

Independent Complaints and Grievance Policy Proposals

Note by the Counsel for Domestic Legislation, Office of Speaker's Counsel, House of Commons

Introduction

1. I am asked to advise the Committee on Standards ("the Committee") in connection with the proposals for implementation of an independent complaints and grievance policy ("ICGP") set out in a letter of 11 June 2018 from the Leader of the House of Commons to the Chair of the Committee ("the Leader's letter").
2. It is difficult to comment at any level of detail on proposals which have been set out in slightly different ways in different papers and which, in any event, have not yet been refined beyond high-level policy.
3. Having said that, I do have initial concerns as to the consistency of certain aspects of what is proposed with natural justice.
4. I set out my particular concerns towards the end of this note; but, given the fluid and developing nature of the policy, and the Committee's presumed wish to discuss the principles involved at this stage, I begin by summarising the potentially relevant principles of natural justice in a way that I hope will be helpful to the Committee.

The Rules of Natural Justice

5. Whether or not the proceedings of the Commissioner for Standards under the ICGP would be susceptible to challenge by way of judicial review¹, there can be no doubt that the Commissioner, the Committee, and all other Parliamentary and external stakeholders will be anxious to ensure that the ICGP is consistent with the laws of natural justice.
6. A few relevant quotations may serve to provide sufficient background as to the status, nature and extent of the rules of natural justice in UK law.
7. “Also known as the requirement of procedural fairness, natural justice is the collection of rules or principles to be followed by any decision-maker responsible for adjudicating upon disputes between, or upon the rights of, others. Simply put, natural justice involves decision-makers informing people of any case against them or their interests, giving those individuals a right to be heard (‘hearing’ rule), being free from any personal interest in the outcome (rule against ‘bias’), and acting only on the basis of logically probative evidence (‘no evidence’ rule). However, one should note that the content and the scope of the rules of natural justice are flexible and therefore the requirements depend on the context, for example the subject matter of issues to be decided, the urgency of the situation and the circumstances of the case.”²
8. “It is well established that the essential requirements of natural justice at least include that before someone is condemned he is to have an opportunity of defending himself, and in order that he may do so that he is to be made aware of the charges or allegations or suggestions which he has to meet: see *Kanda v. Government of Malaya*.

¹ A question into which it is probably not profitable to enter at this stage, beyond noting that Article IX of the Bill of Rights may be a bar to challenge of that kind, but not necessarily – and that the method of implementation of the ICGP may determine the extent to which it will be treated as Parliamentary proceedings for the purposes of that Article. (See, in particular, the reference to the possibility of establishing a statutory system on the penultimate page of the Leader’s letter.)

² *Jowitt's Dictionary of English Law*, 4th Edition, Ed., Daniel Greenberg, 2015.

My Lords, here is something which is basic to our system: the importance of upholding it far transcends the significance of any particular case.”³

9. “One of the difficulties felt in applying principles of natural justice is that there is a certain vagueness in the term, and, as Tucker L.J. said in *Russell v. Duke of Norfolk*:

‘There are ... no words which are of universal application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter under consideration and so forth.’

“If it be said that this makes natural justice so vague as to be inapplicable, I would not agree. No one, I think, disputes that three features of natural justice stand out—

(1) the right to be heard by an unbiased tribunal;

(2) the right to have notice of charges of misconduct;

(3) the right to be heard in answer to those charges.”⁴

10. “... a long line of cases shows that it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.”⁵

³ *Ridge v Baldwin* [1964] A.C. 40 HL per Lord Morris of Borth-Y-Gest at 113-114.

⁴ *Ridge v Baldwin* [1964] A.C. 40 HL per Lord Hodson.

⁵ *R. v Sussex Justices Ex p. McCarthy* [1924] 1 K.B. 256 KBD per Lord Hewart CJ.

Human Rights

11. The long-standing principles of natural justice which form part of the common law of procedural fairness in UK law (and did so long before the enactment of the Human Rights Act 1998) translate into requirements of due process in accordance with the Strasbourg jurisprudence on the application of the European Convention on Human Rights (“ECHR”).

12. In particular, Article 6 of the ECHR provides that:

“1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

...

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights: (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him; (b) to have adequate time and facilities for the preparation of his defence; (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require; (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.”

Application to ICGP

(i) Need for holistic appraisal of proposals

13. In considering the application to the ICGP of the rules of natural justice, it is necessary to consider the behaviour of each component of the proposed system, and then to consider the overall effect in relation to the system as a whole.

14. For example, where the function of the Commissioner is merely to review the findings of the independent investigator, or the function of the Committee is merely to review the findings of the Commissioner, or the function of the House is merely to approve or reject recommendations of the Committee, a flaw in natural justice on the part of the investigator, the Commissioner or the Committee will necessarily flow through into and infect the decisions of the Commissioner, the Committee and the House. Only a review in the nature of a full substantive appeal, with a new opportunity for charges to be put and rebutted and evidence taken and questioned, can remedy natural justice faults in earlier parts of the proceedings (but a full appeal of that kind is likely to obviate the advantages of the earlier stages and render them nugatory).

(ii) Standard of proof

15. The leader's letter proposes that the independent investigator will make findings "based on the civil standard of evidence"⁶.

16. Whether or not that is appropriate, depends on two factors—

(a) the classification of the proceedings as a matter of law; and

⁶ Balance of probabilities, as opposed to the criminal standard of beyond reasonable doubt.

(b) whether the proceedings will or may address matters of a potentially criminal nature, and receive evidence and make findings that could instigate or influence later criminal proceedings.

17. As to the classification of the proceedings, it is not nowadays a simple matter to distinguish between civil and criminal proceedings for the purposes of the rules of natural justice and the ECHR. In *Craies on Legislation* I analyse a number of different instances that fall on either side of the line, without being able to draw any firm conclusions that can be applied to effect a classification in the abstract⁷.

18. The matter will depend in this case on a range of factors, including the range of penalties to be made available as part of the ICGP and the possible use that may be made of its findings and recommendations.

19. As to the second question, I do not think that either the Leader's letter or the Report of the Cross-Party Working Group on the ICGP fully explores the potential criminal (and civil) legal implications of the procedures of the ICGP.

20. That being so, I suggest that the Committee should not at this stage express a view as to what might be the appropriate standard of proof to be applied by the independent investigator or the Commissioner, but that it should be noted that the proceedings are essentially penal in nature and may, at least in some cases, be more suited to a criminal standard.

(iii) Commissioner for Standards' role

21. The Leader's letter proposes an appeal from the independent investigator to the Commissioner "who will be able to reinvestigate if necessary".

⁷ *Craies on Legislation*, Daniel Greenberg, 2017, paras.1.6.1 – 1.6.3.3.1, and Appendix, Extracts 5 & 6.

22. My concerns here focus on the following questions—

- (a) How will the Commissioner be able to know whether a reinvestigation is necessary or not without in effect conducting one?
- (b) Is the Commissioner presently resourced, and well-placed in other ways, to carry out *de novo* investigations across the range of activity that might come within the scope of the ICGP, which is expected to go well beyond the present relatively narrow terms of reference focusing on the House's code and rules?
- (c) What are the susceptibility-to-challenge implications of having an officer of the House acting as an appellate body from a first instance decision of an independent (and possibly statutory) public authority?
- (d) What appeal mechanisms will be available if the Commissioner determines that she has sufficient powers to impose a penalty without reference to the Committee?

(iv) *Committee on Standards' Role*

23. The Leader's letter proposes that where the Commissioner considers that the conduct requires a penalty beyond her powers she should refer the matter to the Committee, which should consider the independent investigator's report and the Commissioner's report and recommend a sanction to the House, without conducting a substantive appeal.

24. My concerns here focus on the following questions—

- (a) How can a defensible decision be made about level of penalty without the Committee being in a position to assess and test the findings of the independent investigator and the Commissioner?

- (b) How will the rules of natural justice – and in particular the principle of avoiding apparent bias – be complied with in a system where the decision on punishment is made by a group of persons some of whom may have been, or may come to be, in a similar position to that of the person against whom the complaint is brought?
- (c) Put another way, if independence is seen as crucial to the credibility of the ICGP, and its compliance with natural justice, can independence be dispensed with at the point of punishment?

(v) *House's role*

25. The Leader's letter proposes that the House should vote on the sanction on a motion to be taken forthwith (ie without debate).

26. My concerns here focus on the following questions—

- (a) Is it consistent with the principles of natural justice for the ultimate decision to be taken in a forum in which neither the alleged wrongdoer nor the complainant have an opportunity to be heard?
- (b) Will the House have the necessary information to make an informed decision, if it is unable to go behind the recommendations of the Committee and the Commissioner?
- (c) How will the rules of natural justice – and in particular the principle of avoiding apparent bias – be complied with in a system where the decision on punishment is made by a group of persons some of whom may have been, or may come to be, in a similar position to that of the person against whom the complaint is brought? If independence is seen as crucial to the credibility of the ICGP, and its compliance with natural justice, can independence be dispensed with at the point of punishment?

(vi) *Anonymity*

27. The Leader's letter discusses the need for confidentiality and anonymity to encourage complainants to come forward.
28. A number of potential justice and fairness issues arise in relation to confidentiality and anonymity, and I do not find that the policy detail in the Leader's letter or the Report of the Cross-Party Working Group on the ICGP provide sufficient detail to enable me even to articulate all the issues, far less to form a view on them.
29. I am, however, particularly concerned by the suggestion that—
- “... the Committee's report would simply state that a complaint of a certain nature had been upheld against a certain MP and that based on the investigation and the Commissioner's papers it is recommended that the MP in question should be, for example, suspended for six months”.
30. I am concerned about this partly because it is not clear whether this, and the earlier proposition that “the identity of the victim will not be revealed without their consent”, are intended to mean that not even the Member complained against will know the identity of the alleged victim.
31. I fail to see how a Member could properly marshal a defence against a charge put by a person whose identity is not revealed to them; and I am clear that it would not be possible to conduct an investigation against a Member in these circumstances in a manner consistent with natural justice.
32. I am also concerned about this proposal in relation to the proceedings of the House; if the House is to be more than a simple rubber-stamp for the Committee (and that would raise its own natural justice questions) it cannot reach a decision on the appropriateness of a recommended punishment without knowing, for example,

whether a breach of trust or an abuse of power was involved in the particular behaviour complained of; I am not convinced that it will be possible to put the House in the possession of the full circumstances without the identity of the complainant being obvious or discoverable, at least in many cases.

(vii) *Nature of appellate proceedings*

33. To some extent, the proposal to introduce an independent external investigator into the process may raise more problems of natural justice than it solves.
34. In particular, the independent external process will presumably make findings of fact and report to the Commissioner accordingly: it is a general principle that review or appellate bodies necessarily defer to the first instance tribunal in relation to findings of fact, the first instance tribunal being in the best position to weigh the evidence and make findings.
35. If the Commissioner is to re-open findings made by the independent investigator, then it will clearly be necessary for the Commissioner to have access to precisely the same evidence, and to question it in the same way, as the independent investigator; otherwise on what basis is the Commissioner to determine the same matters settled by the first instance tribunal with the same degree of authority and in accordance with the principles of natural justice?
36. But if the Commissioner is to do that, then what is the point of the first independent investigator?
37. (And, as I have asked above, is the Commissioner resourced and otherwise well-placed to carry out a forensic investigation of that kind?)
38. If, however, the Commissioner simply rubber-stamps the findings of the independent investigating body, the entire credibility and lawfulness of the ICGP will necessarily depend on the soundness of the independent investigatory process, and the extent to

which that process can make recommendations as to sanctions which can properly be deliberated on by the Commissioner and the Committee, and ultimately the House, without reopening the findings of fact.

Conclusion

39. These are necessarily preliminary and partial observations on the Leader's letter, since the proposals in that letter are relatively unrefined, and in the time available I have not been able to do more than offer an immediate and instinctive reaction.

40. I will of course be happy to consider further any matters that the Committee would find helpful, and to advise as required.

Daniel Greenberg

18 June 2018