



HOUSE OF LORDS

Report from the Commissioner for Standards

The conduct of Lord Freud

Commissioner for Standards

The independent Commissioner for Standards is responsible for considering any alleged breaches of the Codes of Conduct.

Address: The Commissioner for Standards, House of Lords, London SW1A 0PW

Email: lordsstandards@parliament.uk

Telephone: 020 7219 7152

Website: www.parliament.uk/hl-standards

Code of Conduct for Members, Guide to the Code of Conduct and Code of Conduct for Members' Staff

The present Code of Conduct for Members of the House of Lords was agreed on 30 November 2009. Amendments to it were agreed by the House on 30 March 2010, 12 June 2014, 25 February 2016, 9 February 2017, 3 April 2017, 30 April 2019, 18 July 2019, 16 March 2020 and 8 July 2020. The Guide to the Code of Conduct was proposed by the Committee for Privileges (2nd Report, Session 2009–10, HL Paper 81) and agreed by the House on 16 March 2010. The Guide was amended on 9 November 2011, 6 March 2014, 13 May 2014, 24 March 2015, 25 February 2016, 9 February 2017, 3 April 2017, 30 April 2019, 18 July 2019, 16 March 2020 and 8 July 2020.

The Code of Conduct for House of Lords Members' Staff was agreed on 13 May 2014. Amendments to it were agreed on 24 March 2015, 30 April 2019, 18 July 2019, 16 March 2020 and 8 July 2020. The Codes and Guide are kept under review by the Conduct Committee.

Advice

The Registrar of Lords' Interests advises members of the House and their staff on their obligations under the Codes of Conduct.

Address: Registrar of Lords' Interests, House of Lords, London SW1A 0PW

Email: lordsregistrar@parliament.uk

Telephone: 020 7219 3112/3120

Registers of Interests

A list of interests of members and their staff can be found online: www.parliament.uk/hlregister

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The conduct of Lord Freud

Summary of complaint and investigation

1. On 24 November 2020, I received an email from a member of the public complaining that Lord Freud had breached the Code of Conduct. The complaint was triggered by a report in *The Guardian* the complainant had read.

2. On 23 November 2020 *The Guardian* had reported that:

“The head of the judiciary has admonished six Tory parliamentarians for seeking to influence a judge overseeing a hearing this week on whether references written in support of the former MP Charlie Elphicke can be made public.

The six wrote last week to senior judges, copying in the judge who will oversee the hearing on Wednesday, expressing concern that “matters of principle” should first be considered by senior members of the judiciary and by parliament.

But in a response from the office of the lord chief justice for England and Wales, they were told it was “improper” to seek to influence the decision of a judge who would ultimately rule on the basis of evidence and argument in court.”¹

3. One of the parliamentarians involved was Lord Freud. The other five were MPs.

4. The email I received on 24 November 2020 complained that by being a signatory to the letter to the judges, Lord Freud had breached the Code of Conduct:

“If the details reported are true, it appears that the six individuals in question have made major breaches of the Codes of Conduct, including specifically:

- Bringing the House into disrepute through seeking to influence a decision by a member of the judiciary
- Inappropriate use of House notepaper / stationery

Based on the original character references provided in the legal case of Charlie Elphicke, the report also implies that one or more of the members may have inappropriately provided a character reference for a convicted sex offender and/or used House notepaper to do so, and I believe this issue also merits investigation.”

1 ‘Tory MPs rebuked over letter to judge in Charlie Elphicke references case’, *The Guardian* (23 November 2020): <https://www.theguardian.com/law/2020/nov/23/tory-mps-rebuked-over-letter-to-judge-in-charlie-elphicke-references-case>

Though the details of the case are not material to my investigation into the conduct of Lord Freud, for clarity it may be useful to summarise Mr Elphicke’s case briefly. Mr Elphicke was an MP; in July 2019 he was charged with three counts of sexual assault; he chose not to stand for re-election to the Commons in the 2019 General Election; he was found guilty on all three counts in July 2020 and sentenced in September 2020 to two years imprisonment.

Preliminary assessment and relevant aspects of the Code

5. The Code of Conduct requires that I carry out a preliminary assessment to consider whether an investigation into a complaint is necessary.
6. In order to carry out my preliminary assessment, I wrote to Lord Freud on 2 December 2020 requesting copies of the relevant letters.
7. On 3 December, Lord Freud replied and provided copies (see Appendix 1).
8. The complaint referred to Lord Freud's actions as having brought the House into disrepute and constituting inappropriate use of House stationery. There are currently no provisions in the House of Lords Code relating to disrepute and the letters provided by Lord Freud were not sent on House of Lords paper. However, I do not consider it necessary for complainants always to identify exactly what aspects of the Code may have been breached.
9. Paragraph 8(b) of the Code of Conduct requires members to "act always on their personal honour in the performance of their parliamentary duties and activities".
10. Paragraphs 7 and 8 of the Guide to the Code of Conduct give further details on the concept of personal honour:

“(7) Members are required both “to comply with the Code of Conduct” (paragraph 8(a)), and to act always “on their personal honour” (paragraph 8(b)). The term “personal honour” has been explained by the Committee for Privileges as follows:

“The term ‘personal honour’ has been used within the House for centuries to describe the guiding principles that govern the conduct of members; its meaning has never been defined, and has not needed definition, because it is inherent in the culture and conventions of the House. These change over time, and thus any definition of ‘personal honour’, while it might achieve temporary ‘legal certainty’, would quickly become out-moded ... the term ‘personal honour’ is ultimately an expression of the sense of the House as a whole as to the standards of conduct expected of individual members ... members cannot rely simply on their own personal sense of what is honourable. They are required to act in accordance with the standards expected by the House as a whole. ‘Personal honour’ is thus ... a matter for individual members, subject to the sense and culture of the House as a whole.”²

(8) A member who expresses a clear willingness to breach the Code (for example, by attempting to negotiate an agreement to provide parliamentary services in return for payment) demonstrates a failure to act on his or her personal honour, and is thus in breach of paragraph 8(b) of the Code.”
11. I considered that, in principle, being a signatory to letters which sought to influence the judiciary on a live case would be considered contrary to the sense of the House as a whole as to the standards of conduct expected of individual members. Therefore, if the evidence supported this claim, Lord Freud's would constitute a failure to act on his personal honour.

2 Committee for Privileges (2nd Report, Session 2008–09, HL Paper 88).

12. In the light of the letters provided by Lord Freud, I considered that there was evidence sufficient to establish a *prima facie* case that the Code of Conduct had been breached with regard to personal honour.

Investigation

Sequence of events

13. I wrote to Lord Freud on 8 December 2020 to launch my investigation and to ask him to provide a written response to the complaint. Lord Freud replied on 10 December 2020 with his response (see Appendix 2).
14. I interviewed Lord Freud on 6 January 2021, after which he provided copies of letters he had received from the solicitors dealing with Mr Elphicke's case.
15. From this material, Lord Freud made the broad sequence of events leading up to the media reporting clear.
16. In the course of the case against Mr Elphicke, Lord Freud and others (including the five other parliamentarians and various members of the public) had provided the trial judge, Mrs Justice Whipple, with character references regarding Mr Elphicke to assist her in reaching her decision regarding sentencing.
17. On 18 September 2020, the solicitors acting for Mr Elphicke wrote to the referees to say that a journalist from *The Guardian* had made a request for the references. They said that this was "a very unusual and in our experience unprecedented request". They explained that they were opposing the request and that they would keep the referees informed.
18. On 4 November 2020, they wrote again to explain that Mrs Justice Whipple had "directed that anyone who has provided a character reference is entitled to make representations but that they must do so by 4pm on 20 November 2020." They explained that this meant the referees had "the opportunity to let the Judge know your views on the onward disclosure of the reference you kindly provided for Charlie, to the press." They said that any representations had to be supplied to them by 17 November in order for them to be included in the case file for Mrs Justice Whipple's attention and that a hearing on the matter would be held on 25 November.
19. In interview with me, Lord Freud explained that "because a letter had been requested and we were interested parties, we were entitled to write in to the judiciary". It was on that basis that he believed it would be appropriate to be a signatory to the letters sent.
20. On 19 November 2020, Lord Freud and the other parliamentarians sent a letter to:
- the Rt Hon. Lady Justice Thirlwall DBE, Senior Presiding Judge (England and Wales), and
 - Dame Victoria Sharp DBE, President of the Queen's Bench Division.
21. The letter was copied to Mrs Justice Whipple (see Appendix 1).
22. The letter was marked "private and confidential".

23. In the letter, as well as making it clear that they had no objections to their own references being released, they wrote that they were concerned that:

“Whipple J is holding a further hearing in this case on whether the character references provided in Mr Elphicke’s case should be published”.

24. They said that some of those who had provided references were now suffering “serious anxiety and mental harm at the prospect of being identified by Mrs Justice Whipple”.

25. They noted that referees had been invited to make representations about their own references but that some referees were afraid to make written representations “on their private matters without risk of these representations or objections being disclosed to the media”.

26. They considered that this situation was “quite wrong”.

27. The letter then discussed what the signatories considered to be the implications of Mrs Justice Whipple releasing the references: a “radical change to judicial practice” which would have a “chilling effect” on potential referees who would be wary that they would become “the subject of vilification in the media or on social media.”

28. The letter recognised that it was the role of higher courts to adjudicate on the decisions of lower courts, but the signatories considered that the harm arising from the references being released would be done to those involved before any appeal could be heard. They, therefore, considered it necessary for the addressees, “as senior judges with relevant oversight responsibility, to consider the crucially important matters of principle which are at stake in this case, prior to any disclosure of names of any member of the public or of the references they have provided in court.”

29. The letter closed by noting a role for Parliament on this issue: “So serious a matter with such significant repercussions also should be considered further and fully by Parliament.”

30. On 19 November, one of the signatories to the letter, Bob Stewart MP, also asked a question of the Leader of the House in the Commons Chamber. He asked:

“The Guardian newspaper has applied for the release to the media of character references that were provided to a judge solely to assist in sentencing during a criminal trial. If allowed, this would be a fundamental change of practice, with far-reaching consequences for the criminal justice system. Will my right hon. Friend allow time for an urgent debate on this vital matter?”

31. The Leader of the House, the Rt Hon. Jacob Rees-Mogg MP, replied:

“It would obviously be wrong for me to comment on a specific case, but my hon. Friend raises a concerning point. If people have, in a generality, given evidence to a trial on the understanding that is confidential, it risks people not being willing to give such evidence in future if what is believed to be confidential turns out not to be. A just system requires certainty, whatever degree of certainty that is. In individual cases, I understand that it is a matter for the trial judge, under rule 5 of the

criminal procedure rules, but I will of course refer this matter to my right hon. and learned Friends the Lord Chancellor and the Attorney General.”³

32. On 20 November 2020, the signatories to the letter received a response from Ben Yallop, Private Secretary to the Lord Chief Justice of England and Wales (see Appendix 1).

33. In his letter, Mr Yallop wrote:

“It is improper to seek to influence the decision of a judge in a matter of which he or she is seized in this way. Mrs Justice Whipple will determine any matter before her on the basis of the evidence and argument adduced in her court.

It is all the more regrettable when representatives of the legislature, writing as such on House of Commons notepaper, seek to influence a judge in private letter and do so without regard for the separation of powers or the independence of the judiciary. It is equally improper to suggest that senior judges should in some way intervene to influence the decision of another judge. The independence of the judges extends to being free from interference by judicial colleagues or superiors in their decision making. Judicial independence requires that the senior judiciary, the two judges to whom you have written, can play no role in influencing the way in which another judge, in this case Mrs Justice Whipple, conducts a case.

Judges must be free to make their decisions independently of pressure or influence from all, including legislators.”

34. On 22 November 2020, the signatories wrote directly to Mrs Justice Whipple, attaching a copy of their reply to the Lord Chief Justice (see Appendix 1).

35. In that letter they reiterated their concern about the potential harm releasing the references would do to some of those who had provided them. However, they assured her that in writing their initial letter they did not “in any way challenge your authority to take the decision on publication”.

36. The letter to Mrs Justice Whipple closed by saying:

“Likewise, as Parliamentarians we felt duty-bound to highlight the potentially wide-ranging implications of routine publication of references in past or future cases. This general issue has been raised in Parliament in the way that such policy matters regularly are. We would again emphasise that highlighting this in Parliament is not meant, in any way, to interfere with the judicial process, only to highlight the potential harm to ordinary people who in good faith have provided references to assist the courts in making a decision on sentencing.”

37. Also on 22 November 2020, the signatories wrote to the Lord Chief Justice (see Appendix 1). This letter also stated that “[n]othing in our correspondence was intended to challenge the judge’s authority”; their intention had been only to make the addressees and Mrs Justice Whipple aware of the concerns of other referees. They wrote that the letter of 19 November did not ask Dame Victoria Sharp to interfere with Mrs Justice Whipple’s decision-

3 HC Deb, 19 November 2020, vol 684, col 479

making, only to “consider the crucially important matters of principle which are at stake in this case”.⁴

38. The letter to the Lord Chief Justice also said that it was legitimate for the signatories, “as Parliamentarians”, to set out the long-term implications of routinely publishing character references. The letter referred to the answer by the Leader of the House to Mr Stewart’s question, saying that this demonstrated that raising such long-term implications had been “confirmed as properly a matter for Parliament and Parliamentarians”.
39. On 9 December 2020, Mrs Justice Whipple gave her judgment, ruling that all the references should be disclosed with sensitive personal information redacted and the names of some of the referees withheld.⁵

Lord Freud’s response

40. In his written response to me of 10 December 2020, Lord Freud explained his reason for being a signatory to the letters:

“I had been most concerned to learn of the distress some providers of character references were undergoing at the prospect of them being made public. Accordingly, when I was informed that five MPs were proposing to raise this issue as a matter of principle, I thought it appropriate to associate myself with them. I also agreed to join four of them in publishing my own character reference 1) to comply with provision 9(b) of the code and; 2) in the belief that this would mean there would be less interest from the media in uncovering the identity of the private individuals - since the public names in which they were most interested would already have been revealed.

My understanding was that character references have traditionally been kept private by judges. In this case, media outlets were requesting their publication. I thought publication here would firstly cause distress to individuals and secondly set a precedent leaving individuals reluctant to provide such references in future. This would cut off this important source of information for the judiciary. One of the reasons for tackling the issue in letter form was the ‘Catch 22’ for referees. They were reluctant to make representations requesting privacy at a public hearing because they feared this in itself would be likely to reveal their identities.

Accordingly, I added my name to the five MPs’ private letters to the judge involved and senior judges with the intention of alerting them to this issue.

In this case I believe I acted in accordance with the relevant general principles of conduct in provision 9 of the code.⁶ a) I acted in the public interest and, indeed, published my own character reference regardless. b) I resolved my personal interest by publishing. There was no financial interest. c) I believed there was an important general principle involved. e) The issue was aired openly and raised by one of the MPs involved (Bob Stewart, Beckenham) in Business Questions with the Leader of the House of Commons, who replied that it was a ‘concerning point’ and he

4 Though not mentioned in this letter, I assume they intended to convey that they had also not asked Lady Justice Thirlwell to interfere.

5 <https://www.judiciary.uk/wp-content/uploads/2020/12/R-v-Charles-Elphicke-judgment.pdf>

6 Paragraph 9 of the Code sets out the seven principles of conduct in public life

would refer the matter to the Lord Chancellor and Attorney General. (I should add that, in the event, the Lord Chancellor declined to follow up the issue.) f) I revealed my character reference in its entirety.”

41. We discussed these issues further in our interview on 6 January 2021.
42. In his view, the intent of the letters was “to alert the whole of the judiciary because of the issue of principle” and that they, the signatories, had a role which made this appropriate “because a letter had been requested and we were interested parties”.
43. Throughout the interview, Lord Freud was clear that at no point was he concerned about his own reference being made public (indeed, he made it public before Mrs Justice Whipple had reached her judgment on the matter). Rather, he was “concerned at the misfortune of quite a lot of these people that I was hearing about, dreading having their names publicised”.
44. In his view, the references in each of the letters to the signatories being parliamentarians were there to emphasise their personal disinterest in their references being made public. He said, “the context of saying that we are parliamentarians was that we were happy, you know, we were happy to publish our references rather than anything else”.
45. He said that he and the other parliamentarians had considered it necessary to write to set out the concerns of other referees because those other referees were caught in a “Catch-22” situation: “You don’t want your name out, but to do that you have to make public representation”, which in turn risked not only their names being revealed but also their wishes to be anonymous.
46. Lord Freud’s explanation echoed what the letter of 19 November said, “in relation to these character referees, and indeed any others in cases where a similar application is made before an appeal could be heard, the harm to vulnerable individuals would already have been done and could not be remedied.”
47. I asked Lord Freud whether he was aware that the Catch-22 he mentioned was not inevitable, given that courts may order details of a decision about the release of information to remain confidential in order to allow appeals to be made and decided upon. He said he had not known this.
48. I asked whether Lord Freud had taken any advice on the propriety of writing to members of the judiciary “as a Parliamentarian” about a live case. He said he had not, though he said he understood the points made by Mr Yallop about the constitutional principle of the separation of powers between the legislature and the judiciary.
49. Lord Freud said he had taken “comfort” from the reply by the Leader of the House to Mr Stewart’s question. He said that it had demonstrated to him that “it was an open political issue at that stage [...] it had become a public issue. It was stated as a public issue in Parliament as an issue of principle.”
50. During his interview, Lord Freud also explained that although he had been told that the initial letter would be sent on “Portcullis paper”, this was not a phrase he had come across before and therefore he had not realised that the letter was going to be sent on House of Commons headed paper. He explained that others had drafted the letters; he had only been a signatory.

51. I asked what his response had been on seeing the letter from Mr Yallop suggesting their letter had been improper. He said that his response had been “I thought I’d made a mistake. [...] I thought I’d made a misjudgment”.
52. In his view, the subsequent letters were intended only “to explain the position [...] I don’t think they were adding very much. They were just trying to explain that it was an issue of alerting the judges to an issue”.
53. However, Lord Freud said, with hindsight, “I think I and indeed the MPs do not understand the relationship between junior and senior judges. I think we thought of it—certainly, I thought of it—this is my ignorance—as more hierarchical.” We discussed the nature of the hierarchy of the court system—that a more senior court can review the decisions of a lower court, but that judges are independent of one another in their decision-making rather than in what could be described as a line-management relationship. Lord Freud said that he had “assumed a hierarchy, which there is but not in that context”.
54. He agreed that it may have been improper to write as they did but reiterated that he was genuinely concerned about the impact of publication on some of the referees and felt that writing as they did was the only step available because “the lawyers seemed to be in total despair in the letters that they wrote to all the character references. So they did not seem to be able to be confident in doing anything.”

Finding

55. Paragraph 8(b) of the Code of Conduct requires members to “act always on their personal honour in the performance of their parliamentary duties and activities”.
56. The first question is whether Lord Freud was performing a parliamentary duty or activity.
57. The letters sent to him by Mr Elphicke’s solicitors were written to him in his role as a referee. His membership of the House of Lords was incidental at that point. However, once he put his name to letters on House of Commons paper, with other parliamentarians, which referred repeatedly to the signatories’ status as parliamentarians and the role of Parliament to discuss the issues they were raising, he was no longer acting only as a referee but as a parliamentarian.
58. **By putting his name to the letters of 19 and 22 November 2020, Lord Freud was performing a parliamentary activity and was therefore bound by the requirement to act on his personal honour.**
59. The next issue is whether the letters of 19 and 22 November 2020 sought to influence the decision of Mrs Justice Whipple.
60. The letters of 22 November 2020 to Mrs Justice Whipple and the Lord Chief Justice emphasised that the intention was not to challenge the authority of Mrs Justice Whipple to decide matters, and that the letter of 19 November had not sought to persuade Lady Justice Thirlwall or Dame Victoria Sharp to intervene.
61. Lord Freud’s view was that the purpose of the letters was only to increase awareness of the matters of principle raised by the particular case.

62. However, saying as much does not necessarily make it so. The letters dealt specifically with the case in hand and were written in frequently emotive terms; they were not restricted only to matters of principle. Where matters of principle were raised in the letters, they were framed in terms of how those principles ought to be applied to the case in question.
63. With regard to whether the letter of 19 November was intended to persuade two more senior judges to intervene in Mrs Justice Whipple’s decision, it is difficult to read the reference to a formal appeal process being an ineffective route and “therefore” it being important for Lady Justice Thirlwall and Dame Victoria, “as senior judges with relevant oversight”, to consider the matters at stake “in this case” as purely alerting them to wider matters of principle.
64. The letter to Mrs Justice Whipple of 22 November, though less forceful, similarly was not restricted to matters of principle. It referred to the fears of those reluctant to make representations to “the forthcoming hearing”, emphasising that even if those fears were unfounded, “[n]onetheless they are real”.
65. Lord Freud said in evidence that the solicitors “did not seem to be able to be confident in doing anything” and therefore they wrote to the judges as parliamentarians. Clearly, writing in this fashion was hoped to achieve something he believed that submitting a letter via the solicitors as invited could not.
66. **In my view, the letter of 19 November was not written in such a way as only to raise awareness of matters of principle. It addressed the specifics of the case Mrs Justice Whipple was considering. The only reasonable reading of that letter is that it was intended to persuade Lady Justice Thirlwall and Dame Victoria Sharp to intervene.**
67. **Similarly, the letter to Mrs Justice Whipple was written in terms intended to influence her thinking.**
68. Finally, there is the question of whether, by being a signatory to private letters written as a parliamentarian rather than a referee seeking to influence the outcome of a live case, Lord Freud failed to act on his personal honour.
69. Personal honour is “an expression of the sense of the House as a whole as to the standards of conduct expected of individual members ... members cannot rely simply on their own personal sense of what is honourable.”
70. With regard to proceedings of the House, the position concerning active court cases is clear:
- “The privilege of freedom of speech in Parliament places a corresponding duty on members to use the freedom responsibly. This is the basis of the *sub judice* rule. Under the rule both Houses abstain from discussing the merits of disputes about to be tried and decided in the courts of law.”⁷
71. The *sub-judice* rule provides that “[c]ases in which proceedings are active in United Kingdom courts shall not be referred to in any motion, debate or question.” This is a position of such constitutional importance that both Houses have agreed that their approaches towards the matter ought to be as similar as possible and each have made similar resolutions.

72. There are exceptions to the *sub-judice* rule which protect the House's right to freedom of speech (such as where ministerial decisions are in question or where the Lord Speaker has waived the rule).
73. Where questions of *sub-judice* arise in the course of proceedings, these are matters for the Lord Speaker or the House itself in its self-regulatory capacity: the issue of personal honour under the Code does not arise. However, the existence of the rule for proceedings illustrates the general expectation that members will not seek to use their positions as parliamentarians to influence matters before the courts.
74. Given that discussing the merits of disputes about to be tried and decided in the courts of law is clearly outside the standards of conduct expected during proceedings, I believe doing so in private correspondence to senior judges in terms designed to influence the trial judge must also be considered outside the standards of conduct expected of individual members.
75. In his evidence, Lord Freud said he had taken comfort from the fact that the issue had been raised in the Commons and that the Leader of the House had said that it was "a concerning point"; and that this demonstrated that it was "a public issue in Parliament as an issue of principle". However, Mr Rees-Mogg began his reply by noting that it "would obviously be wrong for me to comment on a specific case". Given that the letters to which Lord Freud was a signatory were, in fact, about a specific case, I find it surprising that Lord Freud derived comfort from Mr Rees-Mogg's reply, rather than being warned by his opening words of the impropriety of his action.
76. It is evident from Lord Freud's response to this investigation that he did not, at the time, consider himself to be acting improperly. He was motivated by concern for others involved in the case. From that point of view, he considered that he was acting in the public interest and was entitled to do so as he had been invited to write to Mrs Justice Whipple.
77. A letter to Mrs Justice Whipple from Lord Freud as a referee would have been perfectly proper: it was what he had been invited to do. However, there was nothing in the letter from Mr Elphicke's solicitors that could be read as suggesting a letter from a group of parliamentarians to two senior judges and later to the trial judge outside the process set out by the solicitors had been invited. The letter Lord Freud received was clearly to him as a referee. It provided no basis for him to act as he did.
78. I have considered whether Lord Freud's good intentions and the fact that the question of the constitutional propriety of the letters did not occur to him mean that his conduct cannot be said to be dishonourable.
79. The description of personal honour in the guide to the Code of Conduct is clear that "members cannot rely simply on their own personal sense of what is honourable". Therefore, however well-intentioned or honourable Lord Freud may have felt his actions were, this is not sufficient for him to be considered to have been acting in accordance with personal honour as described in the Code.
80. The independence of the judiciary from interference by parliamentarians is a clear constitutional principle. It is a principle that Lord Freud agreed he understood.

81. In the light of this principle, I consider that there is an inherent dishonour in Lord Freud choosing to leverage his position as a parliamentarian to seek to influence the trial judge by writing in private to two other senior judges, and in acting carelessly by failing even to consider the constitutional propriety of him doing so.
82. **I find that by being a signatory to the letters of 19 and 22 November 2020, Lord Freud failed to meet the standards of conduct expected of individual members.**
83. **I therefore find Lord Freud to have breached the Code of Conduct by failing to act on his personal honour.**

Conclusion

84. Throughout this investigation, Lord Freud has readily admitted that being a signatory to the letters was a mistake and one which he now regrets. I give him credit for this admission.
85. I have also recognised that his motives in acting as he did were to assist members of the public involved rather than for any personal advantage.
86. I have also taken into account the facts that:
- it was not Lord Freud’s idea to contact the judges;
 - he was not involved in drafting the letters;
 - he had not realised the letters were being sent on House of Commons headed paper; and
 - he genuinely lacked knowledge of the nature of the judicial hierarchy.
87. Although I consider that his conduct cannot be overlooked simply because of his good intentions, I do believe that they mitigate against the severity of the appropriate sanction.
88. I therefore consider that this breach can be resolved by “remedial action”. Remedial action usually involves “putting the record straight”.
89. **In this instance, I consider a personal statement to the House on this matter would be an appropriate outcome.**
90. Remedial action requires the agreement of the member concerned. Lord Freud has agreed to make such a statement.

APPENDIX 1: LETTERS PROVIDED BY LORD FREUD

Letter to the Rt Hon. Lady Justice Thirlwall DBE, Senior Presiding Judge (England and Wales), and Dame Victoria Sharp DBE, President of the Queen's Bench Division, dated 19 November 2020

You will be aware that Mr Charlie Elphicke was recently convicted and sentenced to two years in prison by Mrs Justice Whipple (Whipple J).

We write to express concern that Whipple J is holding further hearing in this case on whether the character references provided in Mr Elphicke's case should be published following a request by the Guardian newspaper. These are references which the Judge, when making her sentencing determination, did not read out and where the individuals were not named at the relevant time.

Representation and Privacy, Harm to Vulnerable Witnesses: A matter that greatly concerns us is the effect this proposed hearing is having on members of the public who have given references. In doing so, they were providing information to the court and the justice system to assist the judge in making her decision on sentencing.

Some of the character referees report that they have been put into fear and some have suffered serious anxiety and mental harm at the prospect of being identified by Mrs Justice Whipple.

The judge has ordered the hearing on 25th November to be in open court. Some of the members of the public are afraid to attend or make written representations on their private matters without risk of these representations or objections also being disclosed to the media. While a specific request for their representations to be heard or considered in closed session could be made in relation to them, a number of vulnerable witnesses have expressed concern to their MP as to whether any such assurances, were they to be given, could in any event be relied upon, given the nature of reporting of sensitive issues already in this matter.

We believe that this is quite wrong. Mrs Justice Whipple is aware that some of the witnesses are extremely vulnerable and that a number of the references provided to the court disclose deeply personal and private matters where Mr Elphicke helped referees in his official capacity as a Member of Parliament. This includes references to disability care, severe mental health and business troubles.

We understand that some of the vulnerable witnesses have suffered additional mental harm and distress because of the way this matter is being handled by the Judge; harm to ordinary, private, individuals which was both foreseeable and avoidable.

Many of those most vulnerable witnesses are Mrs Elphicke's constituents, and they have raised such matters of harm and distress with her directly. She therefore joins us as a signatory to this letter in her capacity as the sitting Member of Parliament for Dover and Deal.

Media Interest - Future and retrospective implications

The request made to Whipple J to publish the character references has come from the media. It is understandable that they would wish to use this case to secure a radical change to judicial practice to establish a principle that character references will now be routinely disclosed. This would provide a source of content to be

reported on, especially if it covers references provided in past cases as well as current ones.

However, release of character references to the media in this way, where they have not been read out in the Court proceedings and where such individuals have not been identified or named in such proceedings, has not occurred to date, so far as we are aware.

Indeed, we are not aware of a situation where character references have been released solely for the benefit of the media and outside of the relevant substantive court proceeding.

Consequences to Sentencing Practice: Such a move to release character references in this way could have the chilling effect and harm the criminal justice system.

It has long been the practice that members of the community provide character references to assist the court in determining the sentence that should be passed on a convicted person. They do this in discharge of their public duty to the court and to the community as a whole. The purpose is not to seek to excuse the behaviour which has led to a criminal conviction, only to provide information about the previous general conduct and character of the defendant as it is perceived by the referee. You will be aware that such references are used by judges as an important tool to make the best and most informed decisions. Specific provision is made for this in the sentencing guidelines.

We are concerned that if a person considering giving a character reference thinks it will be published, they may be reluctant to give it. They will fear that carrying out this civic duty, they will be made the subject of vilification in the media or on social media.

If release of character references is allowed by the court, this would be a change of practice with far reaching consequences that would extend to all other cases. Such a change of application could mean the publication of character references in every case. That could well result in bringing an end to the practice and utility of character references.

Role of the Court of Appeal and senior judges: We recognise that the Court of Appeal has a jurisdiction to overturn decision of judges in lower courts. However, in relation to these character referees, and indeed any others in cases where a similar application is made before an appeal could be heard, the harm to vulnerable individuals would already have been done and could not be remedied.

We therefore believe that it is important for you, as senior judges with relevant oversight responsibility, to consider the crucially important matters of principle which are at stake in this case, prior to any disclosure of names of any members of the public or of the references they have provided to the court.

So serious a matter with such significant repercussions also should be considered further and fully by Parliament. We are all Parliamentarians. In order that we may freely express our serious concerns pertaining to vulnerable private individuals, we have decided to place our own references into the public domain.

Letter from Ben Yallop, Private Secretary to the Lord Chief Justice of England and Wales, dated 20 November 2020

I have been asked to reply to your letter dated 19 November to the President of the Queen's Bench Division, Dame Victoria Sharp OBE, and the Senior Presiding

Judge for England & Wales, Lady Justice Thirlwall, which you copied to Mrs Justice Whipple.

It is improper to seek to influence the decision of a judge in a matter of which he or she is seized in this way. Mrs Justice Whipple will determine any matter before her on the basis of evidence and argument adduced in her court. It is all the more regrettable when representatives of the legislature, writing as such on House of Commons notepaper, seek to influence a judge in a private letter and do so without regard for the separation of powers or the independence of the judiciary.

It is equally improper to suggest that senior judges should in some way intervene to influence the decision of another judge. The independence of the judges extends to being free from interference by judicial colleagues or superiors in their decision making. Judicial independence requires that the senior judiciary, and the two judges to whom you have written, can play no role in influencing the way in which another judge, in this case Mrs Justice Whipple, conducts a case. Judges must be free to make their decision independently of pressure or influence from all, including legislators.

Although you have marked your letter 'Private and Confidential' I understand that you have provided it to the Parliamentary correspondent of the Press Association. Irrespective of that, normal practice, in cases where a judge receives an inappropriate or improper communication seeking to influence a decision, is for the communication to be provided to the parties in the case.

Letter to Mrs Justice Whipple, dated 22 November 2020

We write in relation to the hearing scheduled for 25 November 2020 on potential release of references provided to the court in relation to Charlie Elphicke.

You will have seen our recent letter to Dame Victoria Sharp DBE and Lady Justice Thirlwell. For your information, we are also attaching a copy of the response we are sending to the Lord Chief Justice on this matter.

As we set out in that correspondence, we are worried about the harm and distress that is being suffered by vulnerable members of the public who provided references, some of whom are Mrs Elphicke's constituents.

In raising this with you and your judicial colleagues, we do not in any way challenge your authority to take the decision on publication. We only wish you to be aware of the potential impacts of publication and also the concern that some referees are reluctant to make representations at the forthcoming hearing because this will disclose their identity. We certainly do not suggest that you have intentionally caused such outcomes. Nonetheless they are real.

In making the references we provided public, we hope to assist both the court and the other referees because we hope this will enable a greater focus on the question of disclosure of sensitive personal information relating to members of the public, rather than matters relevant only to public figures who provide references in criminal cases.

Likewise, as Parliamentarians we felt duty-bound to highlight the potentially wide-ranging implications of routine publication of references in past or future cases. This general issue has been raised in Parliament in the way that such policy matters regularly are. We would again emphasise that highlighting this in Parliament is not meant, in any way, to interfere with the judicial process, only to

highlight the potential harm to ordinary people who in good faith have provided references to assist the courts in making a decision on sentencing.

Letter to the Lord Chief Justice of England and Wales, dated 22 November 2020

Thank you for the letter sent on your behalf by your Private Secretary, Ben Yallop, dated 20 November 2020.

We note the concern expressed by Mr Yallop regarding our letter to Dame Victoria Sharp DBE and Lady Justice Thirlwell and we hope we can provide you with some reassurance.

You will be aware that trial and sentencing have both concluded in Mr Elphicke's case. All that remains to determine is a media request submitted for media reasons. We acknowledge that this decision will be made by Mrs Justice Whipple, taking into account all the relevant matters, and had not sought to suggest otherwise. Nothing in our correspondence was intended to challenge the judge's authority. However, given the harm that will potentially be caused to Mrs Elphicke's constituents, we felt it important to highlight our serious concerns prior to the forthcoming hearing.

As you acknowledge, our letter of 19 November 2020 was copied by us to Mrs Justice Whipple in order to ensure that she is aware of the points we have raised which we hope she will take into account.

To recap, two distinct issues were set out in our letter. Firstly, harm and distress has been occasioned to wholly innocent parties. Moreover, some of them feel reluctant to make representations at the forthcoming hearing because of the inevitable disclosure of their identities which this would involve. We wanted to make the judge aware of both of these matters.

In choosing to release voluntarily the character references of all sitting parliamentarians, our intention is to assist the court and members of the public who have provided references in this case. We hope that our decision will enable the focus at the hearing to be on whether to release to the media information relating to private individuals and private matters which have been provided to assist the judge in the execution of her duty, without this being overshadowed by the fact that some of the references in the case were provided by public figures.

Secondly, as Parliamentarians, we do feel it is legitimate to set out concerns about the long term implications of publication of character references submitted to the judge solely to assist sentencing, and containing private and confidential information. This has been confirmed as properly a matter for Parliament and Parliamentarians. We refer you to the Leader of House's remarks in Hansard in this regard on 19 November 2020. The Leader of the House has referred this issue to the Justice Secretary and Attorney General.

We have not asked Dame Sharp to interfere with Mrs Justice Whipple's decision, only to "*consider the crucially important matters of principle which are at stake in this case*".

Finally, we can provide the reassurance that you have been misinformed regarding publication of our letter of 19 November 2020. We have not released the letter publicly.

APPENDIX 2: EMAIL FROM LORD FREUD TO THE COMMISSIONER FOR STANDARDS, DATED 10 DECEMBER 2020

Thank you for your letter of 8 December, in which you informed me that you would be investigating whether I breached 8(b) of the code of conduct in the matter of character references.

It was certainly not my intention to breach the provision; rather the opposite.

As background, I had been most concerned to learn of the distress some providers of character references were undergoing at the prospect of them being made public. Accordingly, when I was informed that five MPs were proposing to raise this issue as a matter of principle, I thought it appropriate to associate myself with them. I also agreed to join four of them in publishing my own character reference 1) to comply with provision 9(b) of the code and; 2) in the belief that this would mean there would be less interest from the media in uncovering the identity of the private individuals - since the public names in which they were most interested would already have been revealed.

My understanding was that character references have traditionally been kept private by judges. In this case, media outlets were requesting their publication. I thought publication here would firstly cause distress to individuals and secondly set a precedent leaving individuals reluctant to provide such references in future. This would cut off this important source of information for the judiciary. One of the reasons for tackling the issue in letter form was the 'Catch 22' for referees. They were reluctant to make representations requesting privacy at a public hearing because they feared this in itself would be likely to reveal their identities.

Accordingly, I added my name to the five MPs' private letters to the judge involved and senior judges with the intention of alerting them to this issue.

In this case I believe I acted in accordance with the relevant general principles of conduct in provision 9 of the code. a) I acted in the public interest and, indeed, published my own character reference regardless. b) I resolved my personal interest by publishing. There was no financial interest. c) I believed there was an important general principle involved. e) The issue was aired openly and raised by one of the MPs involved (Bob Stewart, Beckenham) in Business Questions with the Leader of the House of Commons, who replied that it was a 'concerning point' and he would refer the matter to the Lord Chancellor and Attorney General. (I should add that, in the event, the Lord Chancellor declined to follow up the issue.) f) I revealed my character reference in its entirety.