



Northern Ireland
Assembly

Research and Information Service Briefing Paper

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1 Introduction

This briefing paper has been prepared following a request from the Committee on Standards and Privileges. The Committee sought information on the following:

- What, if any, arrangements exist for complainants to be given access to the Commissioner for Standards' investigation report and/or the draft Committee report on complaint cases prior to publication?
- What, if any, input the Commissioner for Standards has to the Committee adjudication process in other legislatures (e.g. fact checking evidence provided to the Committee).

2 Scotland

The Commissioner for Ethical Standards in Public in Scotland has responsibility for:

- investigating complaints about the conduct of MSPs, local authority councillors, board members of public bodies and lobbyists; and
- regulating how people are appointed to the boards of public bodies in Scotland.¹

The Commissioner's functions in relation to conduct are set out in:

¹Statutory powers of the Ethical Standards Commissioner:

<https://www.ethicalstandards.org.uk/sites/default/files/publications/CESPLS%20Legislative%20Background%20April%202019.pdf>

- a) the Ethical Standards in Public Life etc. (Scotland) Act 2000 (the Ethical Standards Act),
- b) the Scottish Parliamentary Standards Commissioner Act 2002 (the Parliamentary Standards Act): and
- c) the Lobbying (Scotland) Act 2016 (the Lobbying Act).²

Section 9(3) of the 2002 Act states that:

*No report concluding that a member of the Parliament, who is named in the report, has breached a relevant provision shall be made to the Parliament unless the member concerned has been given a copy of the draft report and an opportunity to make representations on the alleged breach and on the draft report; and there shall be annexed to the report made to the Parliament any representations made by that member which are not given effect to in that report.*³

The provisions contained in the 2002 Act are supplemented by Directions issued by the Standards Committee to the Commissioner. The latest Direction is dated January 2020 and states the following on interviews and draft reports:

(3) At least 48 hours before interviewing any person for the first time in the course of an investigation, the Commissioner shall notify that person in writing of—

- (a) the purpose of the interview;*
- (b) the powers of the Commissioner under section 13(1) of the 2002 Act;*
- (c) the procedure to be followed in connection with the investigation of the complaint, including that the interview will be tape-recorded;*
- (d) the right of that person to have a third party present at the interview; and*
- (e) the right of that person to have his or her views conveyed through an interpreter.*

(4) A notification transmitted by electronic means is to be treated as being in writing for the purposes of subparagraph (3) if it has been recorded and is capable of being reproduced in legible form.

(5) The Commissioner shall allow any person interviewed to have—

- (a) third party present; and*
- (b) his or her views conveyed through an interpreter.*

² Statutory Powers of the Ethical Standards Commissioner

³ Scottish Parliamentary Standards Commissioner Act 2002: <https://www.legislation.gov.uk/asp/2002/16/section/9>

(6) If the Commissioner interviews any person in the course of an investigation, the Commissioner shall have regard to whether or not that person appears to be a vulnerable person.

(7) For the purposes of subparagraphs (1) and (6) “vulnerable person” means any person who by reason of age, infirmity, illness, disability or any other circumstance appears to the Commissioner to be in need of care or attention.

(8) The Commissioner shall make and keep a tape-recorded record of any interviews that are carried out in the course of any investigation.

(9) No summary of an interview with a witness shall be included in any report by the Commissioner to the Committee unless the witness has been given a copy of the draft summary and an opportunity to make representations about the draft summary. The Commissioner shall annexe to the report to the Committee any representations which are not given effect to in the summary

Draft report

(18) Where there is a question about whether a member’s alleged treatment of a person breaches a relevant provision of the Code of Conduct on the treatment of staff or treatment of other members, the Commissioner shall (in addition to the requirements in section 9(3) of the 2002 Act)—

(a) in so far as possible, make available a copy of the report to be made to the Parliament under section 9(1) of the 2002 Act in draft to the person and the member (whose conduct is being complained about);

(b) give the person and the member an opportunity to make representations on the alleged breach and the draft report.

(19) Where there is a question about whether a member’s alleged treatment of a person breaches a relevant provision of the Code of Conduct on the treatment of staff or treatment of other members, the Commissioner—

shall not include any information in the report to the Parliament under section 9(1) of the 2002 Act that identifies the person or enables the person to be identified, unless the Commissioner is satisfied that there is a good reason for including the information.⁽²⁰⁾
Subparagraph (19) does not in itself prevent the Commissioner from including identifying information in a copy of the draft report given to a member or a person mentioned at subparagraph (18).

Correspondence

The following information was received from the office of the Ethical Standards Commissioner in response to a request from the researcher:

When the Commissioner completes a full investigation into the conduct of a MSP, they will prepare a confidential report describing their investigation and giving their opinion on whether the MSP(s) breached the Code. If the Commissioner considers that there has been a breach, the MSP involved will be given an opportunity to make comments on the draft report.

We will send the report to the Standards, Procedures and Public Appointments Committee of the Scottish Parliament. We'll inform the complainer(s) and the MSP involved. The Commissioner will not publish the report or make any public comment.

Where the Commissioner finds the Code was not breached, the Committee may request further investigation or they may decide not to accept the Commissioner's findings.

Where the Commissioner finds there has been a breach of the Code, the Committee will consider the report in full. This will initially be done in private. The Committee will invite the MSP to submit representations, which also be considered in private. The Committee may also decide to ask the Commissioner's findings of a breach of the Code will be announced in public in the form of a report. The Commissioner does not fact check the Committee's report prior to publication. The Committee may then recommend a penalty to the Scottish Parliament.⁴

3 Wales

The National Assembly for Wales Commissioner for Standards Measure 2009 sets out the powers and duties of the Senedd Commissioner for Standards. The Standards Measure is supplemented by the Procedure for Dealing with Complaints against Assembly members which was approved by the Committee on Standards of Conduct on 9 July 2013.⁵

The procedure states that:

⁴ Correspondence received from the office of the Ethical Standards Commissioner

⁵ National Assembly for Wales Procedure for Dealing with Complaints against Assembly Members:

<https://standardscommissionerwales.org/wp-content/uploads/2013/10/FINAL-agreed-09.07.13-e-Procedure-for-dealing-with-complaints-against-assembly-members.pdf>

4.3 No report, concluding that a Member has breached one of the matters within Standing Order 22.2(i)⁶ may be made to the Committee unless the Member and the complainant have been given a copy of the draft report and an opportunity to comment on factual accuracy. If there is any comment that is not accepted by the Commissioner the report to the Committee must include details of those disputed facts.

4.4 Copies of the Commissioner's final report to the Committee of a formal investigation must be made available to the complainant and the Member complained of at the same time that it is provided to the Committee.

4.5 The Member complained of will be informed by the Committee that he or she has the right to:

- i. make written representations to the Committee within a specified time; and*
- ii. to make oral representations at an oral hearing of the Committee.*

Consideration by the Standards Committee

The Committee will meet first in private to consider the details of the complaint, but will make no findings of substance on the complaint at this stage. The purpose of the private meeting will be to consider whether, in the light of the Commissioner's report, and any other written evidence that it considers appropriate:

- (a) any witnesses should be invited to give evidence to the Committee at an oral hearing; and*
- (b) the Committee should consider the complaint in public or private.*

The Committee may also consider how it proposes that the Member or witnesses should be questioned.

7.3 The Commissioner for Standards may not attend this initial private meeting unless invited by the Committee.

7.4 In accordance with Standing Order 22.5, where a Committee Member is subject to a complaint he or she may take no part in any consideration of the complaint by the Committee. In such circumstances, another Member from the same political group may replace that member in accordance with the arrangements set out in Standing Orders.

⁶ SO 22(i) states that the Standards Committee must investigate, report on and, if appropriate, recommend action in respect of any complaint referred to it by the Commissioner for Standards that a Member has not complied with: (a) Standing Order 2; (b) any Senedd resolution relating to the financial or other interests of Members; (c) Standing Order 5; (d) any Senedd resolution relating to Members' standards of conduct; (e) any code or protocol made under Standing Order 1.10 and in accordance with section 36(6) of the Act; (f) Standing Order 3; or (g) Standing Order 4.

Oral hearing

7.5 The Committee will meet in private - unless it has decided, having taking into consideration the circumstances of the case and any advice received from the Commissioner for Standards or on behalf of the Assembly Clerk, that it should meet in public - to consider:

- i. any oral or written evidence or representations that the Member complained of wishes the Committee to consider; and*
- ii. any oral or written evidence from witnesses.*

7.6 The Commissioner may be invited to give evidence at the meeting at the discretion of the Chair.

7.7 At any oral hearing, the Member complained of, or any witnesses who choose to give evidence, may be accompanied by an adviser.

7.8 A verbatim transcript of the proceedings of any oral hearing will be provided. The general presumption is that the Committee will only ask questions of the Member or witnesses to clarify matters of fact. The Member or any witnesses would have the right to ask and have answered factual questions about procedural or technical matters; they do not have the right to question the Commissioner or the Committee about other matters.

7.8 If the Member or witnesses are accompanied, the chair may give permission for that person to make oral representations and the same rules would apply.

8. Reporting and appeal procedure

8.1 As soon as may be following the Committee's decision the Member complained of must be provided with a copy of the Committee's report, which must be treated in confidence by all parties. In those cases where the Committee has considered the complaint in private, and where there is no breach or the case is dismissed, the Committee must arrange for the report to be anonymised.

Where a Member has been found in breach by the Committee, and the Committee does not recommend that the complaint be dismissed, the Member complained of may, within 10 working days of being provided with the Committee's report, appeal to the Presiding Officer.

The Committee must publish the report of its considerations and lay it before the Assembly along with the Commissioner's report to the Committee. Where the Presiding Officer informs the Committee that an appeal has been made, the Committee may not publish its report or lay it before the Assembly until consideration of the appeal has concluded.

Correspondence

The following information was received from the office of the Standards Commissioner in response to a request from the researcher:

...after [the Commissioner] has submitted his report then he can be asked to give oral evidence to the Committee but no involvement in adjudication. Also, he is not involved and there is no part of the official process that asks him to fact check the Committee report.⁷

4 House of Commons

The complaints process in the House of Commons is complex, made more so by additional layers added in recent years to address issues of bullying and sexual harassment. For the purposes of this research request, it is pertinent to focus largely on breaches of the Code of Conduct, which are within the remit of the Committee on Standards and the Parliamentary Standards Commissioner.⁸

In its report *Review of the Code of Conduct: proposals for consultation*, the Committee on Standards said:

This report deals primarily with possible revisions to the Code, but our inquiry has been wide-ranging and has inevitably raised issues relating to other aspects of the House's standards system. There has also been much discussion in recent weeks about the fairness of the existing system, in the context of an individual case on which the Committee reported.⁹

The Committee has a responsibility for ensuring that the processes whereby breaches of the rules are investigated and adjudicated are fair and appropriate. The Committee believes, for reasons we shall summarise in this section of our report, that Members are presently guaranteed a fair hearing, but we are actively considering possible improvements to the processes we use in Code of Conduct cases (as opposed to cases of bullying, harassment and sexual misconduct which are heard by the Independent Expert Panel).

We intend to request a senior judicial figure to carry out a review of whether the House's current system of investigating and deciding upon breaches of the Code of Conduct for Members of Parliament is compatible with fairness and natural justice, and with Article 6 ECHR, and if appropriate to make recommendations or set out options for

⁷ Correspondence received from the office of the Standards Commissioner

⁸ Cases of bullying, harassment and sexual misconduct which are heard by the Independent Expert Panel and there is a role for the Commissioner in these matters.

⁹ This refers to the report into Mr. Owen Paterson. In that report the Committee stated that: "We will analyse in further detail the length of recent investigations and adjudications as part of our inquiry into the Code of Conduct, and will consider if any further steps can be taken to ensure that investigations and disciplinary cases are conducted as expeditiously as possible."

improvements to the system. We will announce further details of the review shortly.¹⁰

The Committee went on to look at aspects of the way allegations are currently handled by the House authorities, including the rights of Members throughout the process.

Commenting on the issue of procedural clarity, the Committee noted that the procedures adopted by both the Committee and the Commissioner are not as well understood as they should be. It also highlighted the Information Note sent by the Commissioner to Members who are subject to investigation. The Note, which was prepared in 2015, sets out the process that the Commissioner and Committee will follow. Both the Committee and Commissioner are drafting new Information Notes which are expected to be published soon. Relevant extracts from the current Commissioner's Information Note are reproduced below. A full outline of the process is available at the **Appendix**.

Extract from Standards Commissioner's Information Note (2015)

The Clerk to the Committee will send a full copy of the Commissioner's Memorandum about one week before the Committee first meets to consider the Memorandum (unless the Member agrees to a shorter period). The Member may, if (s)he wishes, send the Committee written comments on the Commissioner's Memorandum. The Committee would expect such comment to focus on the Commissioner's conclusions as the Member will have seen the factual parts of the report at an earlier stage. The Committee is able to deal with most of the cases which come before it without taking oral evidence from the Member.

The Committee will:

- give the Member the opportunity to be heard before recommending the imposition of a penalty;
- consider representations from the Member to hear specified witnesses or to put specified questions to witnesses;
- decide whether evidence is to be taken in public or in private. Usually evidence will be taken in private; and
- conduct internal discussions in private.

¹⁰ House of Commons Standards Committee, *Review of the Code of Conduct: proposals for consultation*, November 2021: <https://committees.parliament.uk/publications/7999/documents/82638/default/>

The Committee may:

- seek papers or records at the request of the Commissioner (the Commissioner cannot compel witnesses to give evidence);
- summon persons, papers and records independently;
- require the Member to attend and to produce documents;²
- redact from the evidence confidential and personal information which is not relevant to the alleged breach of the rules; and
- refuse leave for the broadcasting of any public session.

The Committee will:

- consider each Memorandum from the Commissioner and reach its own decision on whether the Member has breached the rules;
- append to its report the Commissioner's Memorandum and any additional evidence assembled by the Committee, including any material submitted to the Committee by the Member and any separate report made by a lay member;
- decide whether any session taking evidence from witnesses will be held in public or in private; and
- publish the evidence appended to the Commissioner's Memorandum on the Committee's webpages, if it is not included in the published report.

The Committee addressed the issue of members' rights during the process and repeated its conclusions set out in a previous report on an alleged breach of the Code of Conduct:

As an independent officer, the Commissioner has no personal interest in whether a breach is found or not. She is not akin to a 'prosecutor', making the best case for the finding of a breach. Rather, she acts as an adviser to this Committee, advising impartially on whether she considers there has been a breach of the Code. We are grateful for the Commissioner's advice, but are not bound by it, and determine on the basis of the evidence before us, including any further written or oral evidence provided by the Member, whether we agree with her findings.¹¹

It goes on to say in its current report that:

The Commissioner's forthcoming revised Information Note will clarify who Members may inform or consult during an investigation, as well as their rights during an investigation more generally. Our own Information Note, to be issued at the same time, will contain equivalent information about Members' rights at the committee stage of the process. The two notes will confirm that the confidentiality requirements imposed on Members under investigation do not preclude their confiding in a close friend or partner or seeking legal or other advice—it is perfectly reasonable that Members should be able to discuss a case, in confidence, with a limited circle of people they are close to, and that they should be able to access professional advice if required. Our

¹¹ House of Commons Standards Committee, *Review of the Code of Conduct: proposals for consultation*, November 2021

Information Note will confirm that a Member can be accompanied by a lawyer before the Committee, though, in accordance with the rules of the House, representation through Counsel is not permitted. We emphasise that the standards system should neither encourage nor discourage Members from seeking legal advice but assert their freedom to do so. Notwithstanding this, in our view the processes of the Commissioner's investigation and the Committee's consideration of a case should be sufficiently straightforward and transparent that no Member will be disadvantaged by not taking formal legal representation.¹²

On the issue of whether the Committee and Commissioner's processes are compliant with Article 6 of the European Convention on Human Rights, the Committee noted that it had:

...reviewed whether the Commissioner's and the Committee's processes are compliant with Article 6 of the European Convention on Human Rights (the right to a fair trial), which states that "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law". On the basis of legal advice we have received, we are confident that the processes are, overall, Article 6 compliant. The Committee is not a court of law and does not purport to be a court of law. Its procedures are established either by Standing Order of the House of Commons or, where the Standing Order is silent, are determined by the Committee itself. In examining individual cases brought before it, it is considering an internal disciplinary matter of the House of Commons, which has exclusive cognisance over matters concerning the conduct of its Members. It is not determining a "civil right or obligation" (i.e. a right established in the domestic law of any jurisdiction in the UK), which is the precondition for Article 6 to be engaged.

*This does not mean that the Committee should not be concerned to ensure that its proceedings are fair and transparent, in accordance with the Article 6 case law. One area of criticism might be that the members of the Committee are arguably not "impartial" as they are making decisions about the conduct of people known to them; but this is at least partly compensated for by the role of the lay members, who have no other connection with Parliament, and who have an effective voting majority. The Committee is, however, established by law - the *lex parliamenti*, which is part of English common law. Other Article 6 requirements are clearly met by our existing procedures in that the Committee gives all those complained about opportunities to express their views orally and in writing before coming to a decision, and all the material from the Commissioner's investigation is made available to the individual being*

¹² House of Commons Standards Committee, Review of the Code of Conduct: proposals for consultation, November 2021

*investigated. The Committee also explains its reasoning in its reports on individual cases.*¹³

Complaints under the Independent Complaints and Grievance Scheme

The Independent Complaints and Grievance Scheme (ICGS) deals with issues of bullying, harassment and/or sexual misconduct. It differs from complaints made under the House of Commons Code of Conduct in that MPs have no role to play in the investigation or adjudication of complaints.

Under the ICGS, an independent investigator is appointed to examine a complaint. An initial assessment is sent to the Parliamentary Commissioner for Standards and if the Commissioner decides that a formal investigation is warranted, then she will oversee the complaint from this point forward.

The investigator will produce a full assessment report and send it to the Commissioner together with their recommendation as to whether the complaint should be upheld.

The Commissioner will then read all the evidence and check that it is fairly and fully reflected in the report, that relevant evidence has been included and irrelevant evidence has not been relied on. The Commissioner will send both the complainant and the respondent a copy of the draft formal assessment report to check that facts and dates are correct, to request any corrections, to raise concerns if relevant evidence has not been considered or relevant witnesses not interviewed or raise other concerns about the process of the investigation.¹⁴

¹³ House of Commons Standards Committee, Review of the Code of Conduct: proposals for consultation, November 2021

¹⁴ ICGS Guide for Complainants: <https://www.parliament.uk/globalassets/documents/icgs-documents/making-a-complaint---a-guide-for-complainants.pdf>

Appendix

If the Commissioner decides to begin a formal inquiry, she **will**:

- Write to the Member, setting out what will be investigated. The Commissioner will provide the Member with a copy of the evidence provided to him/her in support of the allegation and the letter of complaint, set out the rules relevant to that allegation and ask the Member for their response to it.
- Write to the person who made the allegation to tell him/her of the decision to begin an inquiry and explain that the correspondence is privileged.
- See or speak to the Member at any time if the Member requests it. (This can be helpful to the Member in explaining the procedure in an informal way.)
- Make a note or a voice recording of any interview or meeting with the Member and any witnesses, and agree the accuracy of that note or transcript with the Member/witness.
- If during the course of an inquiry, the evidence causes the Commissioner to identify a possible additional breach of the rules, the Commissioner will draw that to the attention of the Member, setting out the relevant rule(s) and giving the Member a fair opportunity to respond to that specific matter.
- Provide the Member with an opportunity to comment on the evidence gathered during an inquiry before reaching his or her conclusions.
- Include personal information only if it is relevant to the decision on the allegation
- At the end of the inquiry, if the Commissioner finds no evidence to substantiate a breach of the rules or decides to use the rectification procedure, the Commissioner will write to inform the person who made the allegation. (The Commissioner will not provide details about the progress of the inquiry while it is ongoing.)
- If the Commissioner refers a Memorandum to the Committee on Standards (paragraphs 38-43), (s)he will report the facts as found and offer her/his own conclusions on whether the Code has been breached.
- Before finalising her/his conclusions, the Commissioner will provide the Member with an opportunity to comment on the draft of the factual sections of any Memorandum and will give careful consideration to any comments received.

The Commissioner will append to the Memorandum all relevant evidence which (s)he has considered. (For a trial period – to be agreed with the Committee - the Commissioner will also share her provisional analysis and conclusions with the Member before finalising her Memorandum.)

- The Commissioner will tell the Member and the person making the allegation when a report has been submitted to the Committee.
- If Parliament is dissolved or the Member otherwise ceases to be a Member while an inquiry is in progress, the Commissioner will cease her/his inquiries until the Member is re-elected. If the Member is not returned to Parliament, the Commissioner may resume her inquiry only with the agreement of the Committee.
- If the Commissioner begins an inquiry following a referral from IPSA or its Compliance Officer, (s)he will show the Member all the material submitted by IPSA/the Compliance Officer. The Commissioner will not invite the Member to reopen matters already properly determined through the Compliance Officer's investigatory process. Otherwise, the Commissioner will conduct the inquiry in the normal way.

In addition, there are steps that the Commissioner **may** take:

- Ask the Member follow-up questions during the inquiry.
- Seek evidence from witnesses, including any identified by the Member.
- Arrange for the payment of the reasonable cost of travel to London by a witness (lost earnings are not paid).
- Consult authorities, such as the relevant Department of the House of Commons or the Registrar of Members' Financial Interests.
- Request the Member to attend for formal interview at any stage.
- Make a voice-recording of an interview with the Member. (If the Commissioner makes a voice-recording of an interview, (s)he will agree a transcript of the interview with the Member.)
- At the request of the Member or the person making an allegation, redact from the evidence confidential and personal information which is not relevant to the alleged breach of the rules.
- At her/his own discretion refer a point of principle to the Committee, during the course of an investigation.

Turning to the issue of the rights of Members, the Information Note states:

The Member may, at any time, provide any evidence (s)he wishes to the Commissioner, including the names of any witnesses whom s/he believes can provide evidence relevant to the inquiry.

The Member may be accompanied by an adviser or friend, when interviewed by the Commissioner or appearing before the Committee. The adviser may not answer on behalf of the Member, and may not address the Committee unless (s)he is asked a question by the Committee. (The Committee does not hear counsel.) The role of an adviser is to give advice to the Member about how to answer questions put to him or her and to help with any papers to which the Member wishes to refer.

Members may, at their own expense, take legal advice on an allegation if they so wish and be assisted by such advice in responding to the Commissioner. However, the Commissioner will expect Members to respond to enquiries (whether orally or in writing) for themselves. Members may, if they so wish, be accompanied by a lawyer or an adviser at any interview with the Commissioner

Except where an Investigatory Panel has been appointed (see paragraphs 55-57), the Member does not have the right to cross-examine directly witnesses who may have given evidence in support of the allegation. However the Commissioner will put to the Member all material evidence in support of the allegations so that the Member may have an opportunity to challenge it if (s)he so wishes.