Agenda

Standards Committee
3rd Meeting, 2004 (Session 2)
Tuesday 9 March 2004

The Committee will meet at 10.45 am in Committee Room 4.

1. **Item in private**: The Committee will consider whether to take item 7 in private.

2. **Replacing the Members’ Interests Order**: The Committee will consider a paper on registrable interests.

3. **Scottish Parliamentary Standards Commissioner**: The Committee will consider the Commissioner’s draft Information Strategy.

4. **Submission to the National Assembly for Wales**: The Committee will consider a draft submission to the Standards of Conduct Committee of the National Assembly for Wales.

5. **Complaints against MSPs**: The Committee will consider a paper on administrative procedures for handling correspondence during the complaints process.

6. **Complaints against MSPs**: The Committee will consider a paper on the disclosure of the Commissioner’s draft reports to complainers.

7. **Complaint**: The Committee will undertake its initial consideration of a report from the Scottish Parliamentary Standards Commissioner at Stage 3.

Dr Sam Jones
Clerk to the Standards Committee
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Please find attached papers on the following:

**Agenda item 2**
Replacing the Members' Interests Order: paper from the Clerk ST/S2/04/3/2

**Agenda item 3**
Scottish Parliamentary Standards Commissioner:
information strategy and information leaflet – paper from the Standards Commissioner ST/S2/04/3/3

**Agenda item 4**
Submission to the National Assembly for Wales: draft submission ST/S2/04/3/4

**Agenda item 5**
Complaints against MSPs: paper from the Clerk ST/S2/04/3/5

**Agenda item 6**
Complaints against MSPs: paper from the Clerk ST/S2/04/3/6

**Agenda item 7**
Complaint: note by the Clerk *(private paper)* ST/S2/04/3/7
report by the Scottish Parliamentary Standards Commissioner *(private paper)* ST/S2/04/3/7a
THIRD MEETING OF THE STANDARDS COMMITTEE
REPLACING THE MEMBERS’ INTERESTS ORDER: EXISTING CATEGORIES OF REGISTRABLE INTERESTS

1. At its meeting on 10 February 2004, the Standards Committee agreed to review the draft Members’ Interests Bill published by its predecessors in the first session and to develop its own proposed legislation for replacing the Members’ Interests Order.

2. This issues paper provides an overview of the current provisions of the Order and, where appropriate, the recommendations of the draft Committee Bill on registrable interests. The paper does not include the registration of non-financial interests as this will be the subject of a separate paper to be discussed at a future meeting.

3. Other forthcoming papers will include the following issues:
   - Non-Financial Interests
   - Declaration of Interests
   - Paid Advocacy
   - Ceased and Future Interests
   - Criminal Defences
   - The Mechanics of Registration and the Register

4. The Committee is invited to consider the paper and to develop its policy on registrable interests.

STANDARDS COMMITTEE CLERKS
MARCH 2004
Existing Categories of Registrable Interests

Introduction

1. Section 39 of the Scotland Act 1998 requires provision to be made for a register of Members’ Interests and other related matters. The Members’ Interests Order is a transitional provision under the Scotland Act 1998 and provides for the establishment and maintenance of a Register of Members’ Interests and set out the interests that are to be registered. The provisions in the MIO on registrable interests are more exacting than those at Westminster and failure to comply could constitute a criminal offence.

Purpose of the Register

2. In considering the existing categories of registrable interests, the Committee may wish to first consider the purpose of the Register. Whilst the MIO is silent on this, section 4.1.1 of the Code of Conduct sets out the purpose of the Register as follows:

   The main purpose of the Register is to provide information about certain financial interests of Members which might reasonably be thought by others to influence Members’ actions, speeches or votes in the Parliament or other actions taken in their capacity as Members.

3. The Neill Committee has characterised the disclosure of interests – whether by declaration or registration - as having a dual purpose. First, to indicate those personal interests which might reasonably be thought by others to influence a Member in his or her conduct. Second, to indicate those personal interests which demonstrate a Member’s particular expertise or involvement in the subject being debated.¹

4. The Committee may wish to consider setting out the purpose of the Register in its proposals for replacement legislation.

Test for Determining a Registrable Interest

5. Prior to considering its detailed policy on registration and declaration, the Committee may find it useful to develop a general test for determining whether or not a Member has a registrable interest which would underpin the registration framework.

6. The approach taken at present in the Members’ Interest Order and Code of Conduct is to require registration and declaration where ‘the interest would reasonably be considered to prejudice or give the appearance of prejudicing the ability of that Member to participate in a disinterested manner in proceedings of the Parliament relating to that matter’. Similar provisions are set out for members of local authorities and public bodies in the Ethical Standards in Public Life etc (Scotland) Act 2000.

¹ Seventh Report of the Committee on Standards in Public Life, Standards of Conduct in the House of Lords, CM4903-1
7. The previous Committee having taken evidence on the matter concluded that an objective test was necessary and agreed that the existing test was appropriate. They also agreed that the test should apply to all interests subject to registration.

8. The previous Committee also noted that the MIO and the Code gave little guidance on how the test should be applied. It therefore recommended that the replacement legislation should make it clear that the test should be applied on an objective basis, that is where it could reasonably be considered that an interest might prejudice or give the appearance of prejudicing the Member’s participation in Parliamentary proceedings.

9. In the draft Bill this is contained at section 7(2) in relation to deletions from the register and in section 11 covering Declaration of interests

10. The Committee is invited to consider this test and to agree it as a basis for policy development

**Current Categories of Registrable Interests**

11. Under the Members’ Interests Order, MSPs are currently required to register interests which fall into the following categories:

- Remuneration
- Related undertakings
- Election expenses
- Sponsorship
- Gifts
- Overseas visits
- Heritable property
- Interest in shares

**Remuneration/Related Undertakings**

**Current Provisions**

12. Members are required to register any remuneration received. The MIO defines this to include any salary, wage, share of profits, fee, expenses or other monetary benefit or benefit in kind. Members are also required to register any directorships which they hold which are themselves not remunerated but where the company (or other undertaking) in question is a subsidiary of, or a parent of, a company in which they hold a remunerated directorship.

**Recommendations of the Previous Committee**

13. The previous Committee noted that the current provision on remuneration and related undertakings are relatively unproblematic and it recommended that the current approach be retained in the replacement legislation. The
Committee considered whether the current requirement to register salaries and allowances received from membership of the House of Commons, House of Lords, European Parliament or local councils should be removed. Whilst the Committee recognised that some this information was available publicly elsewhere, it was of the view that if the Register is to act as a central reference point detailing a Member’s remuneration, such information should continue to be registrable.

14. The Committee considered whether MSPs should be permitted to have paid outside interests or employment. Some witnesses in the course of the Committee’s inquiry had suggested that the Parliament and the Standards Committee should be permitted to act where such interests had a detrimental impact on a Member’s Parliamentary duties, for example, where a Member was unable to participate in Parliamentary proceedings because of commitments in relation to outside employment. The Committee concluded that whilst it regarded an MSP’s role as a full time commitment, providing that such work is properly registered and declared, it is a matter for the judgement of individual members as to whether they wish to accept paid outside employment. The Committee also recommended that replacement legislation should ensure that there was a means to require MSPs to provide details of the nature of any work undertaken, its regularity and the level of remuneration.

Election Expenses

Current Provision

15. The provisions in the MIO on the registration of election expenses currently require a Member to register any contributions from a single source which exceed 25% of the actual expenses incurred by him/her. The rules exclude payments to a Member from political parties.

Recommendations of the Previous Committee

16. The draft Bill retained the current approach to the registration of election expenses as set out in the MIO and the Committee agreed that contributions to election expenses from the political party which the Member represents should not be registered. However, the Committee recommended that in reviewing the draft Bill in the new Parliamentary session, its successors could consider whether there is a continuing requirement for election expenses to be registered alongside Members’ obligations to the Electoral Commission under the Political Parties, Elections and Referendums Act 2000.

The Political Parties, Elections and Referendums Act 2000

17. Under this legislation, political parties are required to make four quarterly returns to the Electoral Commission each year, giving details of cash and non-cash donations received by the party headquarters and by ‘accounting units’ of the party if it has them. Each donation report must provide the
information necessary to prove that the donor is a ‘permissible source’ within the provisions of the Political Parties, Elections and Referendums Act 2000 or has been returned. Details of the following donations must be included in the report:

- All donations of more than £5000 accepted by the party HQ
- All donations of more than £1000 accepted by a party accounting unit
- Any impermissible donations of more than £200 received by the party
- Any donations of more than £200 from unidentifiable sources received by the party.

18. During a UK general election period, parties contesting the election are required to submit weekly reports giving details of any donations of more than £5000 received by the party. Political parties must also submit details of ‘aggregated donations’ where an individual has made a number of donations to different sections of a party which do not individually breach the reporting threshold but which in total are more than £5000.

19. The Committee will note that this requirement refers to donations to political parties rather than individual elected Members and also covers contributions not necessarily received in connection with an election campaign.

**Sponsorship**

**Current Provision**

20. The MIO provides that a member has a registrable interest if he or she is sponsored as a member by any person. The MIO defines sponsorship as "financial or material support on a continuing basis to assist him/her as a Member". This does not include constituency plan agreements or other forms of sponsorship of a Member’s constituency party unless the Member receives the sponsorship himself or herself. This is reflected in paragraph 4.3.26 of the Code which was endorsed by the Parliament in February 2000.

**Recommendations of the Previous Committee**

21. The Committee recommended that the replacement legislation should continue to exclude sponsorship that the Member does not receive himself or herself.

**Gifts**

**Current Provision**

22. The MIO requires that all gifts over £250 received by a Member or his or her spouse or cohabite must be registered. This means that gifts must be registered even if they are from a partner or other family member.

**Recommendations of the Previous Committee**
23. The Committee considered that the provision for the registration of gifts had been too widely drawn and that the requirement to register gifts from family members was an unacceptable invasion of MSPs’ and their families’ privacy. The Committee perceived that expressing the threshold for registration as a percentage rather than a set monetary value would inflation-proof the legislation. The Committee therefore proposed that Members be required to register gifts in excess of 0.5% of an MSP’s salary if they are received in connection with their Parliamentary duties. The draft Bill also provides that gifts to Members’ spouses or partners should be registered, but only if they have been received in connection with the Member’s Parliamentary duties. The Committee argued that whilst there was a risk that this could be seen as a potential invasion of family privacy, it would close a potential loophole where an individual or organisation sought to influence a member by sending gifts to his or her spouse.

Preliminary Discussion by the Current Committee

24. In their preliminary discussion on replacing the MIO on 10 February 2004, Committee members expressed the following points:

- Expressing the threshold as a percentage of MSPs’ salaries might not provide sufficient clarity to the public about the requirement for registration. Expressing the threshold in monetary terms such as £250 or £500 would be more understandable.

- The percentage threshold might also not provide sufficient clarity for MSPs and might increase the risk of Members accidentally failing to register a gift which fell within the requirements.

- On the other hand the percentage figure would ensure that the legislation remained current and reflected any changes to MSP salaries over the years. One option might be to use the percentage threshold in the legislation but to publish the actual figure either on an annual basis or at the beginning of each Parliamentary session.

Overseas Visits

Current Provision

25. The MIO requires that Members must register overseas visits, whatever their purpose or nature, except where the travel and other costs are wholly met by the Member, the Member’s partner, parent, son or daughter or the SPCB or Scottish Consolidated Fund. Overseas visits which are funded by another source but approved in advance by the SPCB are not registrable.

Recommendations of the Previous Committee

26. Under the current rules, overseas visits which are funded by the UK Government or the European Union are registrable. The previous Committee considered whether these should be exempt from registration but
concluded that they should not as the Register performs a useful function in recording non-personal travel which has not been funded by the Parliament, the Executive or approved in advance by the SPCB.

Heritable Property

Current Provision

27. Members are required to register interests in heritable property, which is defined as land or any right or interest in or over land, including houses and other buildings. The threshold for registration as set out in the MIO is a market value greater than £25,000 or income greater than £4,000 per annum. Heritable property used as a residence by the Member or his/her spouse is not required to be registered. Members are required to register the location of any registrable heritable property and provide an estimate of its monetary value in terms of market value which should be updated annually on 5 April. Members are also required to specify, where appropriate, the value of any income from the property. Members are not required to specify the identity of tenants from whom they receive rental income.

Recommendations of the Previous Committee

28. The previous Committee considered that the current provisions should be retained with one exception. The Committee noted that under the present rules, neither the MIO nor the Code specifically exempt from registration heritable property formerly used as a residential home which is currently on sale and unoccupied. Registration is therefore required even where a Member has purchased a new home with a bridging loan yet has little or no equity in the original property. The Committee considered this position to be anomalous and therefore proposed that the replacement legislation should explicitly exclude this from registration.

29. The Committee also agreed that Members should not be required to disclose the identity of tenants from whom they receive rental income. To that end the details required to be registered should also not be such as to enable a tenant to be identified from details of the location of the property.

Interest in Shares

Current Provision

30. Members are required to register their own or their partner's or `relevant person's' shareholdings (``relevant person is defined as a person who is subject to the control or direction of a Member in respect of the shareholding). The threshold for registration is where the nominal value (that is the share price at issue) is greater than 1% of the issued share capital or has a nominal value in excess of £25,000. The provisions are broadly similar to those in place at Westminster, although the rules in the House of Commons' Code of Conduct specify `dependent children' rather than the wider class of `relevant person' as employed here. The House of Commons'
Code also requires MPs to state the nature of the company’s business in each case.

Recommendations of the Previous Committee

31. The previous Committee considered whether the nominal value of a Member’s shareholding is an appropriate measurement. The Committee believed that the market value of a shareholding is a more apposite measurement as the nominal and market values often differ markedly and the former is a poor measure of the true value of a shareholding. For example, BT shares had a nominal value of 50p at launch. On 25 February 2004, BT shares were priced at £1.78 each. The previous Committee recognised that market values may fluctuate and, therefore, proposed that Members be required to update the value of their interest in shares on an annual basis at the beginning of the financial year. The Committee recommended that the current threshold of £25,000 remains appropriate and it also proposed that the 1% share in the issued share capital of a company should be unchanged in the replacement legislation.

Preliminary Discussion by the Current Committee

32. In their preliminary discussion on replacing the MIO on 10 February 2004, Committee members expressed the following points:

- Is there a need for a broader definition of financial interest? Should a policy with a with-profits bonus attached to it be registrable? Should unit trusts be registrable?

33. In developing its policy on gifts, the Committee may wish to consider what financial interests should be included within the ambit of ‘shares’. Examples could include unit trusts, bonds, securities. (Comment: whilst it would be possible for Members to register holdings in unit trusts and list the name of the fund and the number of units held, the Committee may consider that it would be unduly burdensome to require Members to provide details of the holdings within each unit trust or to declare them, not least because holdings within the fund will vary considerably during the course of a financial year and it would be unreasonable to require Members to monitor this.)

STANDARDS COMMITTEE CLERKS
MARCH 2004
SCOTTISH PARLIAMENTARY STANDARDS COMMISSIONER

INFORMATION STRATEGY

Background

For the Scottish Parliament to enjoy the support and respect of the public, Members of the Parliament (MSPs) need to be seen to have probity and high standards in carrying out their Parliamentary duties. Parliament has created a Code of Conduct¹ for MSPs including arrangements for registering and declaring any interests which might conflict with their public duties. Parliament has also recognised² that there needs to be a way of investigating allegations that an MSP has breached the Code of Conduct, in a way that carries the confidence both of MSPs and the public.

The Scottish Parliamentary Standards Commissioner Act 2002 created the post of Standards Commissioner and set out the remit of the job. The Commissioner plays a part, as an independent investigator, in the first half of a four stage process for dealing with complaints that MSPs have breached the Code of Conduct. The Commissioner first decides about the admissibility of complaints under set rules, then, if appropriate, carries out an investigation with powers to call for witnesses and documents. He reports the results to Parliament by sending a report to the Standards Committee.

Section 3(5) of the Scottish Parliamentary Commissioner Act 2002 permits the Commissioner to “give advice to a member of the Parliament or a member of the public about the procedures for making a complaint to the Commissioner and the procedures following on the making of such a complaint”. Parliament decided to split the investigatory role from that of giving advice generally about standards and the Code of Conduct and whether a proposed course of action might breach the Code, so that the Commissioner could not be in the position of investigating conduct on which he had earlier advised. This is set out in Section 3(6). Giving such general advice is the responsibility of the Standards Committee Clerks.

The independent investigatory role is intended to give the public confidence that a robust and objective approach is being taken, which might not fully be the perception were Parliament to do the investigation by itself, e.g. by the Standards Committee, composed of MSPs. At the same time, MSPs need to feel that investigation will be balanced and fair and that they will be protected from insubstantial or inappropriate complaints. The Commissioner is accountable to both Parliament and the public. The legislation requires that the Commissioner should make an annual report to Parliament with information on numbers of complaints received, numbers of investigations carried out etc. This would be publicly available.

It follows from the above that the role cannot be fully effective unless both MSPs and members of the public they represent:

- know of the existence of the Commissioner
- know what he or she is there to do
- know what he or she can’t do and who else may be relevant to approach
- know how to make a complaint and what the process is once a complaint is made

There is also a legal requirement under the Data Protection Act 1998 to inform people about who holds their personal data, the uses to which it is put and to whom it might be disclosed. Although much processing of data by the Commissioner might strictly be exempt from this requirement, there is no reason not to follow the “fair processing principle.” The Freedom of Information (Scotland) Act 2002 will also require public bodies to have a publication scheme to make information available to the public about their activities. The Standards Commissioner is not specifically listed in this legislation at present though it may be that the post will be added in future. At any rate it would be good practice to operate within the spirit of that requirement of the Freedom of Information Act. It is good practice also to inform complainers what they can do if dissatisfied with the Commissioner’s actions and decisions.

There is therefore a need for the Commissioner to make information of various sorts available to people in various appropriate ways.

It is important to appreciate the point of view of the member of the public who may have a grievance about an MSP. They may have an original complaint with another agency with which they have sought help from the MSP. Other agencies may be involved, e.g. Public Services Ombudsman or Legal Services Ombudsman. From this point of view, the complainer does not need a series of detailed leaflets about the various Ombudsmen and Commissioners, but rather a large scale map showing the various bodies, their respective roles and the links and boundaries between them. (This need has been recognised by the group of Ombudsmen and Commissioners in Scotland, the Dunedin Group, and a lead is being taken by Audit Scotland in producing the necessary document. The Scottish Parliamentary Standards Commissioner will contribute to this.)

Even within the Parliamentary system matters can be complex and opaque for a potential complainer e.g.
- complaints about breaches of the Code of Conduct, including the Members’ Interests Order and any replacement, go to the Standards Commissioner.
- complaints about misuse of the allowances system go to the Scottish Parliamentary Corporate Body
- complaints about the conduct of a Member in the Chamber go to the Presiding Officer.
- complaints about the conduct of a Member in committee go to the committee convener
- complaints about Ministerial actions breaching the Ministerial Code are dealt with by the First Minister’s Office
- complaints about Cross Party Groups go to the Standards Committee

It is frustrating for a complainer to have to be redirected to another destination or to be given wrong information which wastes time and effort. If people have a complaint about an MSP, they need information as early as possible about where to direct their complaint. This need is illustrated by the fact that, of the 16 complaints so far considered inadmissible, 7 (44%) failed on the “relevance” test.
If the Standards Commissioner is the correct destination, then they need further information about the Commissioner and the complaints process, including Data Protection Act “fair processing” information, and what to do if dissatisfied with the Commissioner.

Summary of principles

- It is desirable to provide information in order to make people aware of the Standards Commissioner and able to use his service efficiently and effectively, and to increase public confidence in the system to regulate the conduct of MSPs
- Information should be provided as far as possible in a way that takes into account how things look from the stance of the potential complainer
- Given the multiplicity of bodies potentially involved, information needs to be provided with different levels of focus. This will involve cooperation amongst agencies
- The Commissioner will wish to inspire public confidence by being perceived as being helpful and as open as possible, consistent with the need to maintain appropriate confidentiality
- A range of appropriate communication methods should be used, to reach as many appropriate people as possible
- Where individual requests are made for information held by the Commissioner, these requests should be responded to timeously.

Methods

Levels of information

The discussion above suggests that there should be three levels of information provided.

1. A large scale “map” of various Ombudsmen, Commissioners etc. who may deal with complaints about public bodies and public and related functions. This would show where the Standards Commissioner fits into the overall provision.
2. Information about complaints about MSPs in particular, showing where the Commissioner fits in alongside other possible destinations for complaints about MSPs.
3. More detailed information about the Scottish Parliamentary Standards Commissioner and the process in which he or she plays a part.

Vehicles

1. Leaflets. These are convenient to send out to enquirers and also to have available in appropriate places, e.g. public libraries and Citizen’s Advice Bureaux.
2. Website information. This makes information easily and quickly available for those able to make use it. Not everyone has access to the internet, of course. The Commissioner should seek to have appropriate links on the websites of other agencies. He should also develop a website of his own. This would be
preferable to having a section (as opposed to a link) on the Parliament website as it would give a better perception of the independence of operation of the Standards Commissioner.

3. MSP and Parliament staff induction. Induction on standards issues is currently done by the Standards Committee clerks. This is appropriate, but the Commissioner could participate, demonstrating his presence to new MSPs and briefly outlining his role. There would also be a useful role in relation to staff in the Parliament Information Office etc.

4. Annual report to Parliament

5. Accepting invitations to talk to interested groups and organisations.

6. Last, but not least, the media, broadcast and print. This is clearly a potential way of informing larger audiences about the role, through newspaper interviews, taking part in radio and TV programmes etc. However this is a difficult and rather sensitive subject in relation to the Standards Commissioner and a media strategy will be developed and presented as a next step.

**Information strategy action plan**

1. Contribute to Audit Scotland-led production of “large-scale map”. (A small financial contribution will be required).

2. Produce information on complaints about MSPs with Scottish Public Services Ombudsman’s Office

3. Produce leaflet on role of Standards Commissioner.

4. Decide on print run and distribution of leaflets in discussion with Parliament information services and relevant others.

5. Ensure information provided on Parliament and other websites, and in future links to own website.


7. Develop material for website. This will be similar to 3 above, together with annual reports, strategies and links to other relevant sites.

8. Discuss induction proposal with Standards Committee Clerks and other Parliament officials

9. Accept relevant invitations from groups, organisations to give information about role.

10. Develop Publication Scheme in keeping with Freedom of Information (Scotland) Act 2002

Dr J A T Dyer  
Scottish Parliamentary Standards Commissioner  
26 February 2004
References


SCOTTISH PARLIAMENTARY STANDARDS COMMISSIONER
(an INDEPENDENT INVESTIGATOR of COMPLAINTS about the
CONDUCT of MSPs)

WHO IS THE COMMISSIONER?
The current Commissioner is Dr Jim Dyer OBE, who became the Scottish Parliament’s first Standards Commissioner in April 2003. He was appointed following an open recruitment by the Parliament’s Corporate Body, with the agreement of Parliament, for a three year term with a possibility of renewal for up to five years.

WHAT DOES THE COMMISSIONER DO?
The Commissioner investigates complaints that an MSP has broken the Code of Conduct for MSPs. He does this independently of Parliament and reports his findings to Parliament, but within a set of rules laid down in an Act of Parliament, the Scottish Parliamentary Standards Commissioner Act 2002.

The Code of Conduct gives guidance to MSPs on how to carry out their Parliamentary duties. Breaches of the Code cover things like not being accessible enough to constituents, not making known private interests that might conflict with work as an MSP, accepting rewards in return for promoting particular issues and giving favoured access to people who use lobbying firms. The Code is published on the Parliament website on the MSP page, at http://www.scottish.parliament.uk/msps/coc/coc.pdf. If you do not have access to the internet, a copy can be made available by contacting the office of the Clerks to the Standards Committee at the Parliament address given below (Tel: 0131 348 5177)

WHAT CAN THE COMMISSIONER NOT DO?
The Commissioner only investigates whether or not the MSP has done what has been complained about and whether that means that the Code of Conduct has been broken. Parliament decides what consequences should follow if there has been a breach of the Code.

The Commissioner deals with complaints only about MSPs, not their staff or other employees of the Parliament.

The Commissioner does not deal with ALL complaints against MSPs:
• Complaints about the conduct of MSPs in a meeting of Parliament go to the Presiding Officer
• Complaints about the conduct of MSPs in a committee go to the committee convener
• Complaints about Cross Party Groups go to the Standards Committee
• Complaints about misuse of allowances go to the Scottish Parliament Corporate Body
• Complaints about Ministers acting as Ministers, not as MSPs, are dealt with by the office of the First Minister at St Andrew’s House.

The Commissioner does not give general advice about the Code of Conduct or whether a proposed course of action might breach it – that is done by the Standards Committee Clerks.

HOW DO YOU MAKE A COMPLAINT ABOUT AN MSP?
Complaints should be made in writing to the Standards Commissioner and signed by the complainer, giving his or her address. (While email can be used for communication it can’t be used for the original complaint.) Complaints should name the Member of Parliament concerned and set out the facts of the complaint with any supporting evidence. They should be made within one year of the complainer becoming aware of the conduct complained about. Complaints not meeting these conditions, e.g. anonymous complaints, may not be taken further – the Standards Committee of the Parliament decides this, rather than the Commissioner. It is helpful if complainers wish to identify which parts of the Code of Conduct they believe to have been broken.

WHAT HAPPENS NEXT?

The Commissioner informs the MSP about the complaint and tells him or her who has complained, unless there is a good reason not to. In doing this, the Commissioner usually copies to the MSP the letter of complaint and supporting material, so that the MSP is fully aware of what is being complained about. At this stage the Commissioner invites the MSP to respond.

Stage 1 – is the complaint admissible? The Commissioner now has to decide whether the complaint passes three tests set down in law. To go on to Stage 2 (full investigation), the complaint has to be:

- **Relevant** – it has to be about the conduct of an MSP. It must not be an “excluded complaint” (one not in the remit of the Commissioner) unless the Standards Committee have directed the Commissioner to investigate it. It must potentially involve a breach of the Code of Conduct – it must therefore be about the MSP carrying out Parliamentary duties, not wider political activities.

- **Procedurally correct** – it should meet the conditions mentioned under “How Do You Make a Complaint about an MSP?”

- **Of enough substance to justify further investigation** (there is enough evidence to suggest that the conduct complained about may have taken place).

Stage 1 is expected to take no longer than 2 months – if longer the Commissioner has to report on why to the Standards Committee, and, if it would not put at risk the outcome of the investigation, the MSP and the complainer.

Stage 2 – did the MSP carry out the behaviour complained of and did this mean that the Code was breached?

At this Stage the Commissioner decides what is necessary to investigate the complaint and sets about it. He has powers if necessary to compel witnesses to attend and to produce documents, with a fine or imprisonment for non-compliance. Usually he interviews people in a fairly informal way, though interviews must be tape recorded so that a record is available of what was said. Those being interviewed can be supported by another person if they want and can have an interpreter provided if necessary. If a summary of an interview is to be attached to the Commissioner’s report, the person interviewed has to have a chance to view it and suggest any corrections of fact, which are either used to change the report or attached to it.

At the end of the investigation the Commissioner writes a report giving his findings. He can draw conclusions on the balance of probability. The MSP must have a chance to see the draft report and suggest any corrections of fact, which are dealt with as above. The report goes to the Standards Committee of the Parliament who may or
may not accept the conclusions of the Commissioner. The Committee can ask the Commissioner to carry out further investigation or it can carry out its own investigation. Once investigation is over, the Committee discusses what action to recommend to Parliament if the complaint has been upheld.

Some serious breaches of the Code are criminal offences. In these cases the Commissioner would hand matters over to the Police to investigate. Once that process is over the normal process can be resumed.

Stage 2 is expected to take no longer than 6 months – if longer, the Commissioner has to report in the same way as at Stage 1.

WHAT OUTCOME CAN YOU EXPECT?

If the complaint is not admissible at Stage 1, that is the end of the matter. If it goes to Stage 2, there will either be a finding of a breach of the Code or not. If there has been a breach, it is for Parliament to decide, with a recommendation from the Standards Committee, what consequences there should be for the MSP. Parliament can prevent or restrict a Member from taking part in its proceedings for a period of time. In certain circumstances a member can be totally excluded for a time. Parliament can also withdraw a Member’s rights and privileges including right of access as a Member to Parliamentary facilities, services and buildings. Criminal offences carry a penalty of a fine up to £5000, but that is a matter for the Courts.

WHAT IF YOU ARE NOT HAPPY ABOUT THE COMMISSIONER’S DECISION?

At Stage 1, the Commissioner is given sole say about the admissibility of a complaint. This is because he acts independently of Parliament, but the consequence is that there is no in-built mechanism of appeal of the Commissioner’s decision. The Commissioner is potentially open to legal challenge however through judicial review should it be considered that he has not acted properly in law. At Stage 2 the Standards Committee is not bound by the Commissioner’s findings, so that a dissatisfied party could make representation to the Committee.

CONTACTING THE COMMISSIONER

- **Write to**
  
  The Standards Commissioner
  
  The Scottish Parliament
  
  George IV Bridge
  
  Edinburgh
  
  EH99 1SP

- **Telephone**
  
  Direct Tel: 0131 348 6666
  
  Mobile: 07909 872726
  
  (RNID Typetalk calls welcome)

- **Fax**
  
  0131 348 6834

- **email**
  
  standards.commissioner@scottish.parliament.uk
ACCESS
The Commissioner is committed to ensuring that the complaints procedure is as accessible as possible. Please contact the Commissioner if you have any specific requirements (for example, if you need correspondence from the Commissioner to be provided in a specific format, such as Braille or large print).

If you require a copy of this leaflet in a different language or format (e.g. Braille, audio tape, etc.) please contact the Commissioner.

DATA PROTECTION ACT STATEMENT
For the purposes of the Data Protection Act 1998 (‘the Act’), the Commissioner is the data controller of all information capable of identifying living individuals (‘personal data’) contained in or relating to complaints processed by him – for example, the names and other personal details of complainers, MSPs and third parties. The Commissioner keeps all personal data securely for at least 5 years. Such information is used by the Commissioner to assist him in doing his job of investigating and dealing with complaints about MSPs. It is not disclosed other than to help the Commissioner carry out his job or where required by law or Parliamentary Standing Orders – the main example being to produce his report for the Standards Committee. This report is usually made public by the Standards Committee along with its own report to Parliament.

The Commissioner also makes an annual report to Parliament, which may exceptionally contain personal data. The Commissioner might also require to pass information to the police and prosecuting authorities if a complaint potentially involves the commission of a criminal offence by an MSP. Individuals can ask to access personal data held about them by the Commissioner (‘subject access’) in return for a fee of up to a maximum of £10. Because the Commissioner performs a regulatory function, some of the processing he carries out may be exempt from some of the provisions of the Act (e.g. the subject access right) in some circumstances.
THIRD MEETING OF THE STANDARDS COMMITTEE
SUBMISSION TO THE STANDARDS OF CONDUCT COMMITTEE OF THE
NATIONAL ASSEMBLY FOR WALES

1. At its meeting on 10 February 2004, the Standards Committee agreed to respond to a request from the Standards of Conduct Committee of the National Assembly for Wales.

2. The Standards of Conduct Committee of the National Assembly for Wales is currently undertaking a review of the Assembly’s standards framework. As part of this review, the Committee is considering establishing a Statutory Commissioner for Standards. The Committee invited written evidence from the Standards Committee and indicated that there might be a possible invitation to give oral evidence at a later stage.

3. At its meeting on 10 February, the Committee agreed to submit written evidence to the National Assembly for Wales.

The Committee is invited to consider the attached draft submission.

STANDARDS COMMITTEE CLERKS
MARCH 2004
WRITTEN SUBMISSION TO THE STANDARDS OF CONDUCT COMMITTEE OF THE NATIONAL ASSEMBLY FOR WALES

Introduction

1. This paper provides an overview of the arrangements under the Scottish Parliamentary Standards Commissioner Act 2002 in response from a request from the Standards of Conduct Committee of the National Assembly for Wales.

Background to the Current Arrangements

2. The proposal to appoint a Standards Commissioner on a statutory basis came at the conclusion of the Models of Investigation of Complaints inquiry undertaken by the previous Standards Committee in 1999-2000. This inquiry reviewed four possible investigative options: investigation by the Standards Committee, by a Standards Commission, by a non-statutory Standards Officer, or by a Standards Commissioner appointed under statute. The key principle underpinning the Committee’s recommendation was the need for an independent element to be introduced into the complaints process. The Committee considered this to be an essential factor in securing the confidence of complainers, MSPs and the public at large in the Parliament’s handling of allegations of misconduct. As will be seen below, however, the complaints regime still recognises the central role played by the Standards Committee and the Parliament itself, both of which under Standing Orders and the Scotland Act have responsibilities in dealing with complaints against Members.

3. The previous Committee considered that statutory powers to compel evidence held in the Commissioner’s own right were a necessary bulwark of his or her independence. The Committee recognised that although it would have been quicker to appoint a Standards Officer on a non-statutory basis, he or she would have had to rely on the Committee’s own powers to summon witnesses thus risking undermining his or her independence.

4. The structure of the complaints process which is set out below also reflects the previous Committee’s desire to strike a balance between the requirement for transparency with the need to avoid ongoing investigations being prejudiced by publicity or becoming a ‘trial by media’. The Commissioner’s initial consideration of a complaint and any subsequent investigation take place in private and independently of the Committee. The Committee’s initial consideration of the Commissioner’s report also takes place in private session. This is necessary because the Committee could decide to refer the report back to the Commissioner for additional inquiries or to undertake its own investigation and publicity could prejudice this. Subsequent elements of the complaints process take place in public session, for example any oral evidence taken by the Committee. The

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1 Standards Committee 4th Report 2000, Models of Investigation of Complaints, SP Paper 186
Committee’s decision is also announced in public and its report and that of the Commissioner together with any relevant evidence are also published.

5. Following publication of the Committee’s proposals, a temporary Standards Adviser was appointed as an interim measure until the Parliament had an opportunity to consider the Committee’s Bill.

The Scottish Parliamentary Standards Commissioner Act 2002 and the Complaints Process

6. Section 10 of the Parliament’s Code of Conduct (attached) provides an overview of the arrangements for investigating complaints against MSPs.

7. Appointed under the Scottish Parliamentary Standards Commissioner Act 2002, the Standards Commissioner is responsible for investigating complaints against MSPs concerning the conduct of their Parliamentary duties. Specifically, he or she is responsible for the first two stages of the four stage complaints process:

   • **Stage 1:** The Commissioner establishes whether the complaint is admissible. This stage is an initial sift which enables the Commissioner to screen out complaints which are clearly without foundation or fall outwith his or her remit.
   • **Stage 2:** If the complaint is admissible, the Commissioner is responsible for carrying out a full investigation. At the conclusion of the investigation, he or she is responsible for preparing a report for the Standards Committee.
   • **Stage 3:** The Standards Committee’s consideration of the Commissioner’s report. The Committee is not bound by the Commissioner’s findings and may conduct its own investigation. At the conclusion of this stage, the Committee publishes its own report and that of the Commissioner. The Committee’s report will set out whether or not there has been a breach of the Code of Conduct and if so, whether it wishes to recommend the imposition of sanctions.
   • **Stage 4:** The Parliament debates the Standards Committee’s motion on sanctions.

8. The Act provides the Commissioner with statutory powers to compel witnesses and the production of evidence. The Commissioner is also responsible for producing an annual report setting out a statistical analysis of complaints dismissed at Stage 1, details of complaints which proceeded to a full Stage 2 investigation and other matters.

9. The Commissioner’s remit is restricted to the investigation of complaints relating to Members’ conduct of their Parliamentary duties. Certain complaints are excluded from the remit of the Commissioner. Complaints concerning the misuse of allowances, for example, are referred to the Scottish Parliamentary Corporate Body (SPCB); complaints concerning a
Member’s conduct at a meeting of the Parliament or Committee are referred to the Presiding Officer or relevant Committee Convener.

10. The Act also prohibits the Commissioner from making any recommendation on sanctions or from providing advice to Members, for example on the Register of Members’ Interests. In relation to the latter, the previous Standards Committee believed that responsibility for investigating complaints and the provision of advice on standards issues should be separated in order to avoid a situation where the Commissioner might be called on to investigate a matter on which he or she had previously offered advice.

11. The post of Commissioner is a part time appointment and is home-based. The specification for the post indicated that the Commissioner would be expected to spend on average between five and ten days a month on the work but in the event of a substantial inquiry might be required to work full time for a period. The Commissioner receives a salary of £36 500.

12. Following an open recruitment process held in the autumn of 2002, Dr Jim Dyer was recommended for appointment by the selection panel. The Parliament agreed to Dr Dyer’s appointment on 30 January 2003 and Dr Dyer took up the post on 1 April 2003. He has been appointed for a period of three years with the possibility of one further reappointment for up to five years.

13. The Commissioner’s budget is currently set at £100 000 which includes provision for the Commissioner’s salary and National Insurance contributions. The Act enables the Commissioner to appoint staff ‘with the consent of the Parliamentary Corporation as to numbers’. The Commissioner has not to date appointed any staff.

14. The Act also enables the Commissioner to contract for support services to carry out his functions, for example, legal advice. Again the Commissioner requires the consent of the SPCB. The SPCB has approved the Commissioner having a contract with an Edinburgh law firm to provide legal support. All costs for legal support will be met from the Commissioner’s existing budget, and the contract has been let on a short-term basis for one year to allow the SPCB to consider the usage of such advice and possible future options.

The Operation of the New Arrangements in Practice

15. The arrangements under the Scottish Parliamentary Standards Commissioner Act 2002 are relatively new and it is difficult for the Committee to assess how they are operating at present. However, the Committee intends to keep the arrangements under review. For example, the Committee intends to consider whether the Commissioner’s draft report should be disclosed to the complainer at the same time that it is shown to the MSP who is the subject of the complaint.
16. In reviewing the operation of these procedures, the Committee wishes to ensure that they remain fair, open and proportionate. The Committee is also reviewing the rules on the registration and declaration of Members’ interests and intends to bring forward proposals for replacement legislation in a Committee Bill later this year. The Committee’s objective in developing this draft legislation will be to ensure that it complements the arrangements for handling complaints against MSPs creating a standards framework in the Scottish Parliament which is rigorous, transparent and proportionate.
THIRD MEETING OF THE STANDARDS COMMITTEE
COMPLAINTS AGAINST MSPS – ADMINISTRATIVE PROCEDURES

Background

1. This note sets out possible principles for handling correspondence relating to a complaint under investigation by the Commissioner at Stage 1 or 2 of the investigative process or being considered by the Standards Committee at Stage 3. The principles are aimed at striking a balance between the need to ensure the accessibility of the Commissioner and the Committee whilst maintaining the integrity of the complaints process.

Previous Consideration

2. In developing the four stage complaints process and the Scottish Parliamentary Standards Commissioner Bill, the previous Standards Committee did not lay down any detailed procedure for handling correspondence relating to a complaint under active investigation by the Commissioner or consideration by the Committee.

3. In its eighth report, Standards of Conduct in the House of Commons, the Committee on Standards in Public Life heard evidence that some MPs who were the subject of a complaint or their associates had been known to lobby members of the Standards and Privileges Committee in connection with their case. Evidence was also received concerning possible unauthorised disclosures of information relating to complaints under investigation. The Committee on Standards in Public Life concluded that:

   It is wholly inconsistent with membership of the Committee that Committee members themselves should talk about cases outside the Committee meetings; not only may it affect the outcome of a case but it undermines the integrity of the process. Similarly, all MPs should respect the process of investigation rather than seeking to lobby Committee members. We recommend that there should be requirements both on MPs and Committee members to prevent any discussion of cases outside the formal processes for handling complaints.\(^1\)

4. In response to this recommendation, the Standards and Privileges Committee and the Parliamentary Commissioner for Standards include the following provision in their joint statement on procedure:

   The Committee has made clear that it would regard an attempt by anyone to lobby its members, individually or collectively, with the intention of influencing its view of a case, as entirely unacceptable.\(^2\)

Procedures for Handling Correspondence Relating to Complaints under Active Investigation or Consideration

5. The following draft principles are intended to balance the need to ensure that both the Commissioner and the Committee remain accessible whilst avoiding any possible perception that such contact might be inappropriate

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\(^{1}\) Paragraph 7.33

\(^{2}\) Paragraph 30, Procedural Note 2, Complaining Against an MP
or aimed at influencing the Commissioner or the Committee which would undermine the integrity of the complaints process. They are also intended to protect the independence of the Commissioner at Stages 1 and 2 of the complaints process. The principles also recognise that parties to a complaint may have legitimate questions concerning procedure. Whilst the principles propose a means of handling additional information and possible evidence, it is anticipated that such material will be minimal as both the MSP who is the subject of the complaint and the complainer are afforded an opportunity to bring such information to the attention of the Commissioner at Stages 1 and 2.

6. The Committee is invited to discuss and agree the following principles:

- Any inquiry concerning the complaints procedure should be addressed to the Commissioner if the complaint is at Stage 1 or 2 and to the Standards Committee Clerks during Stage 3 or 4.

- Any additional material relating to the complaint should be directed to the Commissioner during Stage 1 and 2 of his investigation.

- Any additional material relating to a complaint at Stage 3 should be addressed to the Committee Clerks who will make this material available to the Committee when it carries out its initial consideration of the Commissioner’s report.

- When the Standards Commissioner’s report is submitted to the Parliament, the Committee Clerks will write to the parties to the complaint to advise them that the complaint is now at Stage 3.

- Should the Committee decide to conduct its own investigation at Stage 3, the Committee will provide guidance to the parties to the complaint on the format and timing for making written submissions to the Committee.

- Any contact aimed at influencing members of the Standards Committee either individually or collectively or ‘lobbying’ by any party to a complaint which is under investigation by the Commissioner or consideration by the Committee will be viewed as unacceptable.

- Should a member attempt to influence the Committee in this way, their behaviour would be viewed as discourteous and disrespectful towards the members of the Committee. Such behaviour could, of itself, be the subject of a complaint against that member.

- Material sent directly to members of the Standards Committee will be disregarded by the Committee.

7. The Committee may wish to consider including the above principles in section 10 of the Code of Conduct.

STANDARDS COMMITTEE CLERKS - MARCH 2004
THIRD MEETING OF THE STANDARDS COMMITTEE
DISCLOSING THE STANDARDS COMMISSIONER’S DRAFT REPORT TO THE COMPLAINER

Background

1. The Committee is invited to consider whether the Standards Commissioner’s report should be shown to the complainer at any stage during the investigation of a complaint by the Standards Commissioner or the Committee. The stages at which the Committee may wish to consider such disclosure are:

- Stage 2: the complainer could be given a copy of the Commissioner’s report in draft at Stage 2, prior to the report being finalised and submitted to the Standards Committee; and

- Stage 3: the complainer could be given a copy of the Commissioner’s final report in the event that the Committee decides to carry out its own investigation into a complaint at Stage 3.

Current Procedure

2. The current procedure is that the complainer receives a copy of the Commissioner’s report when it is published as an annexe to the Standards Committee’s report at the conclusion of the Committee’s consideration of a complaint.

3. Under the Scottish Parliamentary Standards Commissioner Act 2002¹, the Member who is the subject of the complaint must be shown a copy of the Commissioner’s report in draft if it concludes that he or she breached the Code or Members’ Interests Order. The Member is given the opportunity to make representations on the draft report and any such representations are annexed to the Commissioner’s final draft.

4. The inclusion of this provision is consistent with the procedure followed by successive governments at Westminster following the 1966 report of the Royal Commission on Tribunals of Inquiry under the chairmanship of Lord Justice Salmon, which stated that it is more difficult to counter criticism when it appears in a final report. The provision is also similar to the rights afforded to councillors and members of devolved public bodies under section 14(2) of the Ethical Standards in Public Life (Scotland) Act 2000 (asp 7) in relation to proposed reports of the Chief Investigating Officer.

5. Whilst the complainer is not shown a copy of the draft report, he or she is shown a draft summary of any interview with him or her which the Commissioner intends to include in his or her report².

¹ Section 9(3)
² This requirement is set out in the Standards Committee’s Directions to the Commissioner made under section 4 of the Act.
Arguments in Favour of Retaining the Current Procedure

Role of the Complainer, Commissioner and Committee

6. In examining the rationale for the current procedure, it is necessary to first explore the respective roles of the complainer, the Standards Commissioner and the Standards Committee in the complaints process.

7. The complainer initiates the complaint, which is then investigated by the Standards Commissioner who prepares a report. The investigation focuses on the conduct of the Members who are the subject of the complaint and judges their actions against the standards and rules set out in the Code of Conduct or the Members’ Interests Order. The Commissioner is responsible for the conduct of his or her investigation and for his or her findings and conclusion. The role of the Standards Committee is to consider that report, to make a decision in accordance with paragraph 10.2.33 of the Code and subsequently make a report to Parliament.

8. The purpose of any investigation of a complaint is not to determine a dispute between the complainer and the Members complained against but to investigate and conclude whether or not there has been a breach of the Code of Conduct. For those who are the subject of a complaint an adverse finding can have serious consequences. Natural justice therefore requires that they be given an opportunity to answer the allegations. The position of the complainer can be seen as quite different: the complainer is not the subject of the investigation and faces no sanction. For the purposes of the investigation, the complainer is primarily a witness as to facts but that is not to say that a complainer should not be given appropriate opportunity to place all of their relevant evidence before those conducting the investigation.

9. The position of the complainer in this process differs from that of a litigant in civil proceedings. For example, he or she has no particular right to appear before the Standards Committee at Stage 3. Similarly, although the complainer may decide to withdraw the complaint at Stage 2, the Commissioner may recommend to the Standards Committee that his or her investigation should nevertheless continue. The complaint cannot be withdrawn by the complainer at Stage 3.

Privacy

10. Stages 1 and 2 of the complaints process are conducted in private to avoid prejudicing the Commissioner’s investigation. Similarly the Committee’s initial consideration of the Commissioner’s report at Stage 3 takes place in

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3 Standards Committee, 4th Report 2000, Models of Investigation of Complaint, at paragraph 46
private to avoid prejudicing any further inquiries by the Commissioner or the Committee into the matter.

11. Whilst the report is passed to the Member who is the subject of the complaint, he or she is informed that the report remains confidential and should not be disclosed. In the event of an unauthorised disclosure, the Member could be found in breach of the Code. The Standards Committee has no such sanctions over complainers who are not MSPs. Disclosure of the Commissioner’s report to an unauthorised person or to the media could prejudice the Committee’s consideration of the complaint at Stage 3, particularly if it subsequently decides to refer the complaint back to the Commissioner for further inquiries or to undertake its own investigation.

12. Whilst it might be possible to require a complainer to sign a confidentiality agreement, enforcement might be problematic and if disclosure of the report has already taken place this would not prevent the investigative process being undermined.

Delaying the Process

13. Disclosing the Commissioner’s draft report to the complainer at Stage 2 could lead to correspondence and to delays in completing the complaints process. There could also be a risk that disclosure at this stage could develop into an appeal against the Commissioner’s findings. As indicated above, the Commissioner is responsible for his or her findings and it is for the Standards Committee to decide whether or not to accept them. This problem could be circumvented, however, if the complainer was shown the report without the Commissioner's conclusion (see below). Similarly, the complainer could be given a set period to respond.

14. Disclosing the Commissioner’s final report to the complainer in the event of a Stage 3 investigation may also generate correspondence challenging the report and this may prolong the Committee’s Stage 3 investigation. Under the Code of Conduct it is for the Committee to determine what matters are relevant to its investigation and what procedure is to be followed. Correspondence that the Committee considers irrelevant to the particular issues under investigation may therefore be disregarded and need not unduly delay the process. The Committee could also consider giving the complainer a set period within which to respond with any comments to offset any concerns about possible delays.

Other Complaints Systems

15. The practice adopted by other complaints systems in the UK varies. Although there are some exceptions, in general the complainer is not given an opportunity to see or make representations on the investigative body’s report.

16. The Parliamentary Commissioner for Standards and the Standards and Privileges Committee at the House of Commons follows the same
approach as the Scottish Parliament. The complainer receives a copy of the Committee’s and Commissioner’s reports on the day of publication. Prior to this, the Commissioner shares a draft of the factual sections of his report (without the conclusions) with the Member but not with the complainer.

17. Under the complaints procedure developed by the Standards Commission of Scotland under the Ethical Standards in Public Life (Scotland) Act 2000, the individual who is the subject of the complaint is given an opportunity to make representations on the Chief Investigating Officer’s draft report. The complainer is not given a copy of the report at this stage. The draft report is also copied to the public body concerned for information. The final report is submitted to the Commission and copied to the individual who is the subject of the complaint and to the public body. The complainer is advised that the report has been sent to the Commission. On receipt of the report, the Commission may decide to hold a hearing on the matter, and it may publish the report and send it to whomever it thinks appropriate.

18. The Scottish Public Services Ombudsman carries out an evidence check with the complainer and shows the factual element of the report to the complainer without her conclusions and findings. Similarly, the practice of the previous Local Government Ombudsman was to show the complainer the report in draft minus the findings. The Health and Parliamentary Ombudsmen, however, did not show the report to the complainer on the grounds that the complainer was not the subject of the report. If the complainer had been interviewed during the investigation, he or she would be asked to check the interview note for accuracy. The Scottish Prisons Complaints Commission does not share its reports and draft recommendations with the complainer. Once the Chief Executive of the Scottish Prison Service has responded, a copy of the Commission’s recommendation and the SPS’s response is sent to the complainer. The Scottish Legal Services Ombudsman does not send a draft Opinion to any party.

Arguments in Favour of Disclosure

19. The following arguments may support the case for disclosing the draft report to the complainer.

Fairness to Both Parties

20. The existing system could be seen as being unfair to complainers: the Member who is the subject of the complaint has an opportunity to make any representations to the Commissioner concerning his/her findings and conclusions whereas the complainer does not. However, as argued above, the complaints procedure is not a dispute resolution process between two parties. The Member is the subject of the investigation and it is his or her conduct which is being judged against the standards set out in the Code of Conduct. Nevertheless, in some cases it could be argued that the
complainant’s conduct is relevant to the determination of a complaint where that behaviour has impacted on the MSP’s conduct. In such instances, the Commissioner may have to reach a judgement or comment on the conduct of the complainer. It could be argued that in this situation, the complainer should have the same rights as those afforded to the MSP in making representations on the Commissioner’s draft report.

21. In the event that the Committee conducts a Stage 3 investigation into any aspect of the complaint, the Commissioner’s report is relevant evidence that the Committee will consider during its deliberations. The Committee may ask the complainer to provide written or oral evidence on matters referred to in the report. It may seem unfair to complainers that they should be asked to answer questions about matters raised in a report that they have not seen. It could in fact assist the Committee’s investigation if the complainer and other witnesses are able to answer the Committee’s questions with knowledge of the context in which the questions arose.

Accuracy

22. By giving the complainer sight of the draft report, the Commissioner may be able to avoid any inadvertent errors or mistaken assumptions. This would reduce the possibility of a challenge to the report at a later stage. This argument might tend towards supporting the approach taken by the Scottish Public Services Ombudsman and the former Local Government Ombudsman whereby the complainer was shown a copy of the report minus the findings. With this approach, the Commissioner would show the complainer the sections of the report which dealt with the Commissioner’s findings on the facts. The Commissioner’s conclusions as to whether or not this conduct constituted a breach of the Code would not be disclosed and reflects the position that the Commissioner is responsible for his conclusions and findings. This would have the advantage of ensuring that the Commissioner’s conclusion could not be the subject of an unauthorised disclosure or ‘leak’ by the complainer. However, in many cases it may be difficult to separate these elements of the Commissioner’s report and his or her findings on the facts will be an integral element of the Commissioner’s judgement on whether the Member’s conduct amounts to a breach of the Code.

Decision

23. The Committee is invited to consider the following:

- Retention of the existing approach whereby the complainer is not given sight of the Commissioner’s draft report at Stage 2, nor of the final report until it is published with the Committee’s report into the complaint at the conclusion of Stage 3;
- Making provision for the complainer to have an opportunity to make representations on the Commissioner’s draft report. Should the complainer be shown the complete report or the report minus the Commissioner’s conclusions?
• Making provision for a copy of the Commissioner’s final report to be issued to the complainer in the event that the Committee decides to conduct its own investigation in terms of sections 10.2.33 and 10.2.36 of the Code of Conduct.

24. If the Committee agrees to make provision for the Commissioner’s draft report to be disclosed to the complainer, the Committee may wish to consider effecting this change by way of a Committee Direction to the Commissioner under the Scottish Parliamentary Commissioner Act 2002. The change could be incorporated into section 10 of the Code of Conduct in due course.

25. If the Committee agrees to make provision for the Commissioner’s final report to be issued to the complainer in the event of the Committee conducting a Stage 3 investigation, then this could also be done by amendment of section 10 of the Code of Conduct.

STANDARDS COMMITTEE CLERKS
FEBRUARY 2004