



The Scottish Parliament
Pàrlamaid na h-Alba

Standards, Procedures and Public Appointments Committee

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Dear Ms Dyer

MEMBERS' INTERESTS: REFERRAL TO PROCURATOR FISCAL

Following our recent helpful meeting with Gertie Wallace, I am writing to seek your views on a possible change to give the Commissioner for Ethical Standards in Scotland more discretion about referral to the PF of breaches of the Interests of Members of the Scottish Parliament Act 2006.

Background

I attach a more detailed note on the Act and the Commissioner's and Committee's roles but in brief, the Act created a number of offences relating to failure by an MSP to register or declare a registrable interest and paid advocacy. Potential breaches are investigated by the Commissioner who, where he carries out a full investigation, then reports to the Standards, Procedures and Public Appointments Committee. The Committee's role is to consider whether it agrees with the Commissioner's findings and, if it agrees that there has been a breach, to decide what if any sanctions to recommend to the Parliament. The final decision about sanctions is made by the whole Parliament.

The Committee has recently introduced a bill amending the Act. Initially, the Committee consulted on a proposal to remove the criminal offences for failure to register or declare (while leaving the paid advocacy offence untouched). After consultation the Committee decided not to proceed with this part of the proposal. The changes made by the Bill would not therefore alter the nature of the offences as such. However, the Bill will extend the requirements of the register of interests and the Commissioner's area of investigation, by extending the Act to cover Members' requirements to register donations under PPERA (the Political Parties, Elections and Referendums Act 2000).

At present, the 2012 Directions to the Commissioner from the Committee (made under the Scottish Parliamentary Standards Commissioner Act 2002) state at paragraph 3(15) & (16) that:

- “(15) If the Commissioner is satisfied in relation to any complaint that the member has committed the conduct complained about and that the conduct would, if proved, constitute a criminal offence, the Commissioner shall—
- (a) suspend investigation and consideration of the complaint;
 - (b) submit a report to the Procurator Fiscal; and
 - (c) notify the Committee.
- “(16) The Commissioner shall resume investigation and consideration of a complaint in respect of which investigation and consideration has been suspended under subparagraph (15)(a)—
- (a) at the conclusion of any criminal proceedings instituted in consequence of the report by the Commissioner;
 - (b) on receipt of confirmation from the Procurator Fiscal that no such proceedings will be raised; or
 - (c) on receipt of confirmation from the Procurator Fiscal that the Commissioner may do so.”

We recognise that, where a complaint has been referred to the PF, the Commissioner should always follow this procedure to ensure that his investigations do not interfere with the Crown’s investigations or prejudice any future prosecution. It is also likely that the outcome of any criminal investigation would influence how the Committee handled any subsequent report from the Commissioner.

However, Members feel that the requirement for the Commissioner to refer every potential breach, no matter how trivial or inadvertent, to the PF is disproportionate. It leads to unnecessary work for the PF and unnecessary delay for the Member complained about. To date, since 1999 no breaches have been prosecuted and only one has been subject to an indirect measure. Referral to the PF delays the Commissioner’s completion of a complaint investigation (sometimes only by a few weeks, sometimes by several months). It has the potential to lead to an extended trial by media, with members of the public not understanding that the referral to the PF is a requirement on the Commissioner in all cases where an offence may have been committed and does not in itself imply a judgement about the seriousness of the behaviour.

Alternative approach

We therefore wonder whether it might be possible for the Commissioner to be given discretion not to have to report more minor occurrences which could more proportionately be dealt with by the Parliament’s own powers of sanction.

The Committee's original consultation on its proposed bill offered some indicators of a significant breach which might be a possible starting point. These were factors such as

- * whether there is evidence that an MSP has deliberately decided to keep concealed information that should be registered/declared;
- * whether an MSP has knowingly reported the value of an interest to be below the threshold for registration despite being aware that the value was in excess of the threshold; and
- * whether a member has on a previous occasion failed to register/declare, including where they have received advice from the clerks that they needed to do so or have been previously advised by the Committee of the need to register/declare following earlier complaints against them in relation to their register.

We note, in making this proposal, that it would of course still be open to the PF to investigate any breach that came to their attention, whether or not it had been reported by the Commissioner. We anticipate that any potential breach of the rules prohibiting paid advocacy would be referred to the PF. (To date, no such breach has ever been found).

We have had an initial discussion with the Commissioner who is content to move in this direction as long as his decision making on referrals is underpinned by clear principles and remains, like his other investigations, entirely independent of any political influence. We anticipate that a protocol would need to be agreed between the Commissioner and COPFS. While it would be for the Commissioner to consider in the first instance, he would need the agreement of the Committee in order to amend the direction.

Next steps

I would be grateful to know if you consider that this is an approach that you would be content in principle to pursue. If you are able to confirm that, I can share your response with the Committee and get their authority to progress a revised protocol with the Commissioner and yourselves. If you have concerns or questions at this stage, though, I am of course happy to provide more information, to meet you or your officials or to arrange a discussion between my Convener, Stewart Stevenson MSP and the Law Officers.

It would be very helpful to have reached a decision in principle on this issue before the bill moves to Stage 2 around the end of October. I wonder, therefore, if you would be able to reply by the end of our recess (October 23rd)?

Yours sincerely

Gillian Baxendine
Clerk to the Standards, Procedures and Public Appointments Committee

Treatment of offences under the Interests of Members of the Scottish Parliament Act 2006

Offences

The Interests of Members of the Scottish Parliament Act 2006 created the following offences:

- Failure to register a registrable interest at initial registration (s3)
- Failure to register a registrable interest acquired after return (s5)
- Late registration of a registrable interest (s6)
- Failure to declare a declarable interest during proceedings relating to that matter (s13)
- Advocating or initiating a cause or matter (or urging another member to do so) for payment or benefit in kind (s14)
- Failure to comply with a sanction imposed by the Parliament in relation to the above (s15 & 16).

Role of the Ethical Standards Commissioner

The Commissioner's responsibilities are set out in the Scottish Parliamentary Standards Commissioner Act 2002, the Code of Conduct for MSPs and the 2012 Directions to the Public Standards Commissioner for Scotland. These are all included within the Code on the Parliament's website at

http://www.scottish.parliament.uk/Parliamentaryprocedureandguidance/CodeofConduct-5thEdMay2014_3rdRevision.pdf

On receipt of a complaint, the Commissioner carries out an initial investigation of admissibility (Stage 1). The admissibility tests are set out in detail in section 6 of the 2002 Act and include whether the conduct might amount to a breach of a relevant provision and whether there is evidence that the conduct may have taken place.

All admissible complaints proceed to a Stage 2 in-depth investigation at the end of which the Commissioner reports to the Standards, Procedures and Public Appointments Committee. A referral to the Procurator Fiscal as required by the directions would be made in the course of Stage 2, at the point where the Commissioner had established that the member has committed the conduct complained of and that, if proved, it would constitute a criminal offence.

Once the Commissioner has reported, further action on the complaint falls to the Committee (unless it asks the Commissioner to carry out any further investigation).

Role of the Committee

When the Committee receives a report from the Commissioner it is required to

- Decide whether it agrees with the Commissioner's findings in fact and conclusion (or alternatively refer the complaint to the Commissioner for further investigation; or decide to conduct its own investigation – either of these would be unusual).

- Announce its decision in public, and decide in public, following any representations from the Member complained about, whether to recommend any sanctions to the Parliament.

The final decision on sanctions is made by the Parliament as a whole, on a motion from the Committee.

One of the changes in the bill currently before the Parliament is to extend the sanctions available for offences under the 2006 Act. The sanctions in the 2006 Act are currently limited to excluding a member from Parliamentary proceedings. If a member breaches certain other conduct rules, the Parliament can withdraw their rights and privileges (eg removing salary or excluding them from Parliamentary premises). The bill would amend this so that the full range of sanctions is available if an MSP fails to register or declare an interest or undertakes paid advocacy.