INDEPENDENT COMPLAINTS AND GRIEVANCE SCHEME: CONFIDENTIALITY AND DISCLOSURE

Revised paper by the office of the Parliamentary Commissioner for Standards

– DRAFT PAPER –

The purpose of this paper is to inform the Committee about some of the confidentiality issues which have arisen during the Commissioner’s investigation and determination of cases under the Independent Complaints and Grievance Scheme (ICGS). It sets out the Commissioner’s recommendations on these issues and invites the Committee to commend these to the House.

Background

2. Standing Order no 150 gives the Parliamentary Commissioner for Standards the task of investigating allegations that MPs have breached their Code of Conduct and the associated rules. There has always been sensitivity about how much information should be disclosed about investigations and MPs who are investigated. On 2 December 2010, after a media challenge to the arrangements then in force, the House agreed a framework for disclosing information about the Commissioner’s investigations, which remained in force until 19 July 2018. Under these arrangements the Commissioner gave out outline information when she began an inquiry and published full details at its conclusion.

3. The arrangements agreed on 2 December 2010 allowed the Commissioner to post a list of current investigations on her webpages, giving only the name of the MP and the broad area of the investigation. While an investigation was taking place, if approached by the media or others, her office would confirm whether a complaint had been received and whether it was being investigated, and the broad area covered, but without giving out any further information. However, once the Commissioner had completed her inquiry, she would publish her decision in full, along with the evidence she had considered. If she submitted a formal memorandum to the Committee on Standards, the Committee would publish that along with its own report and the full evidence.

4. On 19 July 2018 the House approved the Delivery Report on the Independent Complaints and Grievance Scheme. This had the effect of extending the Commissioner’s remit to allow her to determine allegations of bullying, harassment and sexual harassment by MPs. These cases involve particularly sensitive and personal issues. These cases are investigated by external case managers under the oversight of the Commissioner, rather than by the Commissioner herself. The Report makes plain that these cases are to be considered under conditions of the utmost confidentiality. The Commissioner therefore publishes no information about ongoing ICGS investigations, although outline statistics (which do not distinguish between MPs and other respondents) have been issued centrally.

Confidentiality during ICGS investigations

5. The ICGS Steering Group stressed the importance of keeping ICGS investigations completely confidential to protect complainants. It was argued that complainants would be deterred from bringing forward allegations of bullying, harassment or sexual harassment if they thought they would then be exposed to colleagues or in the media during or after the investigation. This concern was largely based on research about sexual violence cases. The Steering Group felt that given the level of media interest, the close relationships within the “Westminster village” and the intense
speculation which follows any allegation, to disclose even the name of the MP concerned could on occasion allow the complainant to be identified.

6. The Commissioner supports the principle of confidentiality during an ICGS investigation. These cases are different from other Code of Conduct cases because the complainant is alleging that they have experienced personal detriment. He/she is perhaps more likely to be vulnerable. The Commissioner’s office already follows stringent confidentiality procedures to protect personal information. However, she and her staff have taken additional precautions in relation to ICGS cases. Information is shared with others only when they strictly need to know.

7. It is the Commissioner’s practice to ask all those involved in an investigation to keep the information confidential. However, even in the first year of the Scheme, we can see that this request has not always been honoured. Our experience shows that political environments give rise to particular challenges. Those who complain against MPs can be well attuned to the advantages of putting a complaint into the public domain. In several instances it is believed that the complainant – the very person whom the procedures were designed to protect - who has arranged the disclosure of this confidential information.

7. It would be wrong to quote real cases, but the following give an idea of what might happen. ¹ For example, a member of an MP’s staff might threaten to lodge a complaint of bullying against an MP and to make it public if he/she felt that they were about to be subject to performance management procedures. If a complaint was being investigated and the complainant realised that it was unlikely to be upheld, he/she might then disclose slanted information about it to the media, but without saying that the allegation was unlikely to be upheld. Or someone might tell the media that there was an ongoing investigation into harassment by a particular MP, when no such complaint had been received and none was being investigated. Such disclosures can damage public confidence in the ICGS system and can cause distress to all those involved – including on occasions the person responsible for the disclosure.

8. The current ICGS system does not deter or penalise leaks. The Commissioner has no powers to discipline leakers if they are not MPs. And if partial or inaccurate information has been placed in the public domain, there is no easy way of setting the public record straight. Even if the media are carrying an inaccurate or slanted story, the other parties involved in the investigation remain under a duty of confidentiality which would prevent them correcting what has been said.

The views of the Parliamentary Commissioner for Standards

9. The Commissioner believes that there should be stronger safeguards for confidentiality during investigations. She believes that it would be helpful if at the start of an investigation into an MP, complainants, respondents and witnesses were asked to confirm in writing that they would keep the investigation confidential until it had concluded.

Recommendation 1: The contract managers for ICGS investigations should consider whether, when an investigation is opened into an MP, respondents, complainants and witnesses should be asked to confirm in writing that they will keep the investigation confidential until it has concluded.

¹ These examples are based on recent cases.
10. The Commissioner would also welcome some deterrent to the unauthorised disclosure of confidential information. In some cases she might wish to investigate what had happened, if she believed that an MP had been responsible for the disclosure; or to ask the relevant manager to do so if someone else seemed to have been responsible. (She has no authority to investigate such actions by people who are not MPs.) If it could be established on the balance of probabilities that an MP had disclosed confidential information about an ICGS investigation or about the case without permission, the Commissioner would be likely to regard this as an aggravating factor. In other cases, if the disclosure came from elsewhere, she might invite a line manager to consider disciplinary action. The Commissioner believes that she should also have the discretion to suspend or discontinue the investigation, if she considers it appropriate, if it could be established on the balance of probabilities that the disclosure came from the complainant.

**Recommendation 2:** Following an unauthorised disclosure of information, the Commissioner should be empowered – if she thinks it appropriate – to investigate, or to ask the relevant manager to investigate and if necessary to take disciplinary action. She should also have the discretion to suspend or discontinue her own investigation, if the information came from the complainant.

11. Under paragraph 71 of the ICGS Delivery Report, the Commissioner already has the power to disclose information about an ongoing case if necessary for safeguarding. She would welcome the additional discretion to disclose information in order to correct misleading information in the media. She believes that it is important to be able to provide an authoritative counter narrative to inaccurate media accounts. She might for example wish to confirm that an allegation was not being investigated, or to correct inaccurate information about its scope. She would do so only after very careful thought and after consulting all those involved.

**Recommendation 3:** While as a general rule, the Commissioner will not disclose to the public or the media the details of a case while it is under investigation, or afterwards, she should have the discretion in exceptional cases to correct inaccurate or incomplete information. She might wish for example to confirm whether an investigation is taking or has taken place, and the outline facts, on the understanding that she should give out only minimal information, and after consulting the parties involved and considering their mental and emotional wellbeing.

**Publishing details of completed ICGS investigations**

12. The Commissioner would welcome clearer guidelines on publication of completed investigations. It is important that people know what will be made public and when. At present the picture is unclear. In its Report *Independent Complaints and Grievance Policy: Implementation*, published on 13 July 2018, the Standards Committee said:

> We wish to see the following provisions apply in respect of confidentiality:

- Not every case accepted for investigation will reach the level where a remedy is required; in those cases there will not be any announcement of the investigation.
- Even where an investigation takes place and the Commissioner is involved in resolving it, the investigation will not be announced until its conclusion.

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- At that stage a summary of the facts and findings will be published; in deciding on the contents of this, the Commissioner will pay careful attention to the sensitivities and wishes of the complainant.

- In truly exceptional circumstances, the Commissioner may disclose some information before the case has been concluded, either to other agencies, if this is needed in order to protect the interests of vulnerable people, or more generally, if she suspects that a Member is a serial harasser or bully.

13. The Delivery Report effectively gives the Commissioner discretion to publish details of completed investigations in some cases, and always subject to the complainant’s views. For example, paragraph 63 of the Delivery Report says:

...  
b. If an unpublicised complaint is not upheld, the MP’s name should not be published;  
c. In deciding whether to publish details of individual complaints which have proceeded to the stage of investigation by the Commissioner and have been remedied, the Commissioner should consider:  
   i. the potential effect on the reporter and respect any desire for confidentiality on the reporter’s part, and  
   ii. whether naming the responder is proportionate in relation to the finding, bearing in mind the effect on the responder’s reputation.

The ICGS Steering Group particularly noted the Standards Committee’s assurance that if there is no remedy required there will be no announcement of the investigation, and said that it was “reassured by the undertakings from the Committee on Standards”.

The views of the Parliamentary Commissioner for Standards

14. The Commissioner believes that she should normally publish carefully anonymised information about ICGS investigations which she has concluded. These should include those where the allegation has not been upheld. The complainant’s views need not be paramount; they should not carry more weight than those of others involved in the complaint. As the Committee agreed in 2018, there is an important balance between the disclosure of information about cases, which is needed to promote confidence in the new Scheme, and the need to protect sensitive personal information about individuals.

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3 By contrast, the House of Lords Privileges and Conduct Committee has set out detailed guidance on the information to be published in relation to members of the Upper House. This is in its Report published on 3 April 2019: Independent Complaints and Grievance Scheme: Changes to the Code of Conduct. The House of Lords Committee will publish information only after any investigation has concluded. At that stage details will be published if the member of the House of Lords is found to have breached the Code. If the Commissioner agrees remedial action, she will publish a report on her website; if she recommends a sanction to the Conduct Committee then the Committee’s report naming the member will be made public (unless there is a successful appeal). The Lords Commissioner is also given discretion to publish the name of the member involved if she reaches an agreed resolution with both parties or if she finds that the member has not breached the Code.

4 Paragraph 71 of the Independent Complaints and Grievance Scheme Delivery Report
15. If nothing is published stakeholders are unable to see that allegations have been investigated and determined, and that the ICGS process is fair. Seeing the new process at work is important for all those involved: those who have experienced bullying, harassment and sexual harassment and also those being investigated - and indeed the rest of the parliamentary community and the public at large. While as a general rule, the Commissioner will not disclose to the public or the media the details of an ICGS case which is under investigation, she believes she should have the discretion in exceptional cases to issue public corrections of accurate or incomplete information. She might wish for example to confirm whether an investigation is taking place, and the outline facts, on the understanding that she should give out only minimal information, and after consulting the parties involved and considering their mental and emotional wellbeing;

16. The Commissioner believes that it is important to publish clear information about concluded cases in order to build trust and confidence in the ICGS Scheme. This will enable those who experience harassment, bullying and sexual harassment to come forward knowing they will be treated fairly. Those facing investigation also need to know that they will be treated fairly. The Commissioner would therefore welcome authority to issue a quarterly report giving numbers of investigations\(^5\), themes and outcomes, without allowing the complainant to veto publication. She would frame this report in a way which would not make cases identifiable. For example, she would report on whether a complaint related to bullying, harassment or sexual harassment, and whether it was upheld. No names or dates or other identifying information would be given; and themes would be described only as part of a general overview. The Commissioner would however reserve the right, in an exceptional case, to delay publication of information about that case, out of consideration for the mental and emotional wellbeing of those involved, if she considered it advisable.

**Recommendation 4:** The Commissioner should be given authority to issue a quarterly report giving numbers of investigations\(^6\), themes and outcomes, all in anonymised form, without allowing the complainant to veto publication.

**Non-ICGS cases**

17. While this paper is about the confidentiality arrangements for ICGS cases, the Commissioner remains concerned about the arrangements for other cases. On 19 July 2018 the House approved a change in the rules governing what the Commissioner can publish about Code of Conduct cases at the investigation stage. The then Leader argued that it would be confusing to have two different confidentiality regimes for investigations into MPs’ conduct: one for ICGS cases and one for other types of case. She proposed, and the House agreed, that the same confidentiality regime should apply to both types of case (ICGS and other Code of Conduct cases) while they were under investigation. This meant that from 19 July 2018 the Commissioner has ceased to give out any information about ongoing Code of Conduct investigations. (However, she still publishes reports at the end of a non-ICGS investigation.) The Standards Committee and the Parliamentary Commissioner opposed this change.

18. The Commissioner is strongly in favour of being able to publish some information about investigations which are not part of the ICGS. Under the arrangements which applied before 19 July 2018 she would publish lists of those under investigation, and she would confirm whether or not she

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\(^5\) Where information relates to cases of 10 and fewer, exact numbers will not be published.

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had received a particular allegation. These arrangements have been suspended for the last year. Being unable to confirm whether an MP is being investigated does nothing to increase public confidence in the standards arrangements, and have given rise to accusations of secrecy. There have been several examples of alleged misconduct where the media have asked the Commissioner to say whether she is already investigating. As she is unable to do so, the media has then carried stories of inaction by the authorities.

19. In July 2018 it was suggested that these prohibitions on disclosure might be reconsidered in the six-month review of the Scheme. The Commissioner takes the opportunity to say that she very much hopes that – one year later - the Committee will feel able to press for the House to lift the restrictions quickly and to return to the pre-July 2018 position.

Conclusion

20. The confidentiality arrangements agreed on 19 July 2018 were designed in order to encourage complainants to come forward without fearing that their identity would be exposed to colleagues and the media. However these arrangements did not give sufficient weight to the other factors at play in a highly politicised environment, where complainants may see advantage in seeking media coverage on their own terms. In relation to non-ICGS cases, they have prevented publication of information showing that cases are being investigated. There is a risk that they have had the effect of reducing confidence in the new arrangements.

21. The Commissioner hopes that her recommendations above will be taken forward. She is confident that these would go a long way to restore the correct balance between the need to build confidence in the scheme and protecting the confidentiality of individuals.

Office of the Parliamentary Commissioner for Standards
July 2019
Summary of recommendations: ICGS cases

1. The contract managers for ICGS investigations should consider whether, when an investigation is opened into an MP, respondents, complainants and witnesses should be asked to confirm in writing that they will keep the investigation confidential until it has concluded.

The Commissioner invites the Standards Committee to recommend to the House the following changes to her working procedures:

2. Following an unauthorised disclosure of information, the Commissioner should be empowered – if she thinks it appropriate – to investigate, or to ask the relevant manager to investigate and if necessary to take disciplinary action. She should also have the discretion to suspend or discontinue her own investigation, if the information came from the complainant.

3. While as a general rule, the Commissioner will not disclose to the public or the media the details of a case while it is under investigation, or afterwards, she should have the discretion in exceptional cases to correct inaccurate or incomplete information. She might wish for example to confirm whether an investigation is taking or has taken place, and the outline facts, on the understanding that she should give out only minimal information, and after consulting the parties involved and considering their mental and emotional wellbeing.

4. The Commissioner should be given authority to issue a quarterly report giving numbers of investigations\(^7\), themes and outcomes, all in anonymised form, without allowing the complainant to veto publication.

\(^7\) Where information relates to cases of 10 and fewer, exact numbers will not be published.