chief Executive to the professional allegations of maladministration we had made or the SQA's failure to answer our questions. The SQA were effectively given the all-clear to continue with maladministration of the Higher RMPS examinations – which they have duly done.

I then contacted Alasdair Allan, Minister for Learning, Science and Scotland's Languages who has responsibility for the SQA. The letter I sent contained a detailed history of our correspondence with the SQA and the SPSO and offered to provide evidence, on request, for our allegations of maladministration by the SQA in Higher RMPS. Two significant consequences followed; the first was that the Minister did not request any of this evidence so could not have known what the details of our allegations of maladministration were. Secondly, the reply I received from the Minister was a regurgitation of a previous letter which we had received from the SQA (which had also failed to answer any of our questions). It appeared that the Minister had simply approached the SQA about the situation, been given their version of the history of the case and simply accepted it at face value without looking at the very detailed evidence we had submitted. So lack of accountability did not only occur from the SQA but was compounded by the Minister with responsibility for such SQA accountability.

Local Authorities & Planning

Dr John Hinton BSc PhD – Conference Organiser

Honorary Research Fellow at the University of Glasgow. Research Psychophysiological in the field of Psychological Stress especially related to work. Active in promoting community cultural festivals and examining psychological stress caused by public bodies.

Local Authority Officials often make a Mockery of Democracy: Local Authorities' Planning and Traffic Departments often exhibit a culture of faceless unaccountable bureaucratic control: 'consultations' are farces, officials misinform both councillors and the public, giving insufficient time for planning scrutiny, erecting bureaucratic hurdles, misinforming the SPSO, ignoring Historic Scotland: all apparently with impunity. This is a recipe for possible corruption and public apathy. Urgent action is needed to get a culture change.

In Detail

This paper relates the experiences of myself and a colleague, regarding actions without accountability, of a city council, a rural district council and Government Reporters – all supported by documentation. We have had no axe to grind - simply a concern for upholding democracy and community well-being. So we cannot be labeled 'vexatious complainers' in the ombudsman's terms. We know most officials mean well, often doing a difficult job. However, we are concerned about the systems which promote public service failure through lack of accountability.

We were disturbed when Glasgow City Council imposed a metered-parking scheme without proper consultation. Many legally-required street notices were never put up. The Council misinformed on the purposes of the scheme, as proved by their meeting minutes. It hit house-bound disabled, but two Council officials said they had no concern for social issues, just traffic control. A public meeting on the issue was organized by local hoteliers but the senior council official there directed the police to impound two newspaper reporters' notes and eject one. Despite signed confirmations, the SPSO accepted unattributed council denials. We showed that, months before the confirmatory council meeting, the Council had

purchased the special black meters required for the schemes' Conservation areas. Finally, the Council was exonerated in the Ombudsman's Parliamentary Report on all of more than twenty complaints.

Later, the Council tried to massively extend the parking controls which would hit the housebound disabled. Officials untruthfully claimed Area Association support. Again many obligatory notices were missing. We provided proof to the Ombudsman that the Council prevaricated about this and falsified their records. But he dismissed all the maladministration complaints without investigation.

Seven years ago, without consultation, East Dunbartonshire Council decided to close and sell a well-used village hall. Their statistical criteria and survey were proved to be false. To forestall a public meeting at the hall, a gang accompanied by police was sent at 2 am. The door was crow-bared off and replaced with steel sheet and a high surrounding fence erected. This locked in equipment of village clubs, and left them with no other suitable venue. The SPSO was informed about the zero consultation and the misinformation. The Ombudsman merely recommended improved consultation procedures: no apology was required and there was no report to Parliament. This council continues to ignore proper consultation procedures and institutes public works willy nilly. For example, they made half of a town library into a Council Hub with minimal notice and have gone ahead with two public works involving disturbing road changes and building work, several months before the end of the stated consultation period. The Council Leader claims proper consultation using a so-called "Champions Group". But these people were selected by the Council and their stated remit was limited to informing and persuading on the already agreed schemes. Is this consultation?

Ten years ago, a developer proposed a 5-story block of flats in the middle of A-listed St Vincent Crescent. Historic Scotland (a Government body) advised that the Council should refer such a conservation area development to them, but they had not. The Head of Heritage Management of Historic Scotland was perturbed and asked us for copies of the plans. After a six-month objection programme, with Historic Scotland's support, the plan was withdrawn.

Five years ago, in this same A-listed crescent, a developer proposed a modern building with flats over a car showroom. This required annexing 2 metres of conservation area pavement. This time there was no public notification – the planner later wrote that it was sufficient for him to deem it unnecessary. Historic Scotland was again not informed. The planner dismissed his own Council's Traffic Department regulation for new-builds which required integral garage parking. The plan which was submitted to both the Community Council and the Planning Committee misrepresented the location of fine protected trees, one of which would have to be destroyed for the development. This false plan was approved. The Council Planner was asked to curtail the development on grounds of deception, but he supported the developer. He wrote that such action would be perceived as "vexatious". (Note that no public appeal is permitted, though a developer is allowed appeal when refused!) The planning permission stipulated British Standards tree protection before any work started. But this was ignored – trenches dug and concrete poured in. Photographic evidence from a resident and Councillors was brushed aside by the Director of Planning: he accepted the false word of the developer's agent who denied foundation work. In a 'buddy' letter to the agent the Planner gave the resident's name and e-mail, which resulted in threats and harassment. The Council never enforced the tree protection regulations. The developer applied for a pavement Stopping-up Order. But residents, opposition councillors and Community Council opposed it, so a Government Reporter came. The limitations of his remit were unclear. He duly supported the developer and Council to allow the building: the Reporter's remit did not cover the maladministration.

With professional help, we forced a special tree protection order. Two days later at night the tree was chain-sawed. So the building could go ahead. The Police were misinformed that the tree had blown down. The Council did not contact them and removed all evidence. But a resident had taken a photograph he gave to the police with fire service evidence. The Planner had instructed residents to keep out of it as he was dealing with it correctly through the Council Enforcement Officer – but we discovered this officer was on leave for the next seven days. Too late! The developer then wrecked the other tree with a JCB. Councillors' appeals for enforcement of the tree protection had repeatedly been ignored. However a tree-replacement order was served on the developer. Now, two year's later, he has tarred over the area. There is still no enforcement. No one is held accountable. Two years ago the saga was put to the SPSO, who tried fob-off procedures such as being unable to proceed without personal suffering of the complainant. The Ombudsman, Mr Martin, then applied their 12 month rule so they could ignore all malpractice in consultation, the false plan and its implementation. So the Council is largely let off the hook: the maladministration has been pruned to one tree!

Two years ago developers in East Dunbartonshire wanted release of green belt land. This was opposed by all councillors, community councils and many residents. Scottish Natural Heritage wrote that they had not been fully consulted and suggested objections should focus on sustainability, environmental pollution and social issues. But it turned out these were not in the Reporter's remit. Who is accountable for the remit? Many green belt areas were lost. Those retained were saved mainly on scenic criteria. One Reporter has massive power. The Minister provides the rubber stamp and no appeal is possible.

Several years ago East Dunbartonshire Council wisely decided to control bill-posting in public places. An official drafted arbitrary rules affecting community notices, like requiring no display more than seven days before an event! These implementation processes, which are what really affect the people, were never put to the Council Committee for approval.

Our experiences show that unless someone is prepared to endure months of hassle organizing objections, then council proposals go ahead unopposed. Sadly, many people say they perceive that Orders and planning developments are 'cut & dried', and unfortunately executive officials get tarred with the corruption brush. Without doubt, Planners are in unassailable all-powerful positions. Officials can even get councillors' e-mails monitored - as reported in Glasgow, following an embarrassing leak to the Press of information about a public building construction delay. How can more democracy be achieved?

Experience shows that ruling party councillors generally fail to support objections to officials' proposals, while opposition councillors get short shrift. In e-mails, a Green Party councillor said she was 'being stonewalled' in trying to get information on maladministration of a planning scheme. Now regarding proposed extension of parking controls, she stated she was "dismayed by the tone of some of the replies from officers, essentially brooking no discussion". An SNP councilor has had similar difficulties. So it can be a waste of time trying to get help from elected representatives when dealing with officials. Councillors from two authorities have complained that those on planning committees have only two working days to examine masses of planning application documents - an impossibility - hence recommendations of unaccountable officials are accepted. Maybe legislation is possible to ensure more time for accountability.

Can government action be obtained to improve council consultations via a Scottish Parliamentary Petition? We tried it. After extensive face-to-face discussions with a senior officer in the Government Traffic Department in Leith, we submitted a Petition on getting improved council consultation regulations, including notifications to housebound disabled. This utilized a wish-list we had been asked to submit. Pleasingly the Petitions Committee referred our Petition to the Leith Department for action - but after five years, nothing has been done. They write that they have no record of it. Who is accountable?

Can systems be instituted which would lead council officials to alter their attitudes? Legislation could promote a culture change. A suggested positive approach would be to make it an offence NOT to report service failure or maladministration and an offence for management to thwart such reporting. It is critical that elected councillors should have the power, so this reporting could be to a 'Service Facilitation' Committee.

Summary

Public consultations in effect 'rubber-stamping'.

Untruthfulness or not giving the whole truth.

Acting above the Law & ignoring regulations.

Treating elected representatives with contempt.

Accountability legislation to get culture change.

Scottish Public Services Ombudsman (SPSO):

Dr Richard Burton BA, PhD - Secretary Accountability Scotland

Dr Burton is a physiologist who has widened his interest to include the psychology of stress and the pathology of public bodies.

Lack of Accountability by the Scottish Public Services Ombudsman: A Scottish Mid-Staffordshire?

The SPSO often appears to disregard complainants' evidence, fails to investigate properly, is biased towards public bodies and inadequately explains decisions. Adequacy and effectiveness of SPSO investigations go unmonitored, though Parliament has appropriate powers. A commissioned survey (2010) showed an appalling 40% of complainants dissatisfied with their SPSO treatment. Dissatisfaction continues. The ombudsman recently noted that staff are still ill-trained. Bureaucratic 'fob-off systems' must be changed. [Note the SPSO is modelled on the PHSO which failed to investigate the Mid-Staffordshire NHS Trust].

In Detail

The Scottish Public Services Ombudsman, or SPSO, currently Mr Jim Martin, is the final arbiter of complaints against a variety of public service bodies and thus effectively represents the pinnacle of administrative justice - increasingly so as he takes on new responsibilities.

The only possible appeal against his decisions is through judicial review, but this is beyond the means of both members of public and bodies under jurisdiction.

Many complainants have been satisfied by the SPSO's decisions, so what are the problems? In a nutshell

- these stem from a failure of the SPSO to investigate cases adequately and effectively. It is this failure that initially brought Accountability Scotland into existence.

This talk is based mainly on evidence from the SPSO's own website and even this alone gives much reason for disquiet.

The experiences of our own membership are even more damning.

Committees and many MSPs have received complaints about the SPSO, but seem to be entirely unable to do anything about the situation.

In 2009 Professor Jerry White, a former local government ombudsman, was sent an SPSO case file by Mr Martin for assessment and reported to Parliament that, to quote,

"Bluntly, it is the worst case of complaint handling by an Ombudsman's office that I have seen."

Importantly, he had only been asked to look at procedures and was not even judging the adequacy and effectiveness of the decisions.

As a Crown appointee, the Ombudsman is independent of Parliament, and is effectively accountable to no-one - particularly with the demise of the AJTC.

Indeed there is no public body outside of his office that monitors or investigates the quality, effectiveness and justice of the SPSO's rulings.

It is true that the Ombudsman pays much attention to the smooth running of procedures within his office, but his office can be compared to a Heinz bean factory, but one where no-one in it tastes the beans for quality.

Nevertheless, from 2007 to 2010, the SPSO monitored complainant satisfaction by means of questionnaires prepared and analysed by Craigforth Consultancy and others.

According to the latest survey statistics (of 2010), 40% of complainants responding to the survey were dissatisfied with their treatment by the SPSO, with more than 70% of specific comments being negative.

If we take this 40% dissatisfaction rate as typical over the roughly 11 years of the SPSO's existence, then there would have been well over 10,000 dissatisfied complainants.

Would Heinz would be happy with such a failure rate and would the Ombudsman be satisfied with such a high dissatisfaction rate in a hospital?

Even Mr Martin himself has acknowledged the large number of communications he gets about his rulings. Why has Parliament not investigated this?

In 2012 Craigforth moved to the use of focus groups and interviews rather than postal surveys. Again, high levels of dissatisfaction were revealed.

In response to that report, Mr Martin now employs the Samaritans to pass on their skills to his investigators, but of course what complainants want is not just sympathetic treatment but justice.

We accept that Parliament cannot challenge decisions, but the Corporate Body has informed Accountability Scotland and MSPs that Parliament has no powers at all over the SPSO.

We have a different view.

Indeed, the Ombudsman Act of 2002 implies otherwise and Mr Martin has himself written: 'We recognise our accountability to the SPCB'.

According to the Act, Parliament may direct that the Ombudsman's report includes input from some independent body that analyses and quantifies complainant satisfaction more fully than Craigforth has done. This could identify shortcomings in procedures likely to affect the adequacy and justice of SPSO rulings.

The two kinds of Craigforth report I have described illustrate two quite different approaches that could be developed to better inform Parliament. Indeed, they elicited more information than has been published.

There is another method of scrutiny that is accepted and has already been used - the questioning of the SPSO by the parliamentary Local Government and Regeneration Committee. Given more time than is currently available to it, such a committee could well dig deeper and accomplish much more. This committee tries very hard, but has insufficient time for the task.

A possible solution to this might be the new Scottish AJTC, which could independently report on the adequacy and effectiveness of justice delivery by the SPSO. This could be initially by contract and ultimately by statute.

As for Audit Scotland, whilst this has a financial audit role, it does not look at the adequacy and effectiveness of the SPSO and the delivery of administrative justice.

Let us look now towards England. The inquiry into the Mid-Staffordshire Trust revealed major systemic failings in UK administrative justice and in the Parliamentary and Health Service Ombudsman office (PHSO) - 300 deaths and not a single competent complaint. This is very relevant to the SPSO in that Mr Martin contracts some of his health service complaints to the PHSO. This operates in accordance with the same model as the SPSO.

As has been well publicized, the English Care Quality Commission, the CQC, has been found severely wanting (in relation to Morecombe Bay NHS trust) in regard to the adequacy and effectiveness of the investigators. Scotland should take as a warning the failure of the CQC and PHSO to inform the UK Parliament of the impending scandal.

In Scotland we have had a problem with a health board, but of a different sort. I am referring to an SPSO report laid before Parliament against Glasgow Health Board that resulted in a three-fold loss – the Health Board's loss of a consultant, his loss of livelihood, and disenchantment with the NHS on the part of a patient's family. In this case, everybody lost, but the relevant point here is that the SPSO merely looked at medical notes and did not interview the doctor concerned – a fundamental error of a sort that the SPSO makes too often.

I'll now suggest a few other ways in which the SPSO's role as final independent arbiter might be better served.

1. Complaints should be accepted from organisations and not only from individuals that have personally experienced hardship.
2. Cases should not simply be deleted, solely at the SPSO's discretion.
3. The usual time limitation of one year should routinely be extended unless there is good reason otherwise. It can take considerable energy and resources to pursue a complaint to the point of non-resolution.
4. There should be no presumption that public officials and their records are more likely to be trustworthy than complainants.
5. Rulings should not be arbitrary or illogical - or contradict rulings of similar cases in similar circumstances. Where there are competing arguments they should be weighed and fully explained.
6. Complainants should be given ALL reasons for SPSO rulings.

We suspect that these failings reflect some level of unconscious incompetence amongst the SPSO investigators, resulting from lack of training and specific knowledge. They simply do not know what they do not know.

Independent investigation of the SPSO would both provide feedback and in addition it would help if a process of Alternative Dispute Resolution were available in individual case prior to judicial review.

I end by noting that there is some feedback to Parliament in that it receives investigation reports from the Ombudsman.

However, Parliament has effectively failed to use these, due to a lack of process. As a result, identical cases in the same hospital are being reported by the SPSO. As in the disastrous Mid-Staffordshire case, there is no formal parliamentary mechanism for the analysis of these reports.

A press report suggests that a Mid-Staffordshire is already happening here.

Summary

The SPSO's own website reveals major dissatisfaction amongst complainants.

The quality and effectiveness of SPSO rulings needs to be monitored externally – and could be, according to the 2002 Act.

The English situation gives no cause for complacency.

Personal experiences indicate a variety of specific failings.

Addendum 19 Sept 2013

We have since learnt that each report goes to the relevant minister. This is appropriate, but no-one looks at all the reports together to form an overall impression of the SPSO's performance. Nor can anyone assess

the unreported investigations or the individual decision letters.

Part Two: Lack of Accountability of Public Bodies – Achieving Justice.

Professor Walter Humes MA, PhD (Aberdeen), MEd (Glasgow)

Visiting Professor of Education, University of Stirling: He previously held professorships at the Universities of Aberdeen, Strathclyde and West of Scotland. His publications include work on teacher education, educational leadership and management, history of education and policy studies. He co-edits Scottish Education, a 1000-page text on all sectors of the Scottish educational system, the fourth edition of which has just been published by Edinburgh University Press. In 2007 he received the John Aitkenhead Award from the Institute of Contemporary Scotland for services to education, and in 2011 a Magnus Magnusson Medal for his contributions to the online journal Scottish Review.

A Discourse on Accountability & the Reality of Power in Scottish Education: The official narrative of Scottish education employs terms such as partnership, consultation and consensus to explain how the system works. In practice, however, genuine public accountability is limited. Bureaucratic protectionism and professional self-regard are more powerful determinants than the interests of pupils, parents and front line staff. This argument will be illustrated with examples from school, further and higher education.

Introduction

In a brilliant comic novel ('A Confederacy of Dunces') by the American writer John Kennedy Toole, the central character, a marvellous creation called Ignatius J. Reilly, at one point makes this observation: 'You can always tell someone who works for the government by the total vacancy which occupies the space where most other people have faces'.

In the context of today's conference, this should not be taken as a comment on the intelligence of bureaucrats. Many of them are highly intelligent people - though one might question some of the ends to which their undoubted abilities are put. Rather the comment refers to the invisibility, the anonymity, of many public officials – their facelessness. They lack individual identity. As Heather Brooke says in her book *The Silent State*, 'In the UK, the best way of preserving your privacy is to become a public official' (p. 103). Public officials see their role as representatives of a system, not of their devising, rather than as people who might have personal beliefs about the proper way to serve the public. Insofar as they have a sense of responsibility, it is directed towards the rules and protocols which they are expected to follow rather than to the individuals who seek information or advice, or raise matters of concern. In some cases this habit of mind becomes so ingrained that they cease to have any views of their own: they are mere functionaries helping to service the vast machinery of administration which they have inherited from their predecessors. One of the ablest men I ever worked beside was someone who had perfected this role. He was extremely efficient but I never had the slightest inkling of what he really believed about the aims of education or the values which it should represent.

Official Narratives

My remit is to talk about education but I think it is important to listen to the experiences of people in different fields and to see if there are common threads running through all of them. One of the consistent features of most public bodies is that they construct an official narrative of their functions and achievements. This is repeated in a variety of contexts – in reports and newsletters, in press releases and on websites – and it becomes what might be called the 'received wisdom' about the organisation. At the present time, most organisations claim that they are subject to various forms of accountability, that their processes are transparent, that they listen to their clients or customers, and that they take complaints seriously. These terms represent the official rhetoric, part of what might be called their public relations 'charm offensive'.

Education: Partnership, Consultation and Consensus

In the case of education, several other terms are regularly invoked, in addition to accountability and transparency. These include partnership, consultation and consensus. Education is said to be a partnership between central and local government, between parents and teachers, and between teachers and pupils. It is also claimed that policy is developed on the basis of full consultation with all relevant stakeholders with the aim of reaching a consensus on how best to proceed. On the face of it, this sounds reassuring but it becomes less so on closer inspection. Partnerships are rarely equal: differential power comes into play. Certain players in the policy community are more powerful than others. Consultations may appear to be open but can be skilfully stage-managed behind the scenes. Much depends on how consultation responses are analysed and this is something that is not generally open to inspection. What is presented as a consensus may in fact favour some respondents – generally those well-networked within the policy community – more than others. I sometimes observe that it is no accident that the words 'consultation' and 'consensus' both begin with a 'con'.

Headteachers

I occasionally give lectures to teachers who are aspiring to become headteachers. I suggest to them that the role

is likely to involve difficult professional dilemmas where they may have to decide between conflicting loyalties. Curriculum for Excellence, the new reform programme which is currently being introduced in schools, encourages teachers to be more autonomous, to rely on their experience and judgement rather than on directives from above. But would this really be welcomed? When I posed the question to prospective headteachers – do you owe your first loyalty to the pupils in your school, their parents, your teaching colleagues or the wider community? – they told me that they are firmly instructed by their local authorities that they are first and foremost ‘officers of the council’, and that they are expected to adopt a ‘corporate mindset’. They are reminded of the terms of their contracts of employment, which often limit their scope to express their views. I am sure that is a comfortable position for council officials, effectively silencing people who may be well placed to comment on council policies. But consider some of its practical implications. In the case of small rural primary schools, for example, which may be faced with the threat of closure, the headteacher – to whom parents and the community might look for leadership and support – is effectively prevented from making a case.

The Culture of Local Government

The sensitivity of some local authorities can reach absurd levels. Alex Wood was a secondary headteacher in Edinburgh until his retirement a couple of years ago. Earlier in his career he had been Labour leader of Edinburgh City Council. While in post as a headteacher he used to write articles for the Times Educational Supplement Scotland, an important journal for news and comment aimed at teaching professionals. Some of his articles upset the council and he was instructed that anything he subsequently wrote had to be passed to a council official for approval prior to publication. Not only should he refrain from writing anything that might be construed as critical of Edinburgh City Council, he was also told that he could not say anything that was critical of Her Majesty’s Inspectorate of Education.

The irony of this will not be lost on you. Teachers are expected to encourage youngsters to think for themselves, to become ‘responsible citizens’ (one of the key capacities of Curriculum for Excellence) and to tell the truth. It would appear, however, that teachers themselves are not permitted to contribute to public debate if there is any risk that their employers will be embarrassed. I am pleased to report that as soon as Alex Wood retired he published an article in The Herald recounting this episode and he continues to be forthright in his comments about Scottish education.

Too many Scottish local authorities are still paternalistic and authoritarian in their treatment of staff and in their response to requests from members of the public. Many parents of children with special educational needs tell of difficulties they have encountered in obtaining proper assessments of their children’s condition and in securing adequate provision. One very damaging consequence of the bureaucratic assumption that officials know best is that able and committed staff, who may have a lot to contribute, become alienated and suffer a loss of morale. The corollary is that the people who rise in the system are not those with ideas and initiative, but those who quickly learn the rules of the game and become skilful at playing politics. In my gloomier moments I sometimes refer to this as the apotheosis of mediocrity. It is not surprising, therefore, that we witness such episodes as the Edinburgh trams fiasco, the debacle over the redesign of Glasgow’s George Square, or the stop-go situation of Aberdeen’s Union Terrace Gardens. I am pleased to note that Dundee, which had one time had a very dubious record in local government administration, seems to be doing comparatively well, having been shortlisted for the UK City of Culture for 2017.

Higher Education

Let me now turn to universities and higher education. As universities have expanded and made increased demands on the public purse, issues of accountability have assumed greater importance. Unsurprisingly, government expects something in return for its investment. This has involved looking closely at the degree of autonomy which universities have traditionally enjoyed and considering whether governance arrangements are sufficiently transparent. In recent years there have been a number of issues which attracted adverse publicity: e.g. proposals for curricular reforms and departmental closures at Glasgow University, where it was alleged that staff and student views were not properly canvassed. There had also been criticism of the salary levels of some University Principals and the expanding cadre of Vice-Principals who form the senior management teams. Some writers, including myself, had commented on the growing divide between the corporate culture of senior management and the academic values espoused by most teaching staff.

In 2012 a review group was set up under the chairmanship of the Principal of Robert Gordon University, Professor Ferdinand von Prondzynski. I was one of the people who gave evidence to the committee. The review group put forward a number of fairly modest proposals relating to the system of appointment to posts of principal, the composition of governing bodies, the election of governing body chairs and measures to improve gender balance. Subsequently a code of conduct was drawn up but it was widely condemned as toothless not only by representatives of staff and student bodies but also by a majority of members of the original review group. What eventually emerged as part of the Post-16 Education Act passed earlier this year was a much watered-down version of the recommendations in the von Prondzynski report.

This episode is of interest not only because of the substantive content of the recommended reforms which sought to increase transparency and accountability. Just as significant, in terms of understanding the policy process, is the successful behind-the-scenes lobbying that took place, mainly through the body which represents the collective interests of the Scottish Universities, called Universities Scotland.

Bureaucratic Power

I mention this to draw attention to the powerful institutional and bureaucratic structures which sustain Scotland's educational system. The key agencies are very well established and generally resistant to change. Even in the face of counter-evidence, they are confident of their stewardship of the system. Thus both the inspectorate and the Scottish Qualifications Authority, when presented with complaints or evidence about unsatisfactory practices, tend to adopt the default position that they are right and that the complainants are wrong. There is an unacceptable arrogance in this stance, especially at a time when trust in many public and private institutions is at an all-time low, thanks to scandals affecting politics, financial services, the health service and the police. The education inspectorate are now part of a larger body called Education Scotland, formed from the bringing together of the old curriculum advisory body, Learning and Teaching Scotland, and the inspectorate. Whether this will turn out to be a happy marriage, a civil partnership or merely an uneasy cohabitation remains to be seen. Its size and substantial remit may simply mean that enquirers and complainants will have even more layers of bureaucracy to penetrate before they can gain access to the people and the information they seek.

Patronage

An important feature of the current situation, which applies to all public services, not just education, is the way in which people are chosen to serve on public bodies. This involves a well-established system of patronage, largely managed by senior civil servants but subject to periodic ministerial interventions, often in moments of crisis. Since devolution there have been some changes to the process of appointment and many vacancies now invite applications from anyone interested rather than rely on the old system which involved tapping a likely lad – and they nearly were all lads – on the shoulder. But have the qualities sought really changed very much?

Some years ago Andrew McPherson and Charles Raab wrote a brilliant book called 'Governing Education' in which, among other things, they sought to identify the essential qualities of people appointed to government committees and public bodies. They concluded that while some knowledge of the relevant field was certainly desirable, just as important were what they called 'deference and trust'. Recipients of patronage were expected to show respect for established conventions and due deference to those further up the official hierarchy. They also had to be deemed trustworthy in the sense that they could be relied on not to rock the boat, leak information or challenge orthodoxy. I fear that, even with the post-devolution changes, there is never any shortage of aspirants only too willing to fulfil these expectations.

When you put all this together – the individual case studies of complaints that have dismissed or badly handled, the attempts to protect the so-called 'integrity' of organisations at the expense of truth and justice, growing dissatisfaction with the way in which the Scottish Public Service Ombudsman operates, the invocation of 'public interest' arguments in the refusal to allow enquiries of various kinds, and the abuse of narrative privilege in official accounts of potentially embarrassing episodes – what you have is a powerful case for questioning many of the cherished myths of the Scottish political system. These include the belief that we are more committed to social justice and democracy than other countries, and that we are more determined to address issues of social inequality than our nearest neighbour within the UK.

Just how credible are these widely held convictions among the political establishment and media commentators, two groups which sometimes seem to overlap to an unhealthy degree? I see plenty of counter-evidence in the power and influence of successful entrepreneurs, in elite social networking in Edinburgh and, not least, in the way in which public bodies frame their rules to serve their own interests. They seek to disguise this by their use of a disarming rhetoric of transparency and accountability but this is offset by the dark arts of public relations which are cynically deployed to forestall, discredit or silence criticism. The extent of professional protectionism in Scottish public life gives the lie to the democratic myth.

Points of Resistance?

Are there any points of resistance to these disturbing trends? In a recent article in the Scottish Review, Gerry Hasssan suggested that as well as the 'two establishments' of Labour and the SNP, a third force had entered the Scottish political scene and that the old order had not yet taken adequate account of what it means or the extent of its support. He described it in these terms: 'It is characterised by being mostly non-institutional, not part of 'official Scotland' and with a significant presence in the social media'. As examples he cited the work of Andy Wightman on land reform and Lesley Riddoch on cultural change. Scottish Review itself, which now regularly attracts a readership of more than 20,000, might be cited as a forum for ideas and views from a range of people outside the charmed circle of establishment insiders. The superb investigative work by its editor, Kenneth Roy, has caused substantial embarrassment to a number of public bodies. His most recent pieces have drawn attention to the delays in calling fatal accident enquiries, the poor quality of specific judgments, and in some cases official reluctance to hold enquiries at all. The acute sensitivity of the judicial system to criticism of its processes has been both interesting and revealing.

'Solitary Deciders' and Systemic Change

But will these encouraging developments really begin to make a difference or are the bureaucratic defences too well-established to be dismantled? I started with a literary quotation so let me end with one. It is from John le Carré's most recent novel, 'A Delicate Truth'. One of the central characters, a senior Foreign Office civil servant called Toby Bell, is described as an example of 'the most feared creature in our contemporary world: a solitary

decider'. Bell is a man of principle who is faced with a difficult ethical dilemma. His whole training should incline him to take a safe, diplomatic course protecting his career and his freedom (because he is subject to the Official Secrets Act). But he is so shocked at what he discovers about a disastrous mission authorised by an ambitious government minister that he decides he cannot look the other way. In the face of injustice, he is not prepared to become another corporate clone, which is now the favoured profile of many public and private organisations. He chooses to become a 'solitary decider' instead. We need more solitary deciders, not only within central government but also in local authorities, in the health service, in education and in many other public and private bodies.

But that is only the first step. Well-intentioned individuals alone will not bring about the systemic change that is needed. That is why the activities of bodies such as Accountability Scotland are so important. They provide a forum in which people who have had real, often deeply frustrating and unsatisfactory encounters with various forms of officialdom, can compare experiences and consider what collective forms of action might produce better outcomes. This conference could be an important turning point in bringing about an improved system of holding public bodies to the kind of accountability that should be the mark of a mature democratic society.

Professor Tom Mullen LLB (Glasgow), LLM (Harvard)

Professor of Law at the University of Glasgow: He has been convener of the Board of the Legal Services Agency and expert adviser to the House of Commons Select Committee on Scottish Affairs (1996-1997). He has a wide range of publications in his research fields of constitutional law and administrative law.

Administrative Justice in Scotland: An overview of Accountability Mechanisms: Delivering administrative justice means giving citizens effective means of challenging bad administrative decisions. Those means include tribunals, courts and ombudsmen. But, citizens remedies, as well as securing justice for individuals, are an important way of making public services accountable to citizens.

Outline

- 1) Administrative justice institutions
- 2) The meaning of accountability
- 3) What makes administrative justice different?
- 4) Accountability of courts
- 5) Accountability of Tribunals
- 6) Accountability of Ombudsmen

1) Administrative Justice Institutions

- Courts
- Tribunals
- Ombudsmen

2 The Meaning of Accountability

- Who is being held to account?
- For what?
- To whom are they being held to account?
- Against what standard(s) is performance judged?
- Through what mechanism(s) is accountability secured?

3 What Makes Administrative Justice Different?

The institutions of administrative justice are themselves accountability mechanisms.

4 Accountability of Courts

- For what?
 - Judges decisions
 - Conscientious performance of duties
 - Personal conduct of judges
 - Administration of the court
- To whom?
 - the parties to a case
 - litigants in general
 - other court users (witnesses, jurors)
 - the general public

Judges' decisions

- To whom? the parties to the case
- Standards of accountability - are decisions appropriate in law and fact?
- Mechanisms of accountability? appeal to a higher court and judicial review

Judges' conduct

To whom? parties/lawyers/witnesses/jurors

Standards of accountability

statutory test for removal

Statement of Principles of Judicial Ethics for the Scottish Judiciary:

<http://www.scotland-judiciary.org.uk/21/0/Principles-of-Judicial-Ethics>

Mechanisms of accountability?

removal from office

complaints procedure

discipline

Removal from office

Considered by tribunals (one for sheriffs, another for Court of Session judges) which report to First Minister (FM);

Sheriffs removed by FM; judges removed by Her Majesty on advice of FM;

The test is "unfit to hold office ... by reason of inability, neglect of duty or misbehaviour".

Judiciary and Courts (Scotland Act) 2008

Sheriff Courts (Scotland) Act 1971

Complaints/discipline

Complaint may relate to "any matter concerning the conduct of judicial office holders";

Complaints are handled by the judicial office of the Lord President (LP)

(supervised by the Disciplinary judge);

If detailed investigations are required, these are carried out by the nominated judge.

Judiciary and Courts (Scotland Act) 2008, ss. 28-34

Complaints About the Judiciary (Scotland) Rules 2013

<http://www.scotland-judiciary.org.uk/15/0/Complaints>

Lord President may give the judge:

formal advice

formal warning

a reprimand

suspension

There is a Judicial Complaints Reviewer who

reviews conduct of specific investigations on request & may refer case to LP

reports on investigations generally

may make written representations to LP about procedures

5 Accountability of Tribunals: Overview of tribunals

Reserved Tribunals

First-tier Tribunal

Upper Tribunal

Employment tribunals & Employment Appeal Tribunal

Devolved Tribunals (examples)

Mental Health Tribunal for Scotland

Private Rented Housing Panel

Additional Support Needs Tribunal for Scotland

Accountability of Tribunals: the 'old' system

Under the Tribunals, Courts and Enforcement Act 2007 Tribunals have been supervised by:

Reserved

President of Tribunals

Administrative Justice and Tribunals Council (AJTC)

Devolved

President/senior chair of tribunal

AJTC & its Scottish Committee

Accountability of Tribunals: the current system

Complaints about Tribunal judges and Members

Made to the relevant tribunal President/ senior office-holder

Oversight

AJTC abolished with effect from 19 August 2013

Accountability of Tribunals: the current system

Senior President of Tribunals functions

Provides leadership for judges/members of FTT and UT

Provides training for judges & members

representing the views of tribunal members to Parliament/Lord Chancellor/Ministers

Annual report on tribunals

Accountability of Tribunals: the 'new' system

- Tribunals (Scotland) Bill
- Creates new structure for devolved tribunals
- First-tier Tribunal & Upper Tribunal
- FTT divided into chambers and UT divisions

Lord President of Court of Session is head of Scottish tribunals, but will delegate to

- President of the Scottish Tribunals
- Common appointments process for tribunals
- Provisions on conduct and discipline

Complaints/discipline

- LP has power to make rules about complaints, conduct and investigation
- Lord President may give the judge:
 - formal advice
 - formal warning
 - a reprimand
 - suspension

Judicial Complaints Reviewer who will

- Review conduct of specific investigations on request & may refer case to LP
- Reports on investigations generally
- May make written representations to LP about procedures

Removal from office

- Considered by fitness assessment tribunal which report to LP & First Minister (FM);
- judges removed by FM following adverse report by tribunal;
- The test is "unfitness ... by reason of inability, neglect of duty or misbehaviour".

Broader concerns about the SPSO

- What arrangements will exist for oversight following abolition of AJTC?
- See AJTC Scottish Committee advice to Ministers at:
<http://ajtc.justice.gov.uk/scottish/publications-scottish.htm>

Need for an independent body to provide advice to Ministers on administrative justice system in Scotland;

Strategic functions should comprise

- identifying and addressing broader issues affecting administrative justice in Scotland
- encouraging coordination in administrative justice
- encouraging best practice
- facilitating coordination of administrative justice with rest of UK
- encouraging networks
- ensuring that users of the system are listened to
- encouraging and promoting the research

6 Accountability of Ombudsmen: the SPSO

SPSO's function

- to investigate complaints of injustice or hardship caused by maladministration or by service failure;

SPSOs' remit covers

- most 'devolved' public bodies and social landlords;

SPSO may recommend a remedy

- where s/he finds injustice/hardship caused by maladministration/service failure.

Complaints about the SPSO

For what?

- SPSO decisions on complaints
- SPSO service

To whom?

- complainants
- those complained about
- the general public

Decisions on complaints: Review procedure

To whom?

- the parties to the case
- those complained about

Standards of accountability

Decision based on important evidence that contained facts that were not accurate (SPSO review);
New and relevant information that was not previously available (SPSO review)
Legality (judicial review)

Mechanisms of accountability?
SPSO review procedure
Judicial review

Service complaints
e.g. treating complainants unfairly or rudely,
failing to explain things clearly,
causing unreasonable delays.

3 step procedure:
Step 1 Contact member of SPSO staff
Step 2 Head of Complaints Standards
Step 3 Independent Reviewer

Broader concerns about the SPSO
For what?
Quality of decision-making?
Quality of administration

To whom
Scottish Parliament?
Scottish people?

Standards of accountability

Does SPSO generally make the right decisions on complaints?
Does SPSO handle complaints well?

Mechanisms of Parliamentary accountability?

Scottish Parliamentary Corporate Body?
Justice Committee?
Local Government and Regeneration Committee?

Conclusion

Should there be a public administration committee?

Professor Michael Adler BA (Oxford), AM (Harvard), PhD (Edinburgh)

Emeritus Professor of Socio-Legal Studies and Leverhulme Emeritus Fellow, University of Edinburgh: He has worked at the Centre for Law & Society at UC Berkeley, the Centre for Socio-Legal Studies in Oxford and the Faculty of Laws at University College. He extensive research publications in the field of administrative justice and other areas of social policy and authored numerous publications. He was member of a social security appeals tribunal for many years and is currently a member of the Scottish Committee of the Administrative Justice and Tribunals Council.

Administrative Justice in Scotland: What Needs to be Done: The UK Government abolished the Administrative Justice and Tribunals Council (AJTC) on 19 August 2013 and the Scottish Government has announced its intention to set up a non-statutory advisory body of its own to replace the Scottish Committee of the AJTC. This raises the question of what the structure and functions of this new body should be. Some possibilities will be outlined.

In Detail

The Public Bodies Act 2011, which gave the UK Government the power to abolish, merge or change the functions of certain public bodies by secondary legislation, received its Royal Assent on 14th December 2011. The Administrative Justice and Tribunals Council (AJTC), which had been set up under the Courts, Tribunals and Enforcement Act 2007 three years before this, was listed in Schedule 1 of the Act as a body which Ministers could, by Order, abolish. As required by the Act, the Ministry of Justice (MoJ) had run a 12-week public consultation on the future of the public bodies it sponsored, including the proposal to abolish the AJTC. 41 of the responses referred to the proposal to abolish the AJTC and most of the respondents were opposed to abolition. Respondents drew particular attention to the AJTC's strength as 'an independent organisation that exercises a UK-wide overview of the administrative justice system', its role as a forum for bringing together disparate parts of the administrative justice system, and its function of representing the interests of users. Many of the responses were also concerned that, in the event of abolition, the functions of the AJTC could not be adequately covered by MoJ.

The UK Government was unmoved by the results of consultation. It was determined to proceed with abolition and an Order to abolish the AJTC was laid before Parliament on 18th December 2012. The MoJ sought to justify its decision by explaining that

'In conducting its review of public bodies, [it had] first addressed the overarching question of whether a body needed to exist and its functions needed to be carried out at all. It was considered that the oversight of the administrative justice system and development of administrative justice policy was properly a function of Government and also that the AJTC's oversight functions with regard to tribunals were no longer required given the robust governance and oversight arrangements that exist within Her Majesty's Courts and Tribunals Service (HMCTS). . The AJTC was therefore included in Schedule 1 to the Act, which allows abolition of the listed bodies ... with no transfer of functions'

To support its' determination to abolish the AJTC, the MoJ argued that the tribunals system, administered by Her Majesty's Courts and Tribunals Service (HMCTS), ensured that tribunal members and their administrative support systems were now sufficiently independent from the departments whose decisions were being challenged, and that the integration of most tribunals into a coherent structure ensured that HMCTS could itself provide sufficient oversight of tribunal procedures. It also argued that policy development and oversight of the wider administrative justice system should be led from within the MoJ. The argument appeared to be that, because tribunals were now independent and accountable, there was no longer any need for an independent overview of the administrative justice system as a whole.

The MoJ published a programme of work on administrative justice that it proposed to carry out in the next three years. It claimed that this would be carried out 'in-house' by a small group of generalist staff (largely drawn from those who were previously employed in the Tribunals Service) supported by an Administrative Justice Advisory Group (AJAG), comprising hand-picked representatives of bodies that are active in the administrative justice system including organisations that are responsible for redress mechanisms, like HMCTS and the Ombudsman Association, that provide advice and representation, like Advice UK and the Free Representation Unit, and that

represent the system's users, like Mind and Disability Rights UK. The AJAG will have no resources or staff of its own and will meet just twice a year. Even if it does have an 'independent' chairman, a tame advisory group offering advice on topics selected by the MOJ will not be able to match the dedicated expertise of the AJTC, which could set its own agenda, and will not be in a comparable position to challenge policy and practice across the whole of central and local government. The quality and quantity of the oversight given to administrative justice will undoubtedly diminish, with the 'slack' being taken up, at UK level, by parliamentary select committees; the stream of constructive reports on aspects of administrative justice will inevitably dry up; users will no longer have a vigorous champion; and the cross-border aspects of administrative justice across the UK, in particular, those associated with reserved policy areas in Scotland will be ignored.

Because some of the public bodies specified in the Public Bodies Bill were 'cross-border bodies' which operated in Scotland and/or in Wales, the Bill provided that Abolition Orders affecting these bodies required the consent of the Scottish Parliament and the Welsh Assembly before they could be agreed by the UK Parliament. No doubt due to its reluctance to support the retention of a UK-wide body, the Scottish Parliament consented to the abolition of the AJTC. By contrast, the Welsh Assembly initially expressed a preference 'for the AJTC to continue, in respect of the functions it exercises in Wales'. However, it subsequently gave its consent.

Back at Westminster, the Abolition Order was scrutinised by the House of Commons Public Administration Committee, which found that there was a 'fundamental difference of view' between the Government and others over whether there was a continuing need for the functions performed by the AJTC, and doubted the level of cost savings that the Government estimated would be achieved by its abolition, by the House of Commons Justice Committee, which called on the government to reconsider its decision,³ and by the House of Lords Secondary Legislation Committee, which considered the Order on four occasions and concluded its fourth report by saying that 'the tests in the 2011 Act¹ [were] not fully satisfied and that the case for the complete abolition of the AJTC [had not been] made'.

It is clear that these parliamentary committees were not persuaded by the Government's arguments and, on a free vote, it is almost certain that the AJTC would not have been abolished. However, the Government pressed ahead, party discipline prevailed, Parliament gave its approval to the Order on 22nd July 2013 and the AJTC was finally abolished on 19th August.

In giving its consent to the abolition of the AJTC, the Scottish Parliament took into account a commitment from the Scottish Government that, in the event of abolition, it intended to establish a non-statutory advisory body to carry out most of the functions of the AJTC in Scotland and, when she appeared before the Justice Committee of the Scottish Parliament on 12th March 2013, Roseanna Cunningham, MSP (the Minister for Community Safety and Legal Affairs) reiterated the Scottish Government's intention to create a non-statutory advisory committee 'as an interim measure to allow time for full consideration of longer-term options'.

However, there have been no further public statements on the issue and, as far as I am aware, the Scottish Government has not yet taken any steps to set up an advisory committee. This is a shame because, instead of a 'seamless transition' from the Scottish Committee of AJTC to the non-statutory advisory committee which many people had hoped for, there is now an inter-regnum. If they had been asked, some, if not all the members of the Scottish Committee would probably have been willing to serve on the non-statutory advisory committee, at least for a limited period and their expertise would have contributed to the committee's credibility.

Given that the Scottish Government has committed itself to setting up a non-statutory advisory committee as an interim measure and that longer term arrangements, which would require legislation, are envisaged, it is pertinent to ask what the characteristics of a body that would have oversight over administrative justice in Scotland should be. Although I do not wish to restrict myself to considering the desirable characteristics of a non-statutory advisory committee, I shall draw on the advice concerning the remit and capacity of a non-statutory body which, in October 2012, the Scottish Committee of AJTC was asked to provide for Scottish Ministers. As a member of the Scottish Committee, I should add that I played a part in drawing up this advice.

If a new oversight body was modelled on the AJTC, its characteristics would include the following:

- (1) It would be completely independent of the Scottish Government and operate at arms' length from it;
- (2) Although it could consider issues that were referred to it by government or the judiciary, it would also be able to consider issues on its own initiative;
- (3) It would be proactive rather than reactive;
- (4) It would have at least six remunerated part-time members, including a part-time chairman, who would have experience of as many aspects of administrative justice as possible including, in particular, users' experience of administrative justice.
- (5) It would need a budget sufficient to pay for the salaries of the chairman and members, accommodation and a small secretariat, and to provide a degree of support for the chairman and members.
- (6) Its remit would embrace the entire administrative justice system in Scotland and would have to include reserved as well as devolved policy areas. Administrative justice would be understood as an end-to-end process comprising the multitude of decisions taken by civil servants and other officials, complaints and ombudsman procedures, tribunals, courts and all the other ways of holding administrators to account for the decisions they make.
- (7) It would report to Scottish Ministers and to the Justice Committee of the Scottish Parliament. Scottish Ministers would be expected to comment on its recommendations.
- (8) Insofar as its concerns related to reserved policy areas, it would bring them to the attention of UK

Ministers and Government departments.

(9) It would work closely with other bodies representing users, redress mechanisms, regulators and quality assurance systems in Scotland, with the Scottish Civil Justice Council, and with analogous advisory bodies in England (if one is set up), Wales and Northern Ireland.

The UK Government claimed that the MoJ could carry out all the functions that were formerly carried out by the AJTC and that, for this reason, the AJTC would have been redundant. However, this is highly questionable. The administrative justice system is extremely complex, its component parts frequently ignore the interests of users and fail to deliver justice, and they are often in need of co-ordination. Independent scrutiny of the system by a body of experts with a remit such as the one outlined above is the best way of ensuring that the administrative justice system meets the needs and promotes the interests of the large number of people who use it.

The idea that one government department (the MoJ or the Scottish Government's Justice Directorate), even if it was committed to the task and had the resources to carry it out, could effectively monitor numerous other government departments and thereby promote the interests of those on the receiving end of administrative decisions is pretty far fetched. If taken seriously, it would involve the government department in numerous 'turf wars' with other public bodies and would always run the risk of being set aside in light of what are regarded as 'more pressing matters of state'.

If the flourishing of the AJTC and its Scottish Committee following their establishment in November 2007 represented the high water mark for administrative justice, their abolition in August 2013 represented rock-bottom only five years later. However, if the Scottish Government does deliver on its promises, the prospects for administrative justice look much brighter in Scotland than they do in England. A Scottish oversight body could act as 'the hub in the wheel' of administrative justice in Scotland and we would all be better off if that were the case.

Summary

The Rise of the Administrative Justice and Tribunals Council (AJTC)

AJTC evolved from the Council on Tribunals (CoT)

Leggatt Report recommended establishment of a Council with a wider remit – 'the hub in the wheel' of administrative justice

Proposal taken forward in DCA White Paper (2004) and in Tribunals, Courts and Enforcement (TCE) Act (2007)

AJTC, with its statutory Scottish Committee, established in 2007 – championed the user and promoted administrative justice.

The Fall of the Administrative Justice and Tribunals Council (AJTC)

Public Bodies Bill published in May 2010

AJTC included in Schedule 1 (bodies down for abolition)

Despite losing the arguments, the Government won the war

Public Bodies Act given Royal Assent in December 2011

Abolition Order for AJTC laid on 18 December 2012

Expected date of abolition: middle of April 2013 – who will champion the user and promote administrative justice now? – represents 'rock bottom' for administrative justice

Remit of the Scottish Replacement Body

independent from the Scottish Government able to consider issues on its own initiative;

proactive rather than reactive;

at least six remunerated part-time members, including a part-time chairman, with experience of Administrative Justice and users' perspective.

Adequate budget

Remit would include reserved as well as devolved policy areas.

Report to Scottish Ministers and to the Justice Committee: regarding reserved policy areas, it would bring them to the attention of UK Ministers and Government departments

It would work closely with other bodies

The Rise and Fall of The AJTC – Summary

BIRTH: 2007 – represents the 'high water mark' for administrative justice

LIFE: 2007-2013

DEATH: 2013 – represents 'rock bottom' for administrative justice

CAUSE OF DEATH: Conservative Party ideology, Liberal Democrat weakness

Life after Death in Scotland ?

The Scottish Government committed to setting up a 'non-statutory advisory committee as an interim measure' but there has been no action to date.