The Constitution Unit

The Regulation of Parliamentary Standards—A Comparative Perspective

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The Committee on Standards in Public Life

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Summary and Conclusions

The scope of the report

This research for this report was commissioned by the Committee on Standards in Public Life in order to provide some comparative information on other systems of regulating parliamentary standards.[1] The Committee is conducting an inquiry into the regulation of standards in the House of Commons.[2] The research is being published by the Committee. This Constitution Unit publication offers some policy options for the Commons, based on the results of the comparative research, and constitutes its submission to the Committee inquiry.

The parliaments / assemblies selected for study include the new devolved bodies in Scotland, Wales and Northern Ireland, which are described in Part One. The basis for regulating parliamentary standards in Australia, Canada and Ireland, including at sub-national level, is the focus of Part Two. The main points are summarised separately at the beginning of each part, but this section draws together some overall conclusions and offers some evaluation of tutesegulatilia,

detailed scheme. This enables the institution to

devolved bodies a general power to regulate themselves, on the Irish model, where the Oireachtas (parliament) is given powers of self-regulation under the Constitution.

Parliamentary privilege under review

Parliamentary privilege has been under growing pressure as offering insufficient defence for individual human rights and as bestowing on parliaments an unnecessary 'firewall' against judicial intervention.

The use of parliamentary privilege has been subject to review recently. There are particular problems with the application of its disciplinary procedures to non-members. The recommendation of a Joint Committee of the Lords and Commons was for its statutory codification in 1998, so that archaic aspects could be dispensed with and its modern operation defined.[9] This recommendation awaits implementation. In an era of judicial review, the operation of parliamentary self-regulation without the possibility of judicial intervention seems out of place. There is a new emphasis on individual human rights, for example, the rights of witnesses before parliamentary committees, or of those named by members on the floor of the House.[10]

At least one case relating to the privilege of freedom of speech under Article 9 of the Bill of Rights 1689 is due to be heard by the European Court of Human Rights.[11] The decision of Speaker Boothroyd to deny Sinn Féin members access to the facilities of the Commons was recently the subject of an ECHR decision as to admissibility.[12] A sub-national Canadian parliament has already had its use of parliamentary privilege challenged by reference to the Canadian Charter of Rights and Freedoms of 1982. In New Zealand, the House of Representatives thoroughly revised its Standing Orders (SOs) and practices to take account of its Bill of Rights from 1990. It continues to use its powers of parliamentary privilege, illustrating that the concept of privilege can be adapted to the existence of human rights legislation. ECHR judgments indicate that a large degree of discretion is acceptable when parliaments regulate their members.[13]

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[9] HL Paper 43 / HC 214 1998-99 session. This committee was chaired by Lord Nicholls

[10] For a discussion from the Australian viewpoint, see *The Parliamentarian* April 2000 'Privileged debate'

[11] *A v the United Kingdom* 5 March 2002. The decision on admissibility has not yet been issued by the end of March 2002

[12] *Decision as to the admissibility of application no 39511/98 by Martin McGuinness against the United Kingdom*. 8 June 1999. The background and judgment are discussed in House of Commons Library Research Paper 01 / 116. Sinn Fein members now have access to facilities, following a motion in the Commons on 18 December 2001

[13] *Pierre Bloch v France* (120 / 1996 732 / 938) 21 October 1987. The case involved an appeal against expulsion from the National Assembly for election expenses offences. The McGuinness case was also resolved against the petitioner, as the oath requirement could be considered a reasonable condition of elected office

Parliamentary privilege gives the Commons its authority for creating and regulating its own standards machinery. The Commissioner for Standards carries out investigations, as an Officer of the House, but the power to summon witnesses and recommend sanctions belongs to the Standards and Privileges Committee. The operation of this machinery has been criticised as failing to meet the standards of natural justice and as too subject to political pressures. However, the first report of the Committee on Standards in Public Life (the Nolan Committee) was conscious of the practical as well as symbolic value of self-regulation, proposing its preservation with the addition of an independent element.[14]

It is possible to make aspects of privilege subject to statute law and to the courts, while leaving the principle of autonomy untouched. This happened to the inherent power of the Commons to adjudicate on disputes on the election of members, which became the province of the courts in the nineteenth century, following statutory regulation. There are arguments for following this precedent in the area of standards, by creating a statutory commissioner and investigation process. The most obvious model is being developed in Scotland, but there are a number of Commonwealth examples.

Models of investigation

The devolved bodies have all preferred the model of an investigative official, employed by the parliament / assembly to carry out investigations of allegations. Control of resources remains with the managing authorities of the devolved body, apart from Northern Ireland, where the Commissioner is currently serviced by the Assembly Ombudsman's office. The clerks, following concerns about possible conflicts of interests, have retained the role of advising members as to their responsibilities. This division is not commonly found in parliamentary practices in Australia, Canada and Ireland.

The UK investigator model uses inquisitorial-style methods for handling allegations. Each devolved body has established a multiple-stage investigative procedure, but the involvement of lawyers is very limited. This appears to be the general pattern in Australia and Canada, but in Ireland the processes are more adversarial. However its statutory commission has recently obtained powers to use inquisitorial-type officers for the initial investigative stages of allegations against office-holders.

Apart from two Scottish investigations in 1999, the devolved bodies have had relatively minor cases to deal with and have not had a major case of conflicting evidence to contend with.[15] The main issue of conduct worthy of full investigation by the Commissioner is probably the leaking of committee reports. In this respect, the robustness of the new models has not been tested. The Standards of Conduct Committee in the National Assembly for

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[14] Cm 2850 May 1995

[15] There have been some inconclusive inquries into the leaks of committee reports in the Scottish Parliament. See for example Standards Committee 7th report 2001

Wales has already instituted a thorough review of standards regulation and Scotland and Northern Ireland envisage statutory regulation of the investigation process.

Sub-national parliaments in Australia and Canada have tended to take the lead in promoting new forms of regulation and enforcement, presumably due to a greater ability to take action, legislative or otherwise. Queensland and New South Wales have established well resourced statutory bodies to deal with allegations of corruption and misbehaviour, but these bodies cover office holders as well as members of parliament. This is the model favoured in Ireland, which has faced a series of major scandals. The tribunal of inquiry model, initiated by parliament, has been seen as cumbersome and ineffective against serious allegations of wrong-doing. But independent tribunals have been criticised for over-enthusiastic investigations to justify the scale of their budgets and for being remote from the parliamentary institutions.

The scale of allegations of political corruption in New South Wales, Queensland and Ireland has perhaps made the adoption of the investigative tribunal model essential, but it is not commonly used elsewhere. The Canadian provincial legislatures have preferred a statutory parliamentary ethics commissioner with an advisory and investigative role. He/she is appointed by the legislature, normally on a fixed term contract and is categorised as an Officer of Parliament. The remit generally covers the executive as well as the legislature.

A statutory framework

The Irish legislation lacks the detail of the Scottish bill, for example with regard to the precise time limits set out for the investigative stages. The legislative model lacks the flexibility of the inherent powers to take action given by parliamentary privilege. It also means that all possibilities must be catered for at the outset. For example, the initial drafting of the Scottish bill does not appear to allow for full legal protection for complainants against defamation actions. Some qualified privilege might well apply. Yet a more extensive right might be worth conferring, to protect against intimidation.

The use of statute to regulate parliamentary behaviour in UK parliaments/assemblies has not yet been tested in another respect. There have not yet been any prosecutions in respect of the new criminal offences of failure to register or to declare interests or the practice of paid advocacy. There is no defence to the charges, which lei0.001120.819ywhich leiminaly8 -

A major difficulty is that the Scottish legislation would not assist with the difficult issue of the acceptance or rejection of the findings of the Commissioner. The Bill makes clear that the Scottish Parliament is entitled to reject the facts and conclusions reached by the Commissioner. The Parliament will remain open to accusations of political partisanship in its judgments. A statute for the Commons would probably involve more statutory regulation of the appeals process, which is left for the Scottish Parliament's standing orders to establish.

A Commons statute would also need to examine the interface with inherent powers of the House under privilege to summon witnesses and publish reports. Sub-national parliaments in Australia and Canada offer useful precedents as a number have statutory commissioners. In Canada, this model has been influenced by developments in the United States, where state legislatures have appointed ethics commissioners. These legislatures have their own form of self-regulation, based on the concept of parliamentary privilege.

An important obstacle to statutory regulation on the Scottish model is the detail of the investigatory process, which is designed to cover every eventuality. Statutory modification of the investigatory process would be difficult to achieve, due to the pressure on parliamentary time at Westminster. It is hard enough to envisage sufficient time being granted to enact a statutory framework for a Commissioner at all. In contrast, Commons standing orders can be adjusted with ease. Framework legislation which did not offer sufficient guarantees of natural justice might well be subject to challenge in the courts.

There would be difficulties with an external review of the Commissioner's findings. The question of using parliamentary proceedings as evidence in judicial actions would need to be addressed. The operation of another aspect of privilege, Article 9 of the Bill of Rights 1689, prevents their use in most cases.[16] The decisions of the Commissioner would need to be clarified as outside the scope of parliamentary privilege for the findings to become judicially reviewable. Should the findings become the subject of court action, there might be problems of double jeopardy and questions about the value of any separate internal Commons procedures. An alternative might be to insert a specific statutory prohibition against review and to institute an extra-parliamentary tribunal system for appeals.

The Ombudsman model

Given these drawbacks, the model being developed in Northern Ireland is of considerable interest. The parliamentary ombudsman there is acting as Standards Commissioner on a temporary basis, pending legislation to give the office a statutory role as Commissioner. The Ombudsman was available and willing to act on a temporary basis, using the resources of

[16] The most important is the use now made of parliamentary proceedings when interpreting Act of Parliament, following *Pepper v Hart* [1993] AC 593. See also the discussion in the Joint Committee on Parliamentary Privilege report on the use of Hansard in judicial review of ministerial decisions at paras 46-55

his own office. Legislation can be passed by the Assembly, which has devolved power for the Ombudsman.

The Ombudsman model is of potential relevance for the Commons because:

- The office is already established by statute and the ombudsman an Officer of Parliament
- The investigatory model used is inquisitorial and so has similarities to the procedures adopted by the Commissioner. The ombudsman has statutory rights to summon witnesses and publish reports, which attract absolute privilege, rather than parliamentary privilege
- A Commons select committee has a general oversight role, but cannot intervene in individual cases
- Although official bodies are not legally required to accept the findings of the ombudsman, in practice failure to implement recommendations is rare, due to the prestige of the office
- The recommendations of the Commissioner are subject to judicial review
- Decisions on the resourcing of the office are not subject to the parliamentary authorities

There are disadvantages as well. Under current legislation, the Ombudsman only investigates maladministration where an MP endorses a complaint from the public. The Standards Commissioner has inevitably had the more difficult function of regulating the people responsible for his/her appointment. The Ombudsman might encounter similar difficulties, although more protected by institutional independence. The investigatory procedures do not incorporate an appeals system and are designed to cover failures by an official body rather than an individual. The role of the Standards and Privileges Committee would need to be considered. It might need more powers of intervention and guidance than those possessed by the Public Administration Committee for the Ombudsman, for example over types of sanctions. There might be scope for an advisory panel to undertake this role in place of a select committee.

More generally, the office of the parliamentary Ombudsman has been developing in a different direction. The Colcott review has recommended a college of ombudsmen, incorporating local government, health and others, as a less confusing model for the public.[17] The Scottish Public Sector (Ombudsman) Bill is creating a one-stop shop for all complaints currently dealt with by the Health Services Ombudsman, the Local Government Ombudsman and the Housing Association Ombudsman. Any changes following

[17] *Review of Public Sector Ombudsmen in England.* The Government announced that it accepted the conclusions of the review on 4 July 2001. The new body will be expected to resolve disputes more informally, avoiding formal investigations where possible. Primary legislation will be necessary to implement the recommendations. See comments and memorandum by the junior minister, Christopher Leslie, to the Public Administration Committee on 31 January 2002 HC 563-i

implementation of the review would be likely to diminish the parliamentary nature of the office.

Codes of conduct

The devolved bodies do not have separate procedures for privilege-type investigations, in contrast to the Commons which maintains separate investigative systems for offences such as the leaking of select committee reports. These offences are not the responsibility of the Parliamentary Commissioner for Standards.[18] The broad-ranging nature of the requirements in the codes of conduct for members has caused difficulties for the devolved bodies. There is a time-consuming initial filtering stage where a number of trivial complaints have to be assessed, which relate to aspects of parliamentary behaviour conceivably within the scope of the codes.

The main types of complaints against members resulting in investigations have involved allegations of abuse of stationery, publication of inappropriate comments on public officials and leaks of parliamentary reports. There have also been complaints that members are not performing in line with their 'job description'. This has enabled the Standards Committee in Scotland to undertake investigations against MSPs who communicate complaints against other MSPs to the press, before contacting the Commissioner. It has also covered complaints about 'poaching' the constituents of another MSP.[19]

Commonwealth Parliaments initially used the language of privilege to operate a disciplinary system. Offences by members were categorised as contempts of Parliament. Questions about the behavioural standards of individual members were dealt with by the Speaker / Presiding Officer, and gross failures by the committees on privileges. Following the adoption by Westminster of registration and declaration of interests in the 1970s, Commonwealth parliaments began to follow suit.

Separate procedures were developed alongside the traditional privilege machinery specifically for offences relating to the failure to make public financial interests. The division is not altogether satisfactory, as there are areas of overlap. The Code of Conduct developed at Westminster, which incorporated the Seven Principles of Public Life, potentially covered behavioural aspects, such as failure to discharge the duties of a Member and also breaches of

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[18] In the Commons, leaking a report would be considered a breach of privilege rather than an offence against the Code of Conduct. Abuse of stationery and inappropriate comments would be investigated by the Speaker, through senior parliamentary staff. The Standards and Privileges Committee would investigate serious allegations of breach of privilege, after referral from the Speaker. See House of Commons Library Research Paper 01 / 102 *Parliamentary Standards* for background. The procedures used in privilege cases were criticised by the Joint Committee at para 292 as not meeting ECHR requirments

[19] SP Paper 478 Tenth Report 2001 Complaint against Lloyd Quinan MSP. The Committee decided that the current wording of the Code was ambiguous and should be clarified. It did not find a breach of the code. SP Paper 452 Ninth Report 2001 Complaint against Tommy Sheridan MSP

privilege, such as the leaking of reports or improper influencing of committees. In practice, the Standards Commissioners rarely examined behavioural aspects and were precluded under standing orders from investigating allegations of breach of privilege, which were examined solely by the Committee. But the practice of devolved bodies in handling all behavioural aspects has its own difficulties.

Some Canadian and Australian sub-national parliaments have adopted wide-ranging codes with detailed statutory rules. The Canadian Parliament has yet to adopt any system for the effective regulation of the declaration and registration of interests. The federal parliament in Australia has a non-statutory scheme, but the enforcement and investigative mechanisms have not developed to an equivalent extent as in the UK.

Statutory regulation of donations

more acute in the UK shortly, as the PPERA is fully implemented in the next round of elections.

It is possible to offer certain defences to prosecution for failure to register under PPERA,[24] but no such defences currently exist for members in Scotland, Wales and Northern Ireland who fail to register their interests under the requirements of the devolution legislation. This area needs to be reviewed for consistency of treatment, so those members are not subject to overlapping requirements and different levels of defence against prosecution.

The full implication of the potential for prosecution under PPERA for failure to register donations has yet to be appreciated by the Commons, but in theory the new offences cut across the self-regulatory standards system underpinned by privilege. There would appear to be some difficulties in bringing prosecutions against Members at Westminster under PPERA because of the operation of Article 9 of the Bill of Rights. The evidence necessary would need to be additional to parliamentary proceedings, which include within its scope the register of interests or reports by the Commissioner.

The role of the criminal law

There is little logic in making members of devolved bodies subject to the criminal law in respect of registration, declaration and advocacy offences, but not members of the Commons (or Lords). The difference is due to historic circumstances. It might be sensible to redraw the boundary across all UK parliamentary bodies, so that only breaches with the potential of corrupt action or of financial advantage would become criminal offences. Other minor or inadvertent infringements would be dealt with by the parliament/assembly. This would not necessarily preclude a statutory investigative framework or some outside involvement in the imposition of sanctions, such as an advisory panel.

[24] Schedule 7, para 12(3)

Part One: The Regulation of Parliamentary Standards in Scotland, Wales and Northern Ireland

Key points

The standards machinery in Scotland, Wales and Northern Ireland is underpinned by statute, in contrast to Westminster where a non-statutory scheme operates under the protection of parliamentary privilege.

Scotland and Northern Ireland can make changes to their schemes, within the confines of the parent devolution legislation. Scotland is developing its own legislation for an independent Standards Commissioner, through a Committee Bill introduced by the Convenor of the Standards Committee. Northern Ireland has proposed amendments to the legislation for the Assembly Ombudsman to incorporate a Standards Commissioner role. Wales has no primary legislative power, so can make changes to standing orders only. It has currently

In the initial months of the Scottish Parliament two major cases were dealt with by the Standards Committee before any machinery had been adopted. In general, however, the models of standards regulation developed subsequently by Scotland, Wales and Northern Ireland have not yet been tested by serious allegations. The devolution statutes have in any case made major breaches of the codes of conduct criminal offences, which would be investigated by the prosecuting authorities.

Introduction

The major plank of the 1997 Government's constitutional programme was the creation of devolved parliaments / assemblies in Scotland Wales and Northern Ireland. The devolution legislation of 1998 contained provisions designed to create a framework for the regulation of ethical standards in respect of the new members of the institutions. Since their initial establishment, the devolved bodies have developed their own codes of conduct, and investigative machinery.

This report examines some broad themes common to each system and looks at their distinctive features, noting divergences from th

— Freedom of speech, which is guaranteed

Parliament to regulate its standards.[31] Although the UK Parliament is excluded from the Human Rights Act 1998, since it does not fall within the definition of a public body for its purposes,[32] the necessity of ensuring minimum standards in its disciplinary procedures to meet the requirements of fairness in Article 6 of the Convention has been under consideration in both Houses.[33]

The jurisdiction of the domestic courts in the regulation of parliamentary standards has recently been examined by the House of Lords. The judgment endorsed the Court of Appeal decision that proceedings before the Parliamentary Commissioner for Standards, his reports and acceptance by the select committee were all 'parliamentary proceedings' and attempts to investigate or to challenge them in a court of law were a breach of privilege.[34]

The Statutory Regulation of Standards in Scotland, Wales and Northern Ireland

Introduction

Without the protection of privilege, the parliaments / assemblies must act within the scope of their legal powers and duties, and become subject to full judicial scrutiny.[35] Their processes of investigation and regulation must be set out in detail and in advance of the event, which can cause difficulties when unexpected developments occur.

The devolution legislation also made clear for Scotland and Wales that members of the new bodies would be subject to criminal proceedings relating to the corrupt making or accepting of payments.[36] The legal position at Westminster remains unresolved. Although bribery or acceptance of a bribe by an MP is a contempt of Parliament, it is generally believed that such conduct is not a statutory offence under the Prevention of Corruption Acts 1889-1916, and

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[31] The Joint Committee considered briefly a Maltese case *Demicoli v Malta* (1992) 14 EHRR 47 in paras 283-4. At least one case in relation to the use of freedom of speech has been launched (*Guardian* March 6 2002 'Woman branded 'neighbour from hell' takes former MP to court'). This was heard on 5 March 2002 as a decision on admissibility. No decision has yet been issued (*A v United Kingdom*).

[32] Section 6

[33] For details see House of Commons Library Research Paper 01 / 102 *Parliamentary Standards,* Part V

[34] *Hamilton v Al Fayed* [2000] 2 All E.R. 224

[35] This was brought home to the Scottish Parliament as a result of *Whaley v Lord Watson of Invergowrie* 2000 SLT 475 where the actions of the Standards Committee faced immediate scrutiny in the courts in November 1999. The judgment set out a narrow interpretation of the scope of parliamentary autonomy. See a discussion of the case in *Realising the Vision: A Parliament with a Purpose* Barry Winetrobe, Constitution Unit pp 133-5

[36] Scotland Act 1998, s43 makes the Parliament a public body for the purposes of the Prevention of Corruption Acts 1889-1916. Section 79 of the Government of Wales Act makes similar provision. The reasons for the omission of similar provisions in the Northern Ireland Assembly Act remain obscure

there is some uncertainty on whether the common law offence of bribery of a person holding public office extends to MPs.[37]

provision to be made by the Parliament in an Act of the Scottish Parliament.[42] The Standards Committee is currently consulting on proposals for an Act, and is examining the scope of the registration requirements, with a regard to introducing a bill later in 2002.[43]

Wales

The Scottish Parliamentary Standards Commissioner Bill will give the new office similar powers to call for persons and papers, but these powers do not extend beyond the scope of section 23 which imposes restrictions on the Parliament's powers in relation to persons outside Scotland, Ministers of the Crown, reserved matters, judges and members of tribunals. The Explanatory Notes to the Bill give further detail.[45]

Wales

Section 74 gives the Assembly an overall power to require attendance and production of documents in relation to its sponsored public bodies, but may be used by committees only when given specific authority under standing orders. This gives very limited rights to the Committee. SO 16 does not give it such authority. Section 77 gives absolute privilege from defamation actions.

Northern Ireland

Under sections 74-6 of the Act, the Assembly has powers equivalent to those in Scotland to call for persons, papers and records, in devolved areas only. The Standards and Privileges Committee has specific authority in SO 52 to exercise this power. Section 50 gives Assembly publications absolute privilege for the purposes of defamation.

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adopted until 24 February 2000, after the Standards Committee issued its final recommendations. SO 6.1.5 establishes the remit of the Standards Committee.

Wales

Standing Order 16 sets out the role of the Committee on Standards of Conduct, which only allows the Committee to make modifications to the Code already adopted by the Assembly on 18 May 1999. The Code was developed within the Welsh Office, building on recommendations made by the National Assembly Advisory Group[48] and the Commissioners who drew up the initial standing orders for the Assembly.[49] SO 16.3 provided for the appointment of an independent person to provide advice and assistance to the Presiding Officer.

Northern Ireland

The standing orders allow the Committee of Standards and Privileges to make changes to the code of conduct for members, but an initial code was approved on 14 December 1999 by the Assembly which was identical in wording to the Commons code.[50] The Guide to the Rules Relating to the Conduct of Members was similarly modelled on the rules for the Commons. SO 52 (now 57) and SO 64 govern the work of the Committee, allowing it to make reports to the Assembly recommending exclusion of Members where they have contravened provisions of the Code.[51] SO 65 also allows it to consider matters of privilege, but in fact the Committee has had no role in this area, given that the Assembly does not have parliamentary privilege on the Westminster model. Its role is to look at issues such as leaks, which in Westminster would be a privilege-type inquiry, not conducted by the Standards Commissioner.

Recent developments in regulatory schemes

There are significant differences in the powers of each parliament/assembly to make adjustments to the schemes set out in the devolution legislation. Scotland, and Northern Ireland have primary legislative powers and so have the power to make significant alterations as long as the framework set out in

Procedures for Commissioners/Advisers

Each body has established a mechanism to give an independent adviser a role in investigating complaints against members. All three have decided not to allow the commissioner / adviser a role in advising members about the registration of interests, which remain the province of the clerks to the committees. There have been concerns that allowing the commissioner to take on this role might lead to a conflict of interest.[55]

Scotland

The Standards Committee sought approval from Parliament's Bureau and the Scottish Parliamentary Corporate Body (SPCB) to appoint a standards adviser on a temporary basis at its meeting of 3 May 2000.[56]

The adviser's role and remit is to:

— Sift initial complaints
— Conduct investigations independently and in private
— Submit reports to Standards Committee detailing facts
— Attend meetings of the Committee

The Standards Committee recommended the appointment of an interim Standards Adviser pending legislation in its fourth report, which was endorsed by the Parliament on 23 November 2000.[57] The first appointment was Gary Watson in September 2000, who was Scottish Legal Services Ombudsman. The advert specified one or two days a month, with ability to work full time if a major investigation was underway. He has since been replaced by Bill Spence in September 2001. Both appointments were made following an open competition, and were made by the Scottish Parliamentary Corporate Body (SPCB) on the recommendation of the Standards Committee. Since September 2000, the Adviser has worked on average 5-10 days a month.

The temporary adviser reports to the Committee via the clerk. He has no powers to call witnesses or demand documents. Legal advice is provided to the adviser through the Standards Committee clerks. He provides a quarterly report detailing numbers of complaints and proportions not passing the initial sift, with details of the individual members removed. Administrative support is provided by the Standards Committee clerks

The Scottish Standards Commissioner Bill

Terms of appointment

Section 1 sets out the appointments process. The appointment is to be made by the SPCB, with the agreement of the Parliament. The method of obtaining agreement will be set out in standing orders, probably an appointment on a motion of the Standards Committee. Current staff and members, and those who served for the two preceding years are ineligible for appointment.

The maximum period of the initial appointment will be five years, with one re-appointment which cannot be for more than another five years.(Section 1(4) and(5)). This is in accordance with guidance issued by the Commissioner for Public Appointments. The grounds for removal by the SPCB are not set out in the Bill but will be set out in the Commissioner's terms and conditions of appointment in para 1(1) of the Schedule. But removal is subject to subsection (7) and can only follow upon a resolution by the Parliament. This is only carried if at least two-thirds of the total number of votes cast by those present, including any abstentions, are in favour.

The Financial Memorandum to the Bill expected that the post would be on a 'part-time basis', with total costs not exceeding £100,000 per year. The Schedule set out that the SPCB appoints the Commissioner on such terms and conditions as it determines and the Commissioner is permitted under para 2 to appoint staff with the consent of SPCB. Presumably, the recruitment process will be handled entirely in-house, although the selection board may contain an external person, under Nolan principles.

Section 2 allows for the appointment of an acting Commissioner, for example to deal with an individual case, where there might be a conflict of interest for the existing Commissioner, or with exceptionally large caseload, or where the Commissioner is ill. This appointment is made by the SPCB, without the formal agreement of the Parliament to avoid delay.

Functions of the Commissioner

Section 3 sets out the functions of the office. The Commissioner is required to investigate an MSP only where a complaint has been received by him/her that a relevant provision has been breached. Investigation is restricted to the conduct complained of only, and the commissioner would not be able to investigate any other aspect of the Member's conduct. There is a category of excluded complaints under 10.2.13-10.2.17 of the Code of Conduct which are referred elsewhere.

Amendments subsequent to the conduct complained of would be ignored by the Commissioner.

Section 3(6) prohibits the Commissioner from giving advice to an MSP or the public as to whether conduct would constitute a breach of the relevant provision. The Commissioner is

when the Bill comes into force. There are provisions similar to section 12, allowing the Standards Committee to direct the Commissioner to treat a complaint as admissible.

The public actions of the Commissioner are therefore subject to strict statutory regulation in a Parliament whose proceedings are not covered by parliamentary privilege. This is unique in the UK, and the specified time limits and procedure for investigations is probably unprecedented in Parliaments of the Westminster model. A number of Canadian provincial legislatures have equivalent statutes establishing investigative officers, but few contain as much detail as the Scottish legislation, and in any case Canadian legislatures retain the protection of parliamentary privilege. The Oireachtas members' interests committees in Ireland have statutory procedures for their inquiries, but parliamentary self-regulation is protected under the Irish constitution.

Wales

SO 16 requires the appointment of a person 'who is not an Assembly member or a member of its staff' to carry out investigative work on behalf of the Committee for Standards of Conduct and to advise the Presiding Officer on his role in receiving complaints. There was also provision for the Committee to appoint its own adviser to assist it with investigations. There was some initial discussion as to whether the dual role should be carried out by two separate people—this would have required change to the standing orders and clarification of the complaint procedure, so the possibility was not investigated at this stage.[60]

The Assembly resolved on 24 November 1999 that the appointment of an Independent Adviser on Standards would be made in accordance with arrangements to be made by Presiding Officer, taking into account the principles of Assembly's Code of Practice on Public Appointments. The Adviser would not be a member of staff under section 34 of the GOWA, and the post would be reviewed after first year to decide on level of duties and time commitment. The initial assessment was 2-3 days a month. In practice, the Adviser has worked more than this, at one or two days per week. The Adviser provides his own services, and works mainly from home. All the party leaders in the Assembly were consulted on shortlisted candidates. Richard Penn was appointed on 15 March 2000 by resolution of the Assembly to

- advise and assist the Presiding Officer 'on request in respect of any matter relating to conduct of members
- by invitation from the Committee he is asked to investigate factual matters arising out of any complaint received by the Committee

The appointment made for three years initially, subject to termination by 'a substantive resolution of the Assembly.'

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[60] *Appointing the Standards Adviser in the Welsh Assembly* committee secretariat paper for the Committee on Standards in Public Life secretariat seminar 17 November 2000

Clarification of Mr Penn's role in relation to Members was provided by means of a protocol entitled *The Role of and Access to the Assembly's Independent Adviser on Standards of Conduct*. This protocol notes that the Adviser's responsibilities do not include advising members on individual cases or complaints as 'this would be in direct conflict with his role as an independent investigator and could prejudice any future involvement should a complaint arise.' Nor does he receive complaints directly. The protocol also stated that the Adviser would be responsible for handling press contacts in consultation with the office of the Presiding Officer and Committee; he would simply confirm or deny that an investigation was underway and would not issue press notices. In evidence to the Northern Ireland Committee on Standards and Privileges, Mr Penn noted he was not line-managed by anyone. If he had a line of accountability it would be to the Presiding Officer.[61]

Northern Ireland

The Standards and Privileges Committee issued a report in October 2000, recommending the appointment of a Commissioner who would not have a role in the compilation and maintenance of the register.[62] This followed a lengthy enquiry which took extensive evidence from Scotland, Wales, Westminster and Ireland. The administrative arrangements provided for the clerk to service the Commissioner. The report noted: 'Should a need for additional resources arise, this would be considered in conjunction with the Assembly Commission'. [63] The terms and conditions of employment and recruitment process would be discussed with

the Committee that Committee wished to pass on.[67] In practice, the Commissioner has restricted the work to standards issues.

Further development of the role awaits decisions on conferring statutory powers to investigate on the Ombudsman.

Filtering of Complaints

Each body has established separate procedures to deal with this initial stage of investigation. None of the committees have any involvement in this filtering stage, due to concerns that the impartiality of the committee might be compromised.[68] Statistics on these initial complaints are not maintained.

Scotland

Complaints are made to the clerks, who pass them to the Standards Adviser for an initial sift. If a complaint is rejected, the clerks are informed, and also the Committee, if the complaint has featured in the media.[69] Following the first 'Lobbygate' enquiry, about one to two complaints a week were received, mainly from members of the public. The rate of complaint remains similar, but the great majority relate to fairly trivial issues, such as the use of stationery.

Wales

Initially, the committee took responsibility for sifting complaints, but this procedure was abandoned after criticism. Complaints are made to the Presiding Officer, but in practice, they are passed straight to the independent adviser, Richard Penn, who will decide whether there is a complaint to investigate. Where a complaint is dismissed, the committee is not informed, but the Presiding Officer may have a role in very minor cases. The great majority of complaints are trivial, but need to be processed by the Adviser. A relatively high number of complaints are made by the public.

Northern Ireland

Complaints are received by the clerks to the committee, who forward them to the Commissioner for an initial sift. Only a handful of complaints have been made, mainly by Assembly members, in contrast to Scotland and Wales.

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[67] ibid, para 11

[68] Northern Ireland Assembly Inquiry into the Possible Appointment of a Commissioner for Standards First Report, October 2000 at http://www.niassembly.gov.uk/standards/report1-00r.htm

[69] The Committee would also be informed if the complaint was procedurally defective, for example, no MSP was named and the Committee might need to decide whether to proceed. This has occurred in the leaking of committee paper type inquiries

The Investigative Procedure

Scotland

The Standards Committee's Fourth Report recommended a four stage investigative procedure.[70] It decided not to use the distinction made by the Committee on Standards in Public Life between serious and trivial cases, because allegations initially trivial could become more serious in the investigation process.[71] It also built into the process provision for complaints which disclose a criminal dimension, as MSPs are liable to the criminal law.

The stages were:

Stage 1 Initial Consideration

This is an initial review of complaint by the Commissioner, conducted in private. Where there were allegations of criminal activity, there would be reference to Procurator Fiscal, where there was no foundation, the complaint would be dismissed without reference to the committee, unless there had been publicity. Where further investigation was necessary, the Commissioner would give notification to the committee that it would undertake an investigation.

Stage 2 Investigation of Facts by Standards Commissioner

This stage is conducted in private and independently of the Committee. The report recommended that the Commissioner should have powers to compel witnesses to co-operate. On the completion of an investigation, he/she would report to the Committee, without specific recommendation or sanctions. The report would be given at this stage to the member who would be offered the option of appearing before the committee.

Stage 3 Committee consideration of Standards Commissioner's report

This would be considered in private, together with the response from the Member. Where the Commissioner had identified a breach of the Code, then Member would have the right to appear before the committee, with hearings normally in public. The committee could refer back the report to the Commissioner for further investigation—done privately. Or it could conduct its own full review. in public or private. The report did not specify whether this would involve a complete review or a judicial review type investigation. The committee reserved the right to undertake its own investigation of a complaint at any stage.[72] At the end of Stage 3 the Committee, rather than Commissioner, would report to Parliament, setting out findings and upholding or dismissing complaints, but also recommending appropriate sanctions. The Commissioner's report and relevant evidence would be published, together

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SP Paper 186. The report was endorsed by the Parliament in a debate on 23 November 2000

Reinforcing Standards, Sixth Report 2000 Cm 4557 72

Developing Models of Investigation Standards Committee secretariat paper to the Committee on Standards in Public Life secretariat seminar 17 November 2000

with the Committee's report. The imposition of penalties would require a resolution from Parliament, following a motion for debate.

Stage 4 Parliament's Consideration of the Committee's recommendation

Section 39(3) of Scotland Act and Rule 6.5.2 of SOs require the Scottish Parliament, on recommendation from Standards Committee to decide whether to impose sanctions. The report recommended a change to SOs so that reports are debated within specified timetable.[73] Members of Standards Committee should not be entitled to vote in the debate, and this should be set out in SOs. The report considered that the facts should have been settled at this stage, but the Member should have an opportunity to speak in the debate to challenge law or procedure or scale of sanction.

The Investigative Procedure in the Standards Commissioner Bill

Initial Stages

The Explanatory Notes to the Bill explain that the Bill is only concerned with the Commissioner's role in the complaints process envisaged under the fourth report i.e. Stages 1 and 2 of the investigative process, and does not deal with the parliamentary aspect of the investigation process 'because it is a matter for Parliament itself by its own internal rules to set out the procedure that is to apply.' This means that in order to give full effect to the investigative model set out in the fourth report, it will be necessary for the Parliament to make separate provision in the standing orders and the Code of the Conduct for the way in which the Commissioner will make reports to the Parliament and for the procedure that will follow once the Commissioner has made a report to it (Stages 3 and 4).

Section 5 sets out the two stage procedure. Stage 1 consists of investigating and determining whether the complaint is admissible, and Stage 2 of investigating and reporting to Parliament. S5(4) sets out that apart from Stages 1 and 2 it is for the Commissioner to 'decide , iceduigative n2h1tage1l ee, i0716iv0.0he 97 -stagcts shoul1 Tw way in

Section 6 gives more detail on Stage 1 and the admissibility of complaints. Three tests are set out:

— The first test (in subsection (2)(a)) is that the complaint is relevant. Subsection (4) provides what is required to meet the relevance test.

— The second test (in subsection (2)(b)) is largely procedural. The complaint must comply with certain specified requirements listed in subsection (5). Failure to meet any of the specified requirements is a matter that the Commissioner must bring to the Standards Committee under section 7(4) for a decision on whether the complaint should nevertheless be accepted.

— The third test relates to an initial investigation of the complaint to determine whether it warrants further investigation. Subsection (6) provides further specification.

47. Subsection (4) relates to the first test and sets out three matters that need to be established for a complaint to be relevant.

— The first matter is that the complaint must relate to conduct of a member of the Parliament. For example, this prevents complaints concerning the actions of SPCB staff for which separate arrangements are in place. Similarly, complaints about the conduct of other public officials are not relevant.

— The second matter is that the complaint falls within the jurisdiction of the Commissioner and is not one of the complaints for which separate arrangements are made (see section 3(2)) unless the Standards Committee has directed the Commissioner to investigate such a complaint under section 12.

— Finally, some part of the conduct complained about must relate to a matter that the Commissioner considers may be covered by the relevant provisions. The Commissioner is required to identify at this stage which provisions he or she thinks are the relevant ones.

To fulfil the specified procedural requirements, the complaint must be made in writing, and give the complainant's name and address and be against a specific member. A detailed complaint should be given with supporting evidence, within a time limit of one year 'when the complainer could reasonably have become aware of the conduct complained about'.

Section 7(1) requires notification of the member about the complaint, the subject matter and the complainant, unless inappropriate. The EN note that directions could be given under section 4 to set out the circumstances where the identity of the complainant could be protected, and to seek comment from the MSP complained about as part of the Stage 1

Under section 3, the Commissioner is required to investigate a MSP only where a complaint has been received by him / her. A failure to meet the first or third tests results in the dismissal of the complaint. If a compliant passes the first and third test but fails the second (it is procedurally defective), the Commissioner is required to refer the complaint to the Committee which can then direct whether to dismiss or investigate. The Commissioner must dismiss the complaint where the third test is not met, without having to report on procedural deficiencies. The Bill also gives the Parliament power to direct the Commissioner to report classes of complaints with procedural defects to the Committee for consideration before the Commissioner investigates whether the complaint warrants further investigation. The Committee has indicated that it intends to make a direction to this effect in relation to complaints which do not name a member. Where the three tests are met, the Commissioner is required to inform the Committee that he is carrying out a full investigation at Stage 2.

There is no general requirement to inform the Committee when a complaint is dismissed, but there is specific power for the Commissioner to do so under section 7(10). Stage One complaints are expected to take two months; there is provision in section 7(11) for a report to the Committee if consideration is taking longer than this.

Stage 2

Section 8 deals with this stage and is relatively short. It provides for the investigation of an admissible complaint. The Commissioner is required to set out his findings of fact and whether the conduct is in breach of one of the relevant provisions 'that he or she identified when deciding that the complaint was relevant'. There is provision for interim reports where an investigation was taking over 6 months to complete.

The Report to Parliament

Section 9 sets out detailed provisions, listing matters which require to be included within the report. These are:

- The details of the complaint
- The details of the investigation
- The facts found by the Commissioner in relation to the conduct complained about
- The conclusion reached by the Commissioner as to whether the member has, by his conduct, breached the relevant provisions

The Commissioner is specifically prohibited from commenting on appropriate sanctions. 9(3) gives the MSP named in the report a right to a copy of the draft report and to make representations. These representations are to be annexed to the report where they are not given effect in the report. The ENs state:

> The inclusion of this provision is in line with the procedure followed by successive governments at Westminster following the 1966 report of the Royal Commission on Tribunals of Inquiry under the chairmanship of Lord Justice Salmon, the report having noted that it is more difficult to counter criticism when

it appears in a report. The requirement is in addition to the right to be informed of the allegations and to be given an opportunity to respond during the investigation. The provision is similar to the rights afforded to councillors and members of devolved public bodies under section 14(2) of the Ethical Standards in Public Life (Scotland) Act 2000 (asp 7) in relation to proposed reports of the Chief Investigating Officer.

Stages 3 and 4

The process to be followed in these stages will be set out in standing orders, but section 10 makes clear that the Parliament is entitled to reject the facts and the conclusions reached by the Commissioner in a Stage 2 report, and may direct the Commissioner to carry out further specified investigations using the powers to call witnesses and request documents set out in the Act. Withdrawals of complaints are regulated by section 11 and are made at the discretion of the complainant in writing to the Commissioner, as long as they are made before the report to Parliament. The Standards Committee and the member concerned are also to be informed.

The Bill therefore sets out detailed parameters for the investigative stages, in order to make the process transparent, since it will be judicially reviewable. Although there is provision for absolute privilege against defamation actions for the Commissioner's reports, there appears to be no equivalent protection for witnesses or complainants, although some form of qualified privilege may well apply. Careful drafting is required in these areas where the protection of parliamentary privilege is not available.[74]

Wales

At its meeting on 11 November 1999 the Committee endorsed a draft procedure for handling complaints, subject to consultation of all members by 24 January 2000.

A six stage scheme was outlined:

— A complaint would be received by the Presiding Officer, who would check if it fell within terms of reference and, if so, would refer to the Committee. (This procedure has been superseded by an automatic referral to the Independent Adviser)

— A preliminary investigation by the Independent Adviser; an initial consideration to establish if the complaint was genuine and substantial and meriting investigation

— The Adviser would report to the Committee which would not be made aware of the identity of the AM under investigation, but would be given sufficient details of the reasoning to decide whether to follow the Adviser's recommendation on further investigation or otherwise. If the Committee did not agree with the Adviser it would need to demonstrate clear reasons for its decision. The Committee would report its decision to the plenary

[74] For example, a Member is given absolute privilege in forwarding the complaints of constituents to the Parliamentary Ombudsman in section 10(5) of the Parliamentary Commissioner Act 1967

Assembly. There was provision for immediate rebuke or warning, if the AM accepts the decision of the Committee, in cases of minor infractions of the rules

— If there were substantial allegations of criminal conduct, the matter would be passed to the police under a protocol agreed following section 72(6) of GOWA

— Where further information was required, the Adviser would undertake a detailed investigation on behalf of the committee, assembling detailed documentary evidence, interviewing witnesses etc

— The Adviser would then lay the report outlining the facts before the Committee. This report would not be made public. The Committee would then give the Member an opportunity to comment, in writing or orally, on the allegations and would make its findings and formulate its recommendations to the Assembly. (Any Member who is the subject of an investigation can, under standing order 16.5, be accompanied at any hearings by another person). The Independent Adviser would not sit on the Committee but could be called to appear before it. The Adviser's role would be to clarify any item in the report; to answer any issues on the conduct of his or her inquiry. The Committee's role would be limited to a judicial review role, of checking procedures and facts substantiated by evidence and that representations made by members answered by the Adviser

— The Committee would prepare a full report for Assembly with

Large amount of staff and adviser time spent investigating and recording cases outside the remit. Other issues included:

- the extent to which the procedure is compatible with Human Rights legislation
- the sanctions which are available to deal with Members when a complaint is upheld
- the need for an appeals procedure
- the possibility of developing procedures which are flexible enough to allow a proportionate response to some complaints
- the impact of Freedom of Information legislation; and in particular whether and when to inform the Member being complained about (and any other interested parties) about the complaint
- the extent to which the procedure for complaints about Members' conduct should be placed in the much wider context of complaints about the National Assembly's policies, Members and staff

Northern Ireland

After initially attempting to investigate complaints itself, the Committee undertook an enquiry in June 2000 into the feasibility of a Commissioner.

The first report from the Committee on Standards and Privileges did not set out a series of formal stages, but the procedures can be categorised as follows:

- Commissioner would make an initial assessment—where the complaint was trivial, he/she would report accordingly to the Committee and no report of the Committee would be made
- Where the Commissioner made a preliminary investigation only, the findings would be passed to the Committee which would make a report to the Assembly recommending no action. The Commissioner's report would be appended to the Committee report
- Where the complaint was not trivial, a detailed investigation would be undertaken by the Commissioner and he/she would subsequently report the findings to the Committee
- The Committee would 'reach a decision on the findings and conclusions of a detailed report into a complaint submitted by the Commissioner for Standards'. The Committee might ask the Commissioner to appear before them or obtain further information, or might require the attendance of a Member (who could read the report beforehand, but not retain a copy). 'Having considered the Commissioner's report and taken whatever additional oral or other evidence it considers appropriate, the Committee will reach a decision on the conclusions and findings of the report' (para 37) Therefore the Committee is empowered to review the whole case, rather than restricting itself to a wholly judicial review function. The Committee report would set out its decision and indicate appropriate sanctions
- The report of the Commissioner would be submitted to the Assembly under cover of a report from the Committee. The chair of the Committee

> would pursue with the Business Committee an opportunity for debate at a plenary session. The member would have an opportunity to speak in the debate

Three procedural guidance notes have been produced for the Committee which give further detail. The Standards Committee have yet to publish a report on a investigation under the new procedures, although the Ombudsman, as acting Commissioner has had complaints referred to him.[77]

Types of cases investigated

With the exception of Scotland, which had two serious investigations to undertake in its initial stages in 1999, the devolved bodies have had to deal with relatively minor complaints. These have absorbed a large amount of time of the commissioners / advisers, but there have been relatively few formal committee reports as a result.

Most of the cases considered by the advisors / commissioners deal with subjects which, in Westminster terms, would be dealt with as privilege issues, and referred to the Speaker or the Committee on Standards and Privileges for action. These include the leaking of reports and dealing with the constituents of another Member.[78] The latter development is interesting, as it indicates that the regulation of 'standards' can encompass 'job description' aspects of being a member. Another growth area is likely to be issues of political finance, campaign donations and office costs. As yet, there has been no overlap problems with the new requirements in the Political Parties, Elections and Referendums Act 2000 for holders of elected office to register donations separately with the Electoral Commission. This has already proved an issue at Westminster. But with elections due in 2003, candidates will need to consider the new requirements.

Legal Processes

Scotland

Legal advice has been provided to the adviser through the clerks. The Commissioner can appoint staff with the consent of the SPCB to assist. The Commissioner may also appoint other persons to provide services, which could include legal advice. There are no proposals in the Bill to offer legal advice to Members or witnesses, although at present they may have lawyers present, or any other adviser. These may only speak to the Committee with the Convenor's permission. Directions to the Commissioner under the Bill will include advice on the burden of proof. The appeals stage is to the full Parliament, with the proviso that members of the Standards Committee should not vote.[79]

Wales

The Adviser has access to legal advice in the Presiding Officer's office. Witnesses and AMs are not afforded legal advice. They may bring an adviser before the Committee, but with no powers to address the Committee. The appeal is to the Assembly. There is no provision restricting Committee members from voting in the debate.

Northern Ireland

Legal advice is available to the committee through the Legal Services Office—with a Director of Legal Services just appointed as part of the staff of the Assembly. This Office may also give advice to Assembly members. If a member needed legal advice to appear before the Committee, financial assistance might be considered. A member can bring an adviser, but the adviser has no right to address the Committee. Appeals lie to the Assembly. There is no provision restricting Committee members from voting in the debate.

Sanctions

Suspected breaches of the registration, declaration and paid advocacy requirements are criminal offences, and under agreements made with the relevant police forces, are not further investigated by the assemblies / parliaments. No prosecutions have yet been attempted.[80]

Lacking parliamentary privilege, the devolved institutions depend on statute and standing orders to enforce sanctions against Members who have contravened the Codes, but who are not to be the subject of criminal prosecution. The devolution legislation refers to the withdrawal of rights and privileges, without providing further definition. None of the bodies has the power to expel a member. The enforceability of suspension without pay has not yet been tested, particularly if the legal processes are subject to sustained judicial scrutiny, and

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[79] The Joint Committee on Parliamentary Privilege had accepted that a review of a report from the Commons Committee on Standards and Privileges was sufficient protection for an MP with respect to the procedures adopted, but recommended that Committee Members did not vote. See paras 295-8

[80] In the Mike Watson investigation in 1999, failure to declare sponsorship was found, but not a breach of the paid advocacy rule. Standards Committee, fourth report 1999 SP Paper 51

in the light of employment law. No such sanctions have yet been implemented by the devolved bodies. Further details are given below.

Scotland

The Standards Commissioner Bill does not set out sanctions against MSPs found to have contravened relevant provisions. This is left for standing orders, but section 39 (5) of the Scotland Act does allow for the exclusion of members who contravene the relevant provisions. There is statutory authority to withdraw rights and privileges of an MSP during this period.[81]

Wales

There are similar provisions in the Government of Wales Act to exclude members who contravene relevant provisions, with the 'withdrawal of rights and privileges' during the period of exclusion.[82]

through registration and declaration of interests, paid advocacy, regulation of cross-party groups, to general conduct in the chamber and enforcement procedures.

The Committee has issued proposals for consultation on replacing the original members' interests order, with responses requested by 15 April 2002.[85] This report gives a detailed overview of the existing categories of registrable interests and raises selected areas for

Principles ‘Members shall comply with the Assembly’s standing orders and its codes of practice and protocols.’

This has caused difficulties for the Committee, as its wide remit has led to possible overlap with the House Committee, which provides advice on the administration and functions of the Office of the Presiding Officer.[90] It also makes it difficult to dismiss trivial complaints.

The requirements on registration and declaration are set out as an Annex to SO 4. A review of members’ interests was undertaken in 2000 and a revised version of the Guidance on The Registration and Declaration of Members’ Financial and other Interests was endorsed by the Assembly 13 February 2001. Amendments to the Annex were necessary in particular to clarify the requirement to register values in relation to financial interests.[91]

Non-pecuniary interests must be registered under SO 4, which requires the registration of paid or unpaid membership or chairmanship of any body funded in whole or in party by the Assembly. Freemasonry membership must also beu 6vt4250 0 7.02 237.18 690.023sCommitcTD0.0009 Tc0

Members of the Assembly are required to lis

Part Two: The Regulation of Parliamentary Standards in Australia, Canada and Ireland

Key Points

These three states retain the Westminster style parliamentary system, but with adaptations. The federal and state / provincial legislatures of each country have developed various types of machinery to regulate parliamentary standards—some are based on parliamentary resolutions underpinned by parliamentary pr

of conduct. New South Wales and Queensland have established statutory commissions with the power to investigate members for official misconduct. Canadian provincial legislatures have generally established statutory ethics parliamentary officers, who tend to perform an advisory and investigative role. These are classified as Officers of Parliament. Detailed statutory codes of conduct have been developed in some of these legislatures. All have a statutory scheme of registration and declaration of interests, but it is common to make only a summary of the register available for publication.

Ireland has established a Standards in Public Office Commission which investigates allegations against office holders. Committees of the Oireachtas have statutory powers to investigate allegations against their members. The Commission places reports involving office holders who are also members before the parliamentary committee, which has the power to impose sanctions. Investigations have generally been conducted under the adversarial method, with the use of legal counsel, although the Commission gained new powers to appoint investigation officers under 2001 legislation.

Introduction

member was expelled for ‘conduct unworthy’ of the New South Wales legislative council in the 1960s, an action upheld by the courts.[97] Such action is rare at Commonwealth level, and the power to expel was lost in the 1987 Act. The most recent case, *Egan v Willis*,[98]

Corruption and bribery of members of the Commonwealth Parliament is an offence under s73A of the Crimes Act 1914. This provision was added in 1982, but with no provision for this to override Article 9, so cases involving parliamentary proceedings remain problematic.[106] Provisions in the criminal codes of each state cover members of state legislatures, although problems of interpretation remain.[107]

MPs and ministers appear to be public officers within the scope of the common law offence of misuse of public office.[108]

Canada

As in Australia, Canadian legislatures were initially held to have inherent privileges necessary for their operation.[109] For the federal parliament, the privileges of the Commons were conferred by statute.[110] Quebec adopted a list of parliamentary privileges by statute,[111] while other provinces have adopted the privileges of the Canadian House of Commons, again by statute. Courts were generally reluctant to intervene in the internal affairs of Canadian legislatures.

The impact of the Canadian Charter of Rights and Freedoms[112] was examined in *New Brunswick Co v Nova Scotia (Speaker of the House of Assembly)* in 1993 which found, on a majority, that there was no 'blanket rule that the Charter cannot apply to any of the actions of a legislative assembly'. Chief Justice Lamer noted in a minority judgment that even if the Charter did apply to the exercise of inherent privileges, it could well be that the House would itself constitute the 'court of competent jurisdiction' for purposes of hearing a claim and granting a remedy under section 24(1) of the Charter.'[113] The majority judgment

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accepted that where a House exercised an inherent privilege, it is not reviewable by the courts, which leaves open the question of privileges conferred by statute.

Neither House of Parliament has expressly resolved to apply the Charter to any of its proceedings, and the precise boundary between courts and parliament remains undelineated. Section 7 of the Charter (right to principles of fundamental justice) might well conflict with parliamentary processes. There are nineteenth century cases indicating that the power to punish for contempt is not an inherent privilege necessary to the exercise of legislative functions.[114]

A mixture of statute and precedent governs the operation of parliamentary privilege. There are offences relating to Parliament in the Canadian Criminal Code[115] including intimidation of parliament. Section 12 of the Parliament of Canada Act 1985 provides that false evidence to the House of Commons, Senate or a parliamentary committee is classified as perjury. Section 7 precludes the use of parliamentary proceedings in civil or criminal proceedings. Suspension of members has occurred, most recently in 1979 in the Commons and 1998 in the Senate. There has been no expulsion in the Commons since 1891.[116]There is specific statutory authorisation for both Houses to deduct allowances from members.[117] The House may exercise penal powers in respect of contempt, but there are practical considerations where the offence is also statutory since Section 11(h) of the Charter provides ac0.0011 T6tfectial Conecean

infringement and shall have power to ensure freedom of debate, to protect its official documents and the private papers of its members, and to protect itself and its members against any person or persons interfering with, molesting or attempting to corrupt its members in the exercise of its duties.'[120] Article 15.12 provides for all official reports and publications and utterances made in either House to be privileged. Article 15.13 states that a member shall 'in respect of any utterance in either House, [not] be amenable to any court or any authority other than the House itself'. Exceptions are made for serious offences (treason, crimes, and violation of law and order).[121]

However the implication of these rights have not been finally determined. In particular it is not clear whether the privileges referred to in Article 15 attach to individual members only, or whether the privilege is regarded as attaching to each House of Parliament, in Westminster practice.[122] This has important implications for the ability of a Deputy to waive privilege in defamation actions.[123]

There have been a number of court judgments relating to privilege. In *re Haughey* the Supreme Court was prepared to supervise the procedures adopted by a Dáil Committee. In 1990 the High Court granted a stay on an application for judicial review in respect of a suspension imposed by the Senate on the recommendation of the Committee of Procedures and Privileges where the Senator had not had opportunity to be heard prior to the suspension. As the case did not proceed, the conflict between Article 15.10 and Article 40.3 (fair procedures) was not further explored.[124]

Legislation has established that the rights in Article 15.13 attach to committee proceedings, and further legislation has clarified the protection offered to witnesses summoned before a committee.[125] This 1997 legislation has also set out the duties on witnesses to respond to inquiries and the powers to require discovery of documents. The extent to which 'utterance'

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[120] The wording of Article 10 is almost identical with that in the 1922 Constitution

[121] The judgment of Goeghegan J in *Attorney General v Hamilton (no 2*) 1993 ILRM 821 suggested that

extends to written statements remains untested, although it is clear that the protection extends only to utterances in both Houses, and not outside.[126]

There is a lack of clarity in the power set out in Standing Orders to suspend members, where it might conflict with the rights of members in Article 15 and of Ministers to attend the

order the discovery of documents[132] assisted the inquiry into the DIRT (taxation) scandal by the Public Accounts Committee.[133]

In summary, parliamentary privilege in Ireland is more circumscribed than in Australia or Canada, where legislation has specifically conferred the privileges of the Commons at a certain date.

The (UK) Prevention of Corruption Acts remain in force.[134] The Ethics in Public Office Act 1995 made amendments to the legislation to bring within its scope office holders and special advisers. In addition, the Office of the Houses of the Oireachtas was designated as a public body under the Acts and legislation in 2001 included Deputies. Criminal investigations are handled by the DPP. The need to undertake a separate criminal prosecution if the tribunal produces evidence of wrongdoing is seen as a major failing of the tribunals of inquiry process in Ireland.[135]

Regulation of standards of conduct in Parliaments

Australia

The Australian Parliament

House of Representatives

The obligations of members are set out in SO 196 (voting where there is a direct pecuniary interest)[136] and SO 335 (membership of committee where direct pecuniary interest)[137] and by four resolutions adopted on 9 October 1984 establishing ad hoc disclosure of interests, and a public register of interests. The definition of declaration did not extend to proceedings outside the House, in contrast to the Commons 1974 resolution. The resolutions are monitored by the House of Representatives Members' Interests Committee.[138] Non-pecuniary interests are registrable. The interests of family members are registrable.

Paid advocacy is prohibited under section 45(iii) of the Constitution, which disqualifies any member of the Commonwealth Parliament who 'directly or indirectly takes or agrees to take

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[132] The Comptroller and Auditor General and Committees of the House (Special Provisions) Act 1998

[133] Parliamentary Inquiry into DIRT First Report, Public Accounts Committee, 1999. See Chapter 16 for a discussion of recommendations for future parliamentary inquiries

[134] The Prevention of Corruption (Amendment) Act 2001 made amendments to bring Irish legislation into line with international obligations and to strengthen the provisions. Members of the Oireachtas are specifically included

[135] Section 5 of the Tribunals of Inquiry (Evidence) Act 1979 ensures that statements to tribunals are not admissible in criminal cases

[136] This is based on the wording of a UK resolution of 1811 , and is severely limited in its effect, which is restricted to votes on topics which are immediate and personal

[137] Now SO 335

[138] For full details see L M Barlin ed *House of Representatives Practice* (1997)

any fee or honorarium for services rendered to the Commonwealth, or for services rendered in the Parliament to any person or State'. This prohibition appears to have limited the development of paid consultancies by MPs. But there are no general prohibitions on undertaking other paid employment.

Senate

The Senate passed resolutions establishing ad hoc declarations and a register of interests on 3 March 1994. They are monitored by a Committee of Senators' Interests[139] and a clerkly Registrar. The definition of declaration of interests has been more coherent in this House, but covers pecuniary interests only. Registration of family interests is kept in a separate part of the register, with public access only with consent of the Committee. Non-pecuniary interests are registrable, with an obligation on the member to disclose where objectively a conflict of interest may arise. The prohibition on paid advocacy extends to Senators and an earlier resolution prohibiting its use was strengthened by resolution in 1995.[140]

For both houses, the enforcement mechanism is through these parliamentary committees.

The Commonwealth Parliament has not adopted a code of conduct, despite recommendations for one in the 1979 Bowen report[141] and in a Parliamentary Working Group in 1995.

Australian state legislatures

State legislatures have similar rules on declaration and registration of interests. Victoria has a statutory requirement to disclose in its 1978 legislation. The codes of conduct in New South Wales, Tasmania and Queensland contain duties to disclose. Other legislatures are bound by Standing Orders or resolutions covering prohibitions against voting, now seen as inadequate for modern parliamentary practice.[142] In contrast, registration is a statutory requirement in all but Queensland and the ACT, where parliamentary resolution is used.[143] There are a variety of approaches to registration of family interests, including limited access.

Enforcement mechanisms include a summary offence, as in South Australia[144] or reference to a parliamentary committee, with the involvement of the Clerk of the Parliaments, as

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[139] Which has a non-Government majority

[140] For full details see Odger's *Australian Senate Practice* 9th ed 1997

[141] *Public Duty and Private Interest: Report of the Committee of Inquiry*, July 1979. This recommended a code in preference to the adoption of a register of financial interests. It was preceded by the Riordan Report of 1975 Report of the Commonwealth Joint Committee on Pecuniary Interests of Members of Parliament, Declaration of Interests

[142] See Carney pp353-6

[143] See Carney p359 for legislative references

[144] Members of Parliament (Registers of Interest) Act 1983, s7

Registrar.[145] Apart from Queensland and New South Wales, complaint procedures are non-publicised and enforcement mechanisms are not well developed. The usual response is to cite the member for contempt of parliament, punishable by reprimand or suspension. The power to fine is not available unless conferred by statute.[146]

A small number of Australian legislatures have adopted codes.[147] The only one adopted by statute is in Victoria.[148] The Queensland Legislative Assembly adopted its comprehensive code in 2001. These codes contain general standards in relation to personal conduct, but these have not yet proved an issue, as for example in Wales or Northern Ireland.

Commissions against Corruption—New South Wales and Queensland

These two commissions were established against a background of corruption allegations, but have themselves attracted criticism for the scale and nature of their investigations.

The New South Wales Independent Commission against Corruption is established under a 1988 statute[149] and may investigate 'corrupt conduct' by a public official, including MPs and ministers. Following a 1992 case[150] the definition of corrupt conduct was altered to include 'in the case of conduct of a Minister of the Crown or a member of a House of Parliament a substantial breach of an applicable code of conduct'. This has prompted the adoption of non-statutory codes in New South Wales Houses in 1998, and the appointment of a non-statutory Parliamentary Ethics Adviser for each House to advise members on 'ethical issues concerning the exercise of [their] role as a Member of Parliament (including the use of entitlements and potential conflicts of interests)'.[151] The advice is at the request of a member only and there is no investigative role.[152] A parliamentary committee monitors the work of the ICAC.

The ICAC may make a finding of corrupt conduct against a member where a substantial breach of the code has been found. The finding is reported to the member's House which is

responsible for disciplinary action. A finding of criminal conduct against a member is referred by the ICAC to the DPP for prosecution.

The ICAC is a large and well-resourced institution. It has recently issued two reports with extensive recommendations on the use of parliamentary allowances.[153]

These include clear guidelines and adequate auditing procedures. It has faced criticism that the extent of its resourcing has driven investigations into apparently minor transgressions.

Queensland has established the Criminal and Misconduct Commission with the power to investigate members for official misconduct.[154] This was formerly known as the Criminal Justice Commission (QCJC), but this body has just merged with the Queensland Crime Commission.[155] The QCJC had interpreted this as relating to criminal conduct of members, but recently proposed an extension to non-criminal conduct, since implemented.[156]

A new post of Queensland Integrity Commissioner is empowered to give advice on ethical issues on request to the Premier, ministers, government employees and members of the Queensland Parliament who belong to the government party or parties.[157] Another recent post, the Parliamentary Criminal Justice Commissioner, now renamed the Parliamentary Crime and Misconduct Commissioner, assists a parliamentary committee in scrutinising the Commission.[158] The appointments process for the position, its servicing and its main functions are set out in statute in some detail.[159]

The incoming Government of October 1993 campaigned on a platform of reform in the field of governmental and parliamentary ethics, and this led both to the appointment of an Ethics Counsellor for government and ministers and to the appointment of a joint committee of parliament. In 1997 a report of the Special Joint Committee on a Code of Conduct of the Senate and the House of Commons was w 7s was 3eed, but stil pawaits implery ettion.T*0.7.0210.987.021

Brunswick.[167] These statutory officers serve fixed terms, according to the individual legislation. The full list is as follows:

- Nova Scotia has a Conflict of Interest Commissioner, established in 1987
- Ontario has an Ethics Commissioner, established in 1988
- British Columbia has a Conflict of Interest Commissioner, established in 1990
- Alberta has an Ethics Commissioner, established in 1991
- Saskatchewan has a Conflict of Interest commissioner, established in 1987
- New Brunswick has a Conflict of Interest Commissioner, established in 2000

The Canadian Conflict of Interest Commissioners hold annual meetings, and gave evidence to the 1997 Special Joint Committee of the Canadian Parliament.

The background to the appointment of such officers, classified as Officers of Parliament, has been a growth in public concern about the behaviour of politicians. In New Brunswick, for example, the legislature decided to retain in 1997 a retired judge to assess the adequacy of the existing 1978 legislation on conflict of interest. A new Act came into force in 2000 and a Commissioner (a Q.C) was appointed for a term of five years.

Under the New Brunswick Act, the Commissioner performs both an advisory and investigatory role. Requests for investigation must be in the form of an affidavit setting out the grounds for the alleged breach of the Act.[168] The Commissioner then undertakes an investigation and reports the results to the Speaker and to the Member who is the subject of the investigation.[169] The Commissioner may recommend penalties to the legislature of reprimands, fines, suspension or expulsion.[170] He is serviced from the Office of the Clerk of the Legislative Assembly. He has a role in investigating the activities of the provincial government, whose ministerial activities are also covered by the 2000 Act. His first investigation involved an allegation from a member of the Assembly that the Minister for Transportation might have used insider information to further his private interests.[171]

In Ontario, the Integrity Commissioner is appointed by the Lieutenant Governor in Council on the address of the Assembly, under s23 of the Members' Integrity Act 1994[172] The term is for five years and there is provision for appointment and re-appointment. Removal is only upon an address of the Assembly, and there is provision for employees 'necessary for the

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[167] http://www.gov.nb.ca/legis/conflict/back.htm .

[168] Members' Conflict of Interest Act, section 36(2)

[169] Members' Conflict of Interest Act section 40

[170] Members' Conflict of Interest Act section 41(1)

[171] See Commissioner's Annual Report for 2000-2001 at http://www.gov.nb.ca/legis/conflict/annual_report.htm

[172] Amended in 1998 and 1999, and available from www.e-laws.gov.on.ca/

performance of the Commissioner's duties' from the staff of the Office of the Assembly.[173] There are confidentiality requirements concerning information disclosed to the Commissioner, which prevail over relevant Freedom of Information legislation.[174]

Once again, the Ontario Commissioner has a dual advice and investigatory role. There is authority to use the powers of a commission under public inquiry legislation. He reports to the Assembly, recommending penalties of fines, suspension and expulsion. The Assembly must respond within 30 days and has power of final decision, but with limitations concerning the imposition of penalties other than those recommended by the Commissioner.

In provincial legislatures, registration and declaration are governed by statute. A typical provision is the requirement to disclose details of all interests privately to a Commissioner, with a summary being produced for public disclosure. In Manitoba, Nova Scotia and Prince Edward Island[175] members must declare direct and indirect pecuniary interests, and withdraw from proceedings. In New Brunswick a public disclosure statement is made to the Conflict of Interest Commissioner which is then filed with the clerk of the Legislative Assembly and made public. The legislation can be very detailed in its registration requirements.[176]

Ireland

Regulation of the Oireachtas

Following a series of political scandals in the 1980s and 1990s and a number of tribunals of inquiry established by the Oireachtas under the UK 1921 Tribunals of Inquiry Act, there has been legislation to establish a system of regulation for members and office holders.[177] The Ethics in Public Office Bill was introduced as part of Programme for Government of the Labour/Fianna Fáil government of early 1993, pioneered by Eithne Fitzgerald, Labour minister of state. The relevant Acts are the Ethics in Public Office Act 1995 and Standards in Public Office 2001. The legislation has created three types of supervisory machinery:

1. Standards in Public Office Commission for ministers and public office holders
2. Committee on Members' Interests of the Dáil for Deputies[178]
3. Committee on Members' Interests of Seanad for Senators

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[173] Section 23(10)

[174] Section 29

[175] Manitoba Legislative Assembly and Executive Co

The Dáil and Seanad adopted the 2001 legislation by resolution, to preserve the right to self-regulation in Article 15 of the Constitution.[179]

The Commission was initially known as the Public Offices Commission under the 1995 legislation. It consisted of :

— Comptroller and Auditor General
— Ombudsman (Chair)
— Chairman of the Dáil
— Clerk of the Dáil
— Clerk of the Seanad

Under section 2 of the 2001 Act it now consists of:

— High Court, or Supreme Court judge or former judge
— Comptroller and Auditor General
— Ombudsman
— Clerk of the Dáil
— Clerk of the Seanad
— Former member appointed by the Government following resolutions in both Houses

The chairman is removable by the President only on resolutions of both Houses for specified misbehaviour.[180] The members have a term of six years and may be re-appointed for one or more terms. The Commission is therefore part-time in nature, and did not receive a complaint alleging contravention of the 1995 Act in the period 1995-1998.[181] It made preliminary investigations in two cases, without proceeding to a formal investigation in 1999. Its powers are analogous to that of a tribunal of inquiry with representation of all parties by senior counsel and with witnesses afforded the same privileges and immunities as in a court of law. It also has responsibilities under electoral legislation to investigate alleged offences relating to declaration of donations and election expenditure. The Commission has generally had a low public profile in terms of investigation of corruption claims in Irish public life.

inspector to make an initial investigation.[182] Under the 2001 legislation, there is provision for an inquiry officer to carry out a preliminary investigation.[183] There is immunity for complainants in good faith.[184]

The Commission undertook its first formal investigation into a minister and provided a report to the Dáil Committee in December 2001.[185] The report was placed in the Dáil Library and the Deputy was given an opportunity to make representations to the Members' Interests Committee in the interests of natural justice, although there was no statutory provision for this stage. He has since been suspended for 10 days following a debate in the Dáil.[186] As a Deputy, it is for the Dáil to impose sanctions.

Sections 8 and 9 of the 1995 Act required each House to establish members' interests committees and to undertake investigations. Sections 30-34 set out detailed requirement for investigations by the Commission and the Commission respectively, but with no reference to an appeal mechanism other than the House. The Committee was given identical powers to those of the Commission in respect of attendance of witnesses and production of documents. The 2001 Act added to these powers. Witnesses giving evidence before a committee are not entitled to refuse to answer questions or not to produce documents.[187] In general such evidence is not admissible in criminal or civil proceedings. There are provisions applicable to make obstruction of a 'person who is a member of staff of a Committee' an offence. High court discovery rules apply for documents.[188]

It appears that the clerk carries out an initial filtering of complaints from the public. There is provision for the award of costs against vexatious or frivolous complaints in section 11 of the 1995 Act. The Committee was also given powers to advise members and specific protection was given to members who had complied with this advice.[189] Reports of the committee are

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[182] 2 December 1998. A summary of its investigation procedure is available from the website, entitled *Investigation Procedure*

[183] Section 4(4) and section 6, where a detailed procedure for the inquiry officer is set out, including powers to obtain documents

[184] Section 5 2001 Act

[185] Commission Press Release 13 December 2001 'Press Release re report (Deputy Ned O'Keefe investigation)

[186] Section 27 of the Ethics Act 1995 states that a Committee 'may' move a motion relating to a report of the Commission, but there is no time limit. The debate was on March 7 2002, available from http://www.gov.ie/oireachtas/frame.htm The suspension was with pay, as the investigation was undertaken under the 1995 Act

[187] Section 16, 2001 Act

[188] Sections 17 and 18. The Act covers both the investigations of Committee and the Standards in Public Office Commission, which may account for the comprehensive set of powers afforded Committee investigations

[189] Section 12

made to the House under section 29 where the committee can recommend sanctions. The maximum penalty is suspension for 30 sitting days, although where a contravention is continuing suspension for an indefinite period may be imposed until the member complies with the legislation. The Dáil Members' Interests Committee has recommended that the period be increased to 3 months.[190]

In evidence to the Northern Ireland Standards and Privileges Committee in 2000, the Chairman of the Dáil Members Interests Committee noted that it had handled over 100 requests for advice since Act came into force in 1996. The Committee engaged legal consultants for the majority of cases and retained legal advice throughout the year.[191] In 1999 it had begun to hear its first complaint against a member by another member and gave 14 days suspension.[192] They used a legal team for the investigation and would employ consultants to assist with assembling documents. Hearings took place in private and the Deputy who was the subject of the allegation used a legal counsel to address the committee.

The debates on the adoption of the Code in February 202 and on the suspension of Deputy Ned O'Keefe in March 2002 indicate complaints by members of the Committee that such investigations are very time-consuming and onerous. There has also been concern that 'tit for tat' allegations are developing, with Deputies making public accusations against other Deputies, before a full investigation.

The Code of Conduct and registration of interests

The 1995 legislation introduced a statutory framework for the disclosure of registrable interests by members of the Oireachtas, as well as ministers and public servants. Registers were established for Dáil and Seanad members by the relevant clerks of each House. Registers are published annually and open to inspection in the library of the Oireachtas. The interests to be declared and registered are set out in the Ethics Act 1995, with no requirement to state financial value. Statements of family interests are made to the Commission for ministerial appointees only and kept private. New members elected have to show a tax clearance certificate and a statutory declaration. Similar provisions apply before appointment to judicial office and to senior public office.[193]

There has been a perceived overlap with the requirements on members in the Electoral Acts 1997 and 1998 to register donations in Donation Statements, which are filed with the Commission. Members must declare donations over £500 annually. Section 20 of the 2001

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[190] Report on a draft Code of Conduct for Members of Dáil Éireann 1 May 2001 available by searching from http://www.gov.ie/oireachtas/frame.htm

[191] First Report, 2000 Q793

[192] The member was Dennis Foley, with the report being issued on 17 April 2000 at http://www.gov.ie/oireachtas/frame.htm. It gives details of the legal procedures used.

[193] Sections 20-24, 2001 Act

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