

Memorandum of Agreement between the Scottish Parliamentary Standards Commissioner and the Crown Office and Procurator Fiscal Service

1. Aims of this agreement

To confirm the steps that the Scottish Parliamentary Standards Commissioner (“the Commissioner”) should take in the event that an issue or potential issue of criminality arises during one of his investigations;

To confirm the steps that the Crown Office and Procurator Fiscal Service (“the Crown”) will take in the event that the Crown commences an investigation where the accused is a Member of the Scottish Parliament (an “MSP”);

To ensure that the Commissioner does not in any way, in the course of his investigation, prejudice any criminal investigation by the Crown while at the same time ensuring that the Commissioner retains a meaningful role in the investigation of complaints.

2. The Role of the Commissioner

The Commissioner investigates complaints that an MSP has breached the requirements of the Code of Conduct for MSPs or the Interests of Members of the Scottish Parliament Act 2006 (“2006 Act”). He does this independently of the Parliament and reports his findings to the Parliament, but within a set of rules laid down in an Act of the Scottish Parliament - the Scottish Parliamentary Standards Commissioner Act 2002 (“2002 Act”).

The Code of Conduct gives guidance to MSPs on how to carry out their Parliamentary duties. Breaches of the Code and of the 2006 Act include failing to register certain interests, accepting rewards in return for promoting particular issues or giving favoured access to people who use lobbying firms. This list is not exhaustive.

3. What the Commissioner cannot do

The Commissioner only *investigates* the complaint and whether or not the MSP has done what has been complained of and whether or not the Code of Conduct has been broken.

The Parliament decides what consequences should follow if there has been a breach of the Code.

The Commissioner deals with complaints only about MSPs, not their staff or other employees of the Parliament.

The Commissioner does not deal with ALL complaints against MSPs:

Complaints about the conduct of MSPs in a meeting of the Parliament go to the Presiding Officer;

Complaints about the conduct of MSPs in a committee go to the committee convener;

Complaints about Cross Party Groups go to the Standards, Procedures and Public Appointments Committee.

Complaints about misuse of allowances go to the Scottish Parliamentary Corporate Body;

Complaints about Ministers acting as Ministers, not as MSPs, are dealt with by the Office of the First Minister at St Andrew's House, under the Scottish Executive Ministerial Code

4. The Role of the Crown Office and Procurator Fiscal Service

The Crown Office and Procurator Fiscal Service is the sole public prosecuting authority in Scotland, which, in the public interest, ensures that all crimes made known to the Procurator Fiscal are investigated and that effective and consistent use is made of the range of prosecution options.

Decisions whether to investigate any allegation of a crime made known to the Procurator Fiscal and whether to prosecute are within the sole discretion of the Crown Office and Procurator Fiscal Service.

5. Occasions when there is an interaction between the work of the Commissioner and the Crown Office and Procurator Fiscal Service

1. Section 13 of the 2002 Act provides *inter alia* that the Commissioner will have certain powers to compel persons to give relevant evidence, but that a person is not obliged to answer any question or produce any document which that person would be entitled to refuse to answer or produce in proceedings in a Court in Scotland;

Any statement made by a person in answer to any question which that person was obliged under section 13 of the 2002 Act to answer shall not be admissible in any criminal proceedings against that person, except where the proceedings are in respect of perjury relating to that statement;

Any person who refuses to take an oath when required is guilty of an offence and liable on summary conviction to a fine not exceeding level 5 on the Standard Scale or to imprisonment for a period not exceeding 3 months.

2. Subsection 6 of section 39 of the Scotland Act 1998 provides that

“Any member of the Parliament who-

- (a) takes part in any proceedings of the Parliament without having complied with, or in contravention of, any provision made in pursuance of subsection (2) or (3), or,
- (b) contravenes any provision made in pursuance of subsection (4),

is guilty of an offence.”

Subsection 7 of section 39 of the Scotland Act provides that:

“A person guilty of an offence under subsection (6) is liable on summary conviction to a fine not exceeding level 5 on the standard scale.”

Section 17 of the 2006 Act specifies the provisions of the 2006 Act in relation to which taking part in Parliamentary proceedings without having complied with them constitutes an offence, in so far as these provisions relate to registrable financial interests, declarable financial interests and paid advocacy.

3. Section 16(2) of the 2002 Act provides *inter alia* that the Commissioner or his staff, may disclose certain information for the purpose of the investigation or prosecution of any offence or suspected offence.

4. In January 2003, the Standards Committee (now the Standards, Procedures and Public Appointments Committee) issued a Direction to the Commissioner in the following terms [Scottish Parliamentary Standards Commissioner Act 2002 (Procedures, Reporting and Other Matters) Directions 2002: Paras. 14 and 15, "Criminal Offences"]:

"If the Commissioner is satisfied in relation to any complaint that the member has committed the conduct complained about and that the conduct would, if proved, constitute a criminal offence, the Commissioner shall –

- (a) suspend investigation and consideration of the complaint;
- (b) submit a report to the Procurator Fiscal; and
- (c) notify the Committee.

The Commissioner shall resume investigation and consideration of a complaint in respect of which investigation and consideration has been suspended [under the preceding paragraph] -

- (a) at the conclusion of any criminal proceedings instituted in consequence of the report by the Commissioner; or
- (b) on receipt of confirmation from the Procurator Fiscal that no such proceedings will be raised; or
- (c) on receipt of confirmation from the Procurator Fiscal that the Commissioner may do so."

5. The Crown may, in the course of the exercise of its functions in relation to the investigation and prosecution of crime, become aware of information concerning, or an allegation of, conduct on the part of an MSP that would constitute a breach of the foregoing provisions.

6. Matters of Agreement

- 1. The Crown will allocate all enquiries falling within the subject matter covered by this Agreement to the Area Procurator Fiscal for Lothian and Borders (the "APF").
- 2. The Crown will treat the Commissioner as one of its "reporting agencies".
- 3. As soon as the Commissioner receives a complaint about the conduct of an MSP which in his view could *prima facie* involve an issue of criminality, he will advise the APF in writing by sending "a notification".
- 4. On receipt of such a notification, the APF (or a senior colleague nominated by him) will meet with the Commissioner as soon as practicable to discuss the complaint.
- 5. Once the Commissioner has sent a notification to the APF, he can continue his investigation until he is directed otherwise by the APF.

6. When the Commissioner is satisfied that the Member has committed the conduct complained about and that the conduct would, if proved, constitute a criminal offence, the Commissioner will report the matter to the APF in terms of Paras. 14 and 15 of the Scottish Parliamentary Standards Commissioner Act 2002 (Procedures, Reporting and Other Matters) Directions 2002: "Criminal Offences".
7. In the event that the question of criminal conduct first arises during an investigation, the Commissioner will notify the APF immediately and the procedure outlined in paragraphs 3 and 4 above will apply.
8. At the meeting following receipt of the notification by the APF, or later where appropriate, the Commissioner will be advised whether or not he is permitted to advise the relevant MSP that the matter has been referred to the Procurator Fiscal.
9. Any decision on whether or not an MSP is to be prosecuted will be referred by the APF to Crown Counsel.
10. Save in exceptional circumstances, the APF will as soon as reasonably practicable, advise the Commissioner of the existence and substance of any complaint involving a Member of the Scottish Parliament.
11. Before investigating such a complaint, the APF will ask the Commissioner if the subject matter of the complaint falls within his jurisdiction.
12. Should the Crown, or the police on the authority of the APF, require access to or recovery of any part of one of the Commissioner's files, the APF or the police will make a request in writing specifying the particular documents required.
13. The Commissioner will retain all his files for five years after the date on which he finally determines the matter.
14. If the Crown Office wishes him to retain a file for a longer period, the APF will make a specific written request of the Commissioner.
15. The APF and the Commissioner will meet annually on a date to be agreed to discuss the operation of this Memorandum and issues of mutual interest.

Signed:.....

Norman McFadyen, Crown Office and Procurator Fiscal Service

Signed.....

Dr J A T Dyer, Scottish Parliamentary Standards Commissioner

Appendix 1

1. The Scottish Parliamentary Standards Commissioner Act 2002
2. The Scotland Act 1998, section 39
3. The Interests of the Members of the Scottish Parliament Act 2006.
4. The Standards Committee Direction 30th January 2003 [Paras. 14 and 15 of the Scottish Parliamentary Standards Commissioner Act 2002 (Procedures, Reporting and Other Matters) Directions 2002: "Criminal Offences"]