House of Commons

Committee on Standards

Mrs Natalie Elphicke
Sir Roger Gale
Adam Holloway
Bob Stewart
Theresa Villiers

Second Report of Session 2021–22

Report, together with formal minutes relating to the report

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Committee on Standards

The Committee on Standards is appointed by the House of Commons to oversee the work of the Parliamentary Commissioner for Standards, except in relation to the conduct of individual cases under the Independent Complaints and Grievance Scheme; to examine the arrangements proposed by the Commissioner for the compilation, maintenance and accessibility of the Register of Members' Financial Interests and any other registers of interest established by the House; to review from time to time the form and content of those registers; to consider any specific complaints made in relation to the registering or declaring of interests referred to it by the Commissioner; to consider any matter relating to the conduct of Members, including specific complaints in relation to alleged breaches in the Code of Conduct which have been drawn to the Committee's attention by the Commissioner; and to recommend any modifications to the Code of Conduct as may from time to time appear to be necessary.

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Powers

The constitution and powers of the Committee are set out in Standing Order No.149. In particular, the Committee has power to order the attendance of any Member of Parliament before the Committee and to require that specific documents or records in the possession of a Member relating to its inquiries, or to the inquiries of the Commissioner, be laid before the Committee. The Committee has power to refuse to allow its public proceedings to be broadcast. The Law Officers, if they are Members of Parliament, may attend and take part in the Committee's proceedings, but may not vote.

Publications

Committee reports are published on the Committee's website at www.parliament.uk/standards and in print by Order of the House.

Committee staff

The current staff of the Committee are Paul Connolly (Media Relations Manager), Arvind Gunnoo (Committee Operations Officer), Dr Robin James (Clerk), and Stuart Ramsay (Second Clerk).

Contacts

All correspondence should be addressed to the Clerk of the Committee at the Committee's email address, standards@parliament.uk. The telephone number for general enquiries is 020 7219 6615.

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Report

1. This Report arises from an inquiry that the Parliamentary Commissioner for Standards opened on her own initiative following receipt of information from the office of the Lord Chief Justice of England and Wales, that suggested that Mrs Natalie Elphicke MP, Rt Hon Sir Roger Gale MP, Adam Holloway MP, Colonel the Rt Hon Bob Stewart MP and Rt Hon Theresa Villiers MP breached paragraphs 16 and 17 of the Code of Conduct by sending letters to senior judges in relation to the public disclosure of pre-sentencing character references, and that those letters sought improperly to influence a judicial process.

2. The Commissioner has supplied us with a memorandum relating to these matters, which we publish as an appendix to this report.[1] All five Members have provided us with further written evidence which we publish as appendices to this report.[2] In addition, three of the five Members (Sir Roger Gale, Adam Holloway and Colonel Stewart) opted to give oral evidence; a transcript of that evidence is available on our website.

3. Full details of the Commissioner's inquiry and her findings are set out in the memorandum. We summarise them briefly before setting out our own analysis and conclusions which take into account the written and oral evidence from the Members concerned.

The Commissioner's findings

4. Mrs Elphicke, Sir Roger, Mr Holloway, Col Stewart and Ms Villiers ("the Members") sent a letter on 19 November 2020, using House-provided stationery, to Dame Kathryn Thirwall, Senior Presiding Judge for England and Wales, and Dame Victoria Sharp, President of the Queen's Bench Division, copied to Mrs Justice Whipple.

5. Mrs Justice Whipple had heard the trial of a former Member, Charlie Elphicke, and was to hear and decide on an application made under section 5.7 of the Criminal Procedure Rules to release the pre-sentencing character references. The Members' letter of 19 November 2020 "express[ed] concern" that Mrs Justice Whipple was holding a hearing into whether the character references should be released, and argued that a decision to disclose the references would be a "radical change to judicial practice" which "could have the [sic] chilling effect and harm the criminal justice system".[3] The letter also stated that "some of the witnesses are extremely vulnerable" and that the authors of the letter understood that those witnesses had "suffered additional mental harm and distress because of the way this matter is being handled by the Judge".[4] The letter ended by stating:

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

1 Appendix 1
2 Appendix 2, Appendix 3, Appendix 4
3 Appendix 1, paragraph 8
4 Appendix 1, paragraph 8

> So serious a matter with such significant repercussions also should be considered further and fully by Parliament. We are all Parliamentarians. In order that we may freely express our serious concerns pertaining to vulnerable private individuals, we have decided to place our own references into the public domain.[5]

6. On the same day, Sir Roger, Mr Holloway, Col Stewart and Ms Villiers published their own character references, and made a statement to the media about their concerns, which included a statement that they had written to senior judges about the matter. Col Stewart also asked a question of the Leader of the House at Business Questions the same day.[6]

7. The Private Secretary to the Lord Chief Justice of England and Wales replied on 20 November to the letter of 19 November, stating that "It is improper to seek to influence the decision of a judge in a matter of which he or she is seized in this way. […] It is all the more regrettable when representatives of the legislature, writing as such on House of Commons notepaper, seek to influence a judge in a private letter and do so without regard for the separation of powers or the independence of the judiciary".[7]

8. The Members replied on 22 November to the Lord Chief Justice, stating:

> "You will be aware that trial and sentencing have both concluded in Mr Elphicke's case. All that remains is a media request submitted for media reasons. […] Nothing in our letter was intended to challenge the judge's authority.
>
> […] [A]s Parliamentarians, we do feel it is legitimate to set out concerns about the long-term implications of publication of character references submitted to the judge solely to assist sentencing, and containing private and confidential information. This has been confirmed as properly a matter for Parliament and Parliamentarians.
>
> […] We have not asked Dame Sharp (sic) to interfere with Mrs Justice Whipple's decision, only to 'consider the crucially important matters of principle which are at stake in this case'"[8]

9. The Members also wrote to Mrs Justice Whipple on 22 November, stating:

> "In raising this with you and your judicial colleagues, we do not in any way challenge your authority to take the decision on publication. We only wish you to be aware of the potential impacts of publication and also the concern that some referees are reluctant to make representations at the forthcoming hearing because this will disclose their identity.
>
> […] [A]s Parliamentarians, we felt duty-bound to highlight the potentially wider-ranging implications of routine publication of references in past of future cases."[9]

5 Appendix 1, paragraph 8
6 HC Deb 19 November 2020, Vol 684 col 479
7 Written Evidence 2
8 Written Evidence 3
9 Written Evidence 4

10. All the letters were also signed by Lord Freud, a Member of the House of Lords, whose conduct falls outside the Commissioner's remit. The House of Lords Commissioner reported on her investigation into Lord Freud's conduct on 9 February 2021. She concluded that by being a signatory to the letters of 19 and 22 November, Lord Freud had failed to meet the standards of conduct expected of individual members of the House of Lords. She found therefore that he had breached that House's Code of Conduct by failing to act on his personal honour. She recommended that he make a personal statement on the matter in the House.[10] Lord Freud did so, also on 9 February, saying: "My motive was purely to alert the judiciary to what I considered an important issue of principle. However, I recognise it was not my place to do so and should not have added my name to the letter. I apologise to the House and judiciary."[11]

11. Paragraph 16 of the House of Commons Code of Conduct for Members states:

> Members are personally responsible and accountable for ensuring that their use of any expenses, allowances, facilities and services provided from the public purse is in accordance with the rules laid down on these matters. Members shall ensure that their use of public resources is always in support of their parliamentary duties. It should not confer any undue personal or financial benefit on themselves or anyone else, or confer undue advantage on a political organisation.[12]

12. Paragraph 17 of the Code states:

> Members shall never undertake any action which would cause significant damage to the reputation and integrity of the House of Commons as a whole, or of its Members generally.[13]

13. The Commissioner accepted that an "important point of principle" was highlighted in the letter, but noted that "a hearing, in open court, with legal representation and full arguments" was scheduled to consider the "specific issues concerned with the release of the character references".[14] She also noted that the letter of 19 November ended with a "request that senior judges act ahead of the pending court hearing".[15]

14. Mrs Justice Whipple had invited written submissions from all the character referees, to be facilitated by Mr Elphicke's former defence team, now acting as officers to the court. The Commissioner stated that she was "unclear why the Members did not either submit their concerns directly to Mrs Whipple or, alternatively, encourage the affected constituents to make use of the mechanisms provided by the court".[16]

15. The Commissioner concluded that, by privately requesting the intervention of two senior judges, and then following the letter with further correspondence, the five Members had attempted to interfere in a judicial process. She concluded that this amounted to a

10 House of Lords, Report of the Commissioner for Standards, *The conduct of Lord Freud* (Commissioner report 2020–21/11), paras 82–83, 89
11 House of Lords Official Report, 9 February 2021
12 Code of Conduct together with the Guide to the Rules relating to the conduct of Members (HC 1882)
13 Code of Conduct together with the Guide to the Rules relating to the conduct of Members (HC 1882)
14 Appendix 1, paragraph 14
15 Appendix 1, paragraph 15
16 Appendix 1, paragraph 20

breach of paragraph 17 of the Code.[17] Since actions that breach paragraph 17 of the Code cannot be part of a Member's Parliamentary duties, House-provided stationery should not have been used, and she therefore found that the letters also breached paragraph 16 of the Code.[18]

16. The Commissioner found that Sir Roger Gale, Adam Holloway and Col Stewart did not breach paragraph 16 of the Code in using House-provided stationery for their pre-sentencing character references for Mr Elphicke. (This finding only relates to those three Members: Ms Villiers used her own stationery and Mrs Elphicke did not provide a reference.)

The Committee's consideration of the cases

17. We have considered these cases as five individual cases, although with significant overlap. All five Members have submitted written evidence to us. Mrs Elphicke and Ms Villiers accept the Commissioner's findings, and have apologised for breaching the Code.[19] Sir Roger, Mr Holloway and Col Stewart did not accept the Commissioner's findings in their written evidence to us. They requested to give oral evidence before us, which they did on 13 July 2021.[20] Mr Holloway and Col Stewart subsequently accepted in oral evidence to us that they had breached the Code and apologised for doing so.

18. We set out our analysis on features common to the cases of all five Members below, before setting out our overall conclusion. We then set out the outcome for each Member individually.

Analysis

Application of Parliamentary privilege

19. The Commissioner in her memorandum considered the issue of whether the letter of 19 November 2020 was protected by parliamentary privilege by virtue of the fact that the issue had been raised on the floor of the House during Business Questions that day by Col Stewart, and the implications of this. Parliamentary privilege is a complex concept, but in this instance it can be considered as two things: the rights of Members to speak freely in proceedings, and the right of the House to control its own precincts and proceedings. In this case, the action complained of was the sending of letters to the judiciary. Such letters are not proceedings, and privilege does not apply. Moreover, parliamentary privilege does not operate to displace or exclude the House's internal disciplinary processes, of which the Commissioner's investigations are part; instead, the House has protected freedom of speech in proceedings in the way in which the Commissioner's remit is defined. This investigation is within that remit.

20. As the Commissioner observes, given the nature of Parliamentary privilege, it would be surprising if it were to operate in such a way that, by raising an issue on the floor of the

17 Appendix 1, para 76
18 Appendix 1, para 77
19 Appendix 2, Appendix 4
20 Transcripts of the oral evidence are published on the Committee's webpages.

House, a Member would be granted either "unlimited power of action" in following up that proceeding by other means or "blanket immunity from a further proceeding of the House", such as an inquiry conducted by the Commissioner.[21]

21. **We agree with the Commissioner that the conduct of the five Members in sending the letters of 19 and 22 November 2019 is not exempt from investigation under the House's internal procedures by reason of parliamentary privilege.**

The draft letter

22. The Commissioner considered during her investigation an early draft of the letter that was eventually sent, in a revised form, by the Members, and she expressed her "concern" about some of the contents of the draft. The Commissioner stated while she had not considered the question of a breach in relation to the contents of this purely draft letter, she felt that the draft might be likely "to indicate the early intention of at least one of the Members". She made clear that she "accept[s] and recognise[s] that there are major differences between this version and the eventual letter sent".[22]

23. **We, like the Commissioner, accept that the early draft referred to in her memorandum was not the form in which the eventual letter was sent. We have not therefore taken the contents of the draft letter into account in considering this case.**

Were the letters an attempt at improper influence?

24. In their written evidence, Sir Roger, Mr Holloway and Col Stewart claimed that "no attempt was made to 'influence the course of a live case' and neither, in the letter sent on 19 November 2020, was there any criticism, actual or implied, of Mrs Justice Whipple".[23] In oral evidence, Sir Roger repeated this claim that the letter was not an attempt to influence judicial decision-making:

> I suppose you could argue that they are judicial proceedings, but I must confess that it did not cross my mind at all that this would be regarded as an interference in a trial. What we were trying to do—it really is all we were trying to do—was to put down a marker to say, "Just before we take the pin out of this grenade, could you please make sure that you understand what may happen if it goes 'bang'?"[24]

25. Col Stewart, asked whether he accepted that the Members had sought to influence the judges, responded:

> I wouldn't say—we were trying to alert the judges. Influence? Well, I suppose, in a way, we were, which is where we were wrong. What we were trying to do was to alert the judges—senior judges—that we were concerned about something.[25]

21 Appendix 1, paragraph 49
22 Appendix 1, paragraph 39
23 Appendix 3
24 Q21
25 Q42

26. We note that Sir Roger Gale, despite maintaining that there was no attempt to influence the case, seemed to backtrack on this claim in his oral evidence to us. He stated that Mrs Justice Whipple's eventual judgement in the case had clarified the law and suggested that this was perhaps attributable to the action taken by the Members:

> "I am not a lawyer, but it appears to me that a precedent has now been set. There is a point of reference, and hopefully from henceforth anybody finding themselves in a similar situation will know that they can make a plea in mitigation and that their private details, where appropriate, will be redacted. If we have achieved that—I don't like these circumstances any more than you do; I appreciate you don't—we have probably done the cause of the House a favour."[26]

27. The letter of 19 November 2020 asked the Senior Presiding Judge for England and Wales and the President of the Queen's Bench Division "to consider the crucially important matters of principle which are at stake in this case, prior to any disclosure of names of any members of the public or of the references they have provided to the court."[27] The Commissioner observed that this is "a request that the two senior judges act ahead of the pending court hearing scheduled for 25 November 2020".[28]

28. This is a clear call for the senior judges to take action in the case. We agree with the Commissioner that this makes the position that the letter was solely about a point of principle untenable. **The only reasonable interpretation of the letter of 19 November 2020 is that it was seeking intervention by Dame Kathryn and Dame Victoria prior to the hearing on 25 November.**

29. **The contents of the letter of 19 November also make it impossible to accept the argument that it contains no implied criticism of Mrs Justice Whipple. The fact that the letter was copied to Mrs Justice Whipple rather than addressed to her directly implies that the Members were attempting to exercise an undue influence over her through her superiors rather than informing the hearing.**

30. Speaker's Counsel, in advice to the Commissioner, quoted from the 1999 report of the Joint Committee on Parliamentary Privilege on the relationship between Parliament and the courts:

> The proper relationship between Parliament and the courts requires that the courts should be left to get on with their work. No matter how great the pressure at times from interest groups or constituents, Parliament should not permit itself to appear as an alternative forum for canvassing the rights and wrongs of issues being considered by the judicial arm of the state on evidence yet to be presented and tested.[29]

Speaker's Counsel further advised the Commissioner that:

> […] in the light of the observations of the Joint Committee on Parliamentary Privilege, and of the courts, on the importance of respecting

26 Q16
27 Written Evidence 1
28 Appendix 1, paragraph 15
29 Joint Committee on Parliamentary Privilege, *Parliamentary Privilege*, First Report of Session 1998–99 (HC 214-I), paragraph 192

> and maintaining the constitutional separation between the courts and Parliament, I would have said that it would be particularly improper for [the Members who sent the letter] to use the authority and status conferred on them as Members of Parliament to influence the outcome of legal proceedings (or, as a minimum, in a way that could appear to be attempting to influence those proceedings).[30]

31. The Commissioner found that the risk that the letter could be perceived as an attempt to influence the conduct and outcome of the hearing on 25 November 2020 was "particularly acute" because it was sent "to senior judges and not directly to the judge holding the hearing";[31] and that the fact that the letter was copied to Mrs Justice Whipple had the effect of "letting her know that she has been by-passed and the issues have been raised with her senior colleagues".[32]

32. The nature of the request in the letter of 19 November 2020, and the recipients of that letter, make clear that this was an attempt to influence judicial decision-making. This is compounded by the fact the letters were sent privately. The Commissioner noted that the letter was "raising privately the very issues that the pending hearing had been convened to hear and consider publicly",[33] and concluded that "by privately requesting the intervention of two senior judges, and then following that letter with further correspondence, the Members attempted to interfere with independent judicial decision making".[34]

33. We do not accept the distinction, put forward to us by Sir Roger in oral evidence, between a trial and a hearing: both are judicial proceedings.[35] We acknowledge that the trial and sentencing of Charlie Elphicke had concluded and that this was not an attempt to interfere in that trial. The hearing, held under section 5.7 of the criminal procedure rules, into whether the character references should be released, was nevertheless a judicial proceeding. The disclosure of references was a matter that fell to be heard and decided upon by a judge according to court procedures and ought not, therefore, to have been subject to external interference by parliamentarians.

34. We also do not accept the argument, put forward in the written evidence from Sir Roger, Mr Holloway and Col Stewart, that it is a defence of the Members' actions that "the original and all other letters were sent in confidence" and "in privacy".[36] To the contrary, attempts improperly to intervene in judicial proceedings are worse, and more potentially undermining of public trust in the judicial process, if conducted secretly and without any public awareness or scrutiny.

35. **We agree with the Commissioner that the letter of 19 November 2020, and the two follow-up letters, were an attempt improperly to influence a judicial proceeding.**

What options were open to the Members to take?

36. We note that in this case a number of alternative avenues were open to the Members.

30 Appendix 1, paragraph 54
31 Appendix 1, paragraph 55
32 Appendix 1, paragraph 23
33 Appendix 1, paragraph 72
34 Appendix 1, paragraph 76
35 Q1, Q17, Q21
36 Appendix 3

37. Mrs Justice Whipple had directed BCL LLP, Mr Elphicke's former solicitors now acting as officers of the court, to notify referees of the hearing regarding the disclosure application and to invite them to make written submissions to BCL.[37] The Members concerned could therefore have used the process made available to them by the court, which would have been in accordance with the court's own rules, with all the necessary measures to ensure openness and fairness that this would entail.

38. In order to raise the broader issue of principle, we consider it would have been appropriate for the Members to make representations to the Lord Chancellor and Secretary of State for Justice, who has policy responsibility for the justice system. We note that Mrs Elphicke told the Commissioner she had written to the Lord Chancellor and to the Attorney General to seek a meeting about the matter.[38] Those individuals would not, of course, have attempted to influence the case in question.

39. Col Stewart had also, as noted in paragraph 5 above, raised the issue by asking a question in the Chamber to the Leader of the House during Business Questions. The Leader of the House properly stated in his response that "in individual cases, I understand that it [disclosure of character references] is a matter for the trial judge, under rule 5 of the criminal procedure rules, but I will of course refer this matter to my right hon. and learned Friends the Lord Chancellor and the Attorney General".[39] It seems likely that the Leader of the House had taken legal advice beforehand about what he could and could not say under the House's sub judice rule.

40. **We conclude that the Members had a clear opportunity to make representations to the court in this specific case, according to the court's own processes, and also had a number of avenues open to them to raise, in an appropriate way, their broader concerns on matters of principle.**

Duties to constituents

41. All five Members in this case maintained that they were acting on behalf of their constituents. The Commissioner found that "only Mrs Elphicke could confirm that the constituents in question fell under her constituency. In light of the usual parliamentary convention that a Member does not get involved in constituency casework from outside their own constituency, the other Members did not advance any argument that they had any constituency responsibility for these constituents".[40] Mrs Elphicke appended to her written evidence to us a series of communications from her constituents expressing degrees of distress and concern at the proposal to release character references.[41]

42. In oral evidence, Sir Roger, Mr Holloway and Col Stewart all acknowledged that they were not acting on behalf of named constituents.[42] In their written evidence, however, they had maintained that "the general principle engaged in the release of unredacted character

37 Appendix 1, paragraph 20
38 Written Evidence 11
39 Hansard HC Deb 19 November 2020 Vol 684 Col 479
40 Appendix 1, paragraph 18
41 Evidence not reported
42 Qq27–32, Q44, Qq63–65

references potentially affects all constituents".[43] They further argued that they had been acting in accordance with the duties set out in Section III of the Code of Conduct, in particular, paragraph 6 of that section which states:

> Members have a general duty to act in the interests of the nation as a whole; and a special duty to their constituents.[44]

43. Our conclusions in response to these arguments are as follows. We do not agree with the claim that a general policy matter affects everyone, and that it therefore affects all constituents, and that it therefore is a "constituency matter". Further, we note that the general duties in Section III of the Code are not rules of conduct. Members' compliance with them cannot be investigated by the Commissioner or adjudicated by this Committee. It is clear from the structure of the Code that the general duties of Members set out in Section III are subject always to the enforceable rules of conduct set out in paragraphs 10–18 of the Code. **We cannot accept the argument that by acting, or intending to act, on behalf of constituents (in accordance with the general duties of Members), a Member is absolved from responsibility for adhering to the specific rules of conduct or other rules of the House.**

Overall conclusion

44. **The letters signed and sent by the Members in this case were an attempt improperly to influence judicial proceedings. The Members concerned had several avenues open to them by which they could legitimately have raised their concern over the issues at stake in the case. These included making representations to the court through the proper channels, as they were invited to do, and approaching the Government's point of liaison with the judiciary, the Lord Chancellor. Despite having these alternative options, they chose to write privately to two senior judges to request their intervention in a decision that properly belonged to Mrs Justice Whipple and that would be made in accordance with the court's normal processes. Their letters were, appropriately, disregarded and they were rebuked by the Lord Chief Justice. There is no suggestion that the Members concerned actually influenced the outcome of the hearing. But they sought to do so, and by acting as they did risked giving the impression that elected politicians can bring influence to bear on the judiciary, out of public view and in a way not open to others. Such egregious behaviour is corrosive to the rule of law and, if allowed to continue unchecked, could undermine public trust in the independence of judges.**

45. **We therefore agree with the Commissioner that, in sending their letters of 19 and 22 November 2020, Mrs Elphicke, Sir Roger, Mr Holloway, Col Stewart and Ms Villiers undertook an action which caused significant damage to the reputation and integrity of the House of Commons as a whole, or of its Members generally, and was therefore a breach of paragraph 17 of the Code.**

46. **We further conclude, as a consequence of the above, that, by using House-provided stationery in order to do so, Mrs Elphicke, Sir Roger, Mr Holloway, Col Stewart and Ms Villiers also breached paragraph 16 of the Code.**

43 Appendix 3

44 Code of Conduct together with the Guide to the Rules relating to the conduct of Members (HC 1882)

47. We note that, although the broad principle has been very long established, there has never been any explicit rule in the Code forbidding Members to interfere with judicial proceedings, nor a general rule against Members attempting to use their position as a Member of Parliament to exert improper influence or gain improper advantage. This had been taken to be self-evident. However, we intend to return to this matter as part of our review of the Code of Conduct for Members. We offer advice to all Members on the matters raised in this case in our concluding comments at the end of this report.

48. The Committee is determined that there should be genuine learning and improvement from this case. We are already reviewing the code of conduct and will consult later this year on changes to the rules which will provide Members with explicit guidance on this.

49. In accordance with our usual practice, we have considered whether there are any aggravating and mitigating factors in relation to these breaches.[45] We set out the aggravating and mitigating factors, and the outcome, for each Member individually. **Although all five Members acted in unison, we have only imposed a single day's suspension on the two Members who had substantial legal experience, and the one Member, of longest standing in the House, who still does not accept his mistake; all three of whom should have known better.**

Mrs Natalie Elphicke

50. In relation to Mrs Elphicke, we consider the following to be aggravating factors:

- Mrs Elphicke has been a qualified solicitor for over 20 years and is a qualified barrister. We would have expected a lawyer of her experience to have been particularly aware that her actions in this case were an attempt improperly to interfere in judicial proceedings.
- Mrs Elphicke was closely involved in every aspect of this case, and was the driving force behind drafting the original letter of 19 November.
- Mrs Elphicke should have realised that there would be an apparent conflict of interest arising from her close involvement in her husband's trial.

51. We consider the following to be mitigating factors:

- Mrs Elphicke acknowledged, although only at the end of the Commissioner's investigation, that she breached the rules of the House and apologised to the Commissioner and to us for doing so.
- Mrs Elphicke is a relatively new Member, having been elected in 2019.
- Mrs Elphicke thought she was acting in the best interests of her constituents.

52. ***We recommend that Mrs Elphicke be suspended from the service of the House for one sitting day. Mrs Elphicke should also apologise to the House by means of a letter to the Committee, and to the Lord Chief Justice of England and Wales by letter copied to the Committee. The terms of both apologies should be agreed in advance by Mr Speaker and the Chair of the Committee.***

45 Committee on Standards, Sanctions in respect of the conduct of Members, Seventh Report of Session 2019–21 (HC 241), para 80.

Sir Roger Gale

53. In relation to Sir Roger Gale, we consider the following to be aggravating factors:

- Sir Roger is a very senior and long-serving Member of the House, and a former Special Constable. We consider that a Member of his seniority and experience should have been particularly aware of the impropriety of his actions in this case.

- Sir Roger has not accepted that he breached the rules of the House, and continues to claim that his actions, if anything, have enhanced the reputation of the House. He is the only one of the five Members to maintain the claim that their letter may actually have influenced Mrs Whipple's judgement.[46] Sir Roger told us in oral evidence, "I would find a different way of doing it, but would I do it again—would I seek to achieve the same effect? Yes, I would".[47] We are therefore not entirely convinced that Sir Roger would not act in a similar way in the future.

54. We consider the following to be a mitigating factor:

- We believe that Sir Roger conscientiously considered that he was taking the right course of action.

55. ***We recommend that Sir Roger be suspended from the service of the House for one sitting day. Sir Roger should also apologise to the House by means of a letter to the Committee, and to the Lord Chief Justice of England and Wales by letter copied to the Committee. The terms of both apologies should be agreed in advance by Mr Speaker and the Chair of the Committee.***

Adam Holloway

56. In relation to Mr Holloway, we consider the following to be aggravating factors:

- Mr Holloway is an established Member of the House, having been elected in 2005.

- Mr Holloway has evidenced carelessness and inattention in this matter. Despite claims by the other Members in this case that the contents of the letter were carefully considered, and subject to numerous amendments, Mr Holloway told us that he had given the letter only "twenty seconds" thought before agreeing to sign it.[48]

57. We consider the following to be mitigating factors:

- It appears that Mr Holloway played a peripheral part in drafting and organising the initial letter.

- Mr Holloway has acknowledged, although only at the point at which he gave oral evidence before us, that he breached the rules of the House; and apologised to us for doing so.

46 See paragraph 26 above.
47 Q26
48 Q58, Q60, Q67

58. ***We recommend that Mr Holloway should apologise to the House by means of a personal statement, and should apologise to the Lord Chief Justice of England and Wales by letter copied to the Committee. The terms of both apologies should be agreed in advance by Mr Speaker and the Chair of the Committee.***

Bob Stewart

59. In relation to Col Stewart, we consider the following to be an aggravating factor:

- Col Stewart is an established Member of the House, having been elected in 2010.

60. We consider the following to be mitigating factors:

- It appears that Col Stewart played a peripheral part in drafting and organising the initial letter.
- Col Stewart has acknowledged, although only at the point at which he gave oral evidence before us, that he breached the rules of the House; and apologised to us for doing so.

61. ***We recommend that Col Stewart should apologise to the House by means of a personal statement, and should apologise to the Lord Chief Justice of England and Wales by letter copied to the Committee. The terms of both apologies should be agreed in advance by Mr Speaker and the Chair of the Committee.***

Theresa Villiers

62. In relation to Ms Villiers, we consider the following to be an aggravating factor:

- Ms Villiers is an experienced Member of the House, a trained barrister, and a former Secretary of State for Northern Ireland. We would have expected a Member of her seniority and experience, with legal expertise, to have been particularly aware that her actions in this case were an attempt improperly to interfere in judicial proceedings.

63. We consider the following to be a mitigating factor:

- Ms Villiers has acknowledged, although only at the end of the Commissioner's investigation, that she breached the rules of the House and apologised to the Commissioner and to us for doing so.

64. ***We recommend that Ms Villiers be suspended from the service of the House for one sitting day. Ms Villiers should also apologise to the House by means of a letter to the Committee, and to the Lord Chief Justice of England and Wales by letter copied to the Committee. The terms of both apologies should be agreed in advance by Mr Speaker and the Chair of the Committee.***

Advice to Members

65. It has long been recognised that Parliament and the courts have distinct constitutional roles. A judge in a 1997 ruling stated that the relationship between them depends on what

he described as "a mutuality of respect between two constitutional sovereignties".[49] This applies to the practical, day-to-day relationship between Parliament and the courts. At the heart of the relationship is the concept of comity: that Parliament and the courts should respect each other's constitutional roles and not seek to interfere in each other's proceedings or internal affairs.

66. The courts will not interfere with established parliamentary privileges, nor with each House's right to regulate its own internal proceedings (sometimes referred to as its "exclusive cognisance"). Article IX of the Bill of Rights 1689 is the statutory expression of a wider, older, principle, of freedom of speech in Parliament. On Parliament's side, each House has agreed to observe a sub judice resolution in formal proceedings, restraining freedom of speech where active cases are in question, and the rules of order prohibit casual criticism of the judiciary.

67. These restraints are not absolute: the courts have found it necessary to examine proceedings on occasion, and the Chair can choose to waive the sub judice rule where matters of particular importance are in question. Moreover, it is recognised that both courts and Parliament have a legitimate interest in Ministerial decisions, so the sub judice rule does not apply when such decisions are in question.

68. Nonetheless, each institution, and the individuals who serve in them, ought to proceed very cautiously and carefully when it considers that it may be encroaching on the rights and privileges of the other.

69. It follows that this self-restraint should apply to the way in which individuals from each institution behave toward the other, when acting in an official capacity.

70. Not only is the principle of comity between the courts and Parliament long established, but each institution has clear rules about the way in which proceedings are conducted, and the proper way to engage with them. As befits the function of Parliament, there are many opportunities for outside individual bodies and individuals to engage with its proceedings, for instance by submitting evidence to select committee inquiries. Nonetheless, a select committee would be surprised if, for example, a judge wrote to them to criticise the way in which they handled their proceedings, or demanded to take part in a private meeting.

71. The courts, because of the nature of their work, have much more structured rules than Parliament. There are clear ways in which individuals can participate in legal proceedings or seek to give their views. Members are as entitled as anyone else to engage with the courts within those rules.

72. But the principle of comity must mean that Members should not try to influence the courts by bringing their authority as Members to bear on a particular active case other than through the normal rules of court. To do so risks undermining the independence of the courts.

73. Decisions of the judiciary must not be subject to external influence, whether by private individuals, the executive or by individual parliamentarians, for the simple reason that decisions of a court should be made on the merits of the arguments and evidence put before it in accordance with fair processes.

49 By Sedley J, in R(Al-Fayed) v Parliamentary Commissioner for Standards[1997] EWCA Civ 2448

74. Members should not, therefore, seek improperly to influence an active judicial proceeding. "Improper" influence means influence exercised outside the established institutional channels for participating in or engaging with judicial proceedings. Just as the House expects the courts to respect Parliament's right to order its own proceedings, so individual Members should respect a presiding judge's right to decide how a case should be handled. The law itself has remedies if the judge is in error.

75. **For clarity, Members may do the following, subject to the rules of the House (for example, on declaration or paid advocacy):**

a) **Participate in or initiate legal proceedings;**

b) **Provide character references;**

c) **Raise any case in proceedings in Parliament in terms which do not breach the sub judice resolution, or request that the Chair waive the sub judice resolution in a particular case;**

d) **Engage in private correspondence with members of the judiciary which does not relate to active judicial proceedings;**

e) **Make private representations to a decision-making body, mediating body (such as an Ombudsman) or regulatory body, which is not judicial in function; or**

f) **Make, outside of proceedings in Parliament, the same kind of public comment as any other citizen could do.**

76. **Members should not, however:**

a) **Make private representations about proceedings which are active or are not definitively concluded to members of the judiciary, outside of the court's own processes for making representations; or**

b) **Make private representations about proceedings which are active or are not definitively concluded to a tribunal, such as an employment or immigration tribunal, outside of the tribunal's own processes for making representations;**

c) **Otherwise attempt to pressurise members of the judiciary in the exercise of their functions.**

As we have found in this case, actions listed above cause significant damage to the reputation and integrity of the House of Commons as a whole and may therefore breach paragraph 17 of the Code of Conduct.

77. **If Members are in doubt as to whether it is appropriate to make representations to a particular body, they should seek advice from the Clerk of the House or another senior Clerk before doing so.**

Appendix 1: Memorandum from the Parliamentary Commissioner for Standards – Mrs Natalie Elphicke MP, Rt Hon Sir Roger Gale MP, Mr Adam Holloway MP, Colonel Bob Stewart MP, Rt Hon Ms Theresa Villiers MP

Summary

This memorandum reports on the inquiry that I began following receipt of information from the office of the Lord Chief Justice of England and Wales. On review of the material, I decided to use my own powers under Standing Order No. 150 to open an inquiry into the Members.

I commenced the inquiry on 8 December 2020.

I investigated whether the Members had acted in breach of paragraphs 16 and 17 of the 2019 Code of Conduct for Members. I found that in writing to senior members of the judiciary ahead of a pending judicial hearing, the Members had risked interfering in that judicial process and, in doing so, had caused significant damage to the reputation and integrity of the House.

Breaches of paragraph 17 of the Code of Conduct are not matters that I can resolve using my own powers granted under Standing Order No. 150 and I have therefore referred this matter to the Committee on Standards for consideration of whether any further action is required.

Report

Background

1. On 20 and 23 November 2020 my office was copied into email correspondence between the Lord Speaker's office, in the House of Lords, and the Speaker's office in the House of Commons. That correspondence shared letters exchanged between the office of the Lord Chief Justice and a group of parliamentarians; Mrs Natalie Elphicke MP, Rt Hon. Sir Roger Gale MP, Mr Adam Holloway MP, Colonel Bob Stewart MP, Rt Hon. Ms Theresa Villiers MP ("the Members"), and Rt Hon. Lord Freud.[50]

2. The letters exchanged between the office of the Lord Chief Justice and the parliamentarians concerned an imminent hearing to determine whether pre-sentencing character references submitted to the court to assist in the sentencing of a former MP, Mr Charlie Elphicke, should be released publicly.

50 As a Member of the House of Lords, Lord Freud's conduct falls outside my remit

3. The first letter in the chain was dated 19 November 2020[51] and was sent by the parliamentarians to Dame Kathryn Thirlwall, the Senior Presiding Judge for England and Wales,[52] and Dame Victoria Sharp, President of the Queen's Bench Division.[53] The letter was copied to Mrs Justice Whipple who had heard the trial of Mr Elphicke and who was to hear and decide on the application to release the pre-sentencing character references publicly.

4. This letter was replied to by the Private Secretary to the Lord Chief Justice on 20 November 2020,[54] which generated a follow-up letter from the parliamentarians to the Lord Chief Justice on 22 November 2020.[55] This further letter was also copied to Mrs Justice Whipple, who was also sent an additional separate letter by the Members on 22 November 2020.[56]

5. A final response was then sent by the Private Secretary to the Lord Chief Justice on 23 November 2020[57] and which copied the correspondence chain to the Lord Speaker's office and the Speaker's office.

6. All of the correspondence sent by the parliamentarians used House-provided stationery.

7. On 19 November 2020, Sir Roger, Mr Holloway, Colonel Stewart, and Ms Villiers published, via the media, the pre-sentencing character references they had provided to the court. A statement was also released expressing the view of the parliamentarians that references provided from members of the public to the court, should not be disclosed.[58]

What did the Members' letters say?

8. The Members' letter of 19 November 2020 to Dame Kathryn Thirlwall and Dame Victoria Sharp states:

> **R v. Elphicke – Release for Media Publication of Character References Not Made Public in Criminal Proceedings**
>
> *You will be aware that Mr Charlie Elphicke was recently convicted and sentenced to two years in prison by Mrs Justice Whipple (Whipple J).*
>
> *We write to express concern that Whipple J is holding a further hearing in this case on whether the character references provided in Mr Elphicke's case should be published following a request by the Guardian newspaper. These are references which the Judge, when making her sentencing determination, did not read out and where the individuals were not named at the relevant time.*

51 WE1 evidence bundle
52 The Rt Hon Lady Justice Thirlwall DBE – Senior Presiding Judge | Courts and Tribunals Judiciary
53 Dame Victoria Sharp DBE, President of the Queen's Bench Division | Courts and Tribunals Judiciary
54 WE2 evidence bundle
55 WE3 evidence bundle
56 WE4 evidence bundle
57 WE5 evidence bundle
58 MPs who gave 'naughty Tory' Charlie Elphicke character references after sex attack conviction | Daily Mail Online

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

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

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

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

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

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

Media Interest – Future and retrospective implications

The request made to Whipple J to publish the character references has come from the media. It is understandable that they would wish to use this case to secure a radical change to judicial practice to establish a principle that character references will now be routinely disclosed. This would provide a source of content to be reported on, especially if it covers references provided in past cases as well as current ones.

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

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

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

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

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

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

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

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

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

9. The Members' letter to the Lord Chief Justice on 22 November 2020, which was copied to Mrs Justice Whipple, states:

Thank you for the letter sent on your behalf by your Private Secretary, [name redacted], dated 20 November 2020.

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

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

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

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

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

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

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

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

10. The Members' further letter of 22 November 2020 to Mrs Justice Whipple reads:

> *We write in relation to the hearing scheduled for 25 November 2020 on potential release of references provided to the court in relation to Charlie Elphicke.*
>
> *You will have seen our recent letter to Dame Victoria Sharp DBE and Lady Justice Thirlwell. For your information, we are also attaching a copy of the response we are sending to the Lord Chief Justice on this matter.*
>
> *As we set out in that correspondence, we are worried about the harm and distress that is being suffered by vulnerable members of the public who provided references, some of whom are Mrs Elphicke's constituents.*
>
> *In raising this with you and your judicial colleagues, we do not in any way challenge your authority to take the decision on publication. We only wish you to be aware of the potential impacts of publication and also the concern that some referees are reluctant to make representations at the forthcoming hearing because this will disclose their identity. We certainly do not suggest that you have intentionally caused such outcomes. Nonetheless they are real.*
>
> *In making the references we provided public, we hope to assist both the court and the other referees because we hope this will enable a greater focus on the question of disclosure of sensitive personal information relating to members of the public, rather than matters relevant only to public figures who provide references in criminal cases.*
>
> *Likewise, as Parliamentarians we felt duty-bound to highlight the potentially wide-ranging implications of routine publication of references in past or future cases. This general issue has been raised in Parliament in the way that such policy matters regularly are. We would again emphasise that highlighting this in Parliament is not meant, in any way, to interfere with the judicial process, only to highlight the potential harm to ordinary people who in good faith have provided references to assist the courts in making a decision on sentencing.*

The scope of my inquiry

11. I decided to open a formal inquiry on my own initiative using the authority given to me by Standing Order No. 150 because I was concerned whether:

- the content of the letters sent to the judiciary risked interfering with an ongoing judicial matter and therefore potentially put the Members in breach of paragraph 17 of the Code of Conduct for Members; and
- the use of House-provided stationery to write to the judiciary was allowed within the House's rules on stationery and might amount to a breach of paragraph 16 of the Code of Conduct for Members.

12. During the course of my inquiry, I received copies of the pre-sentencing character references that had been written on behalf of Mr Elphicke by Sir Roger,[59] Mr Holloway,[60] Colonel Stewart,[61] and Ms Villiers.[62] I noted that the references written by Sir Roger, Mr Holloway, and Colonel Stewart had been submitted to the court on House-provided stationery. I therefore also considered whether such usage was allowed within the House's rules on stationery and might also amount to a breach of paragraph 16 of the Code of Conduct for Members.

Analysis of the key issues raised during the inquiry

Matter of policy and principle and not about an individual case

13. All the Members told me that their joint letter of 19 November 2020 to Dame Kathryn Thirlwall and Dame Victoria Sharp related to a matter of principle and was not concerned specifically with the earlier criminal court proceedings involving Mr Charlie Elphicke.

14. I accept that an important point of principle was highlighted by their letter; namely, should character references provided to assist a court's sentencing deliberations be considered private or public documents and, if such references are to be considered as public documents, what harm might arise from their release. However, it is critical to note that the court had not yet taken a view on that decision. A hearing, in open court, with legal representation and full arguments, was scheduled to be heard imminently on 25 November 2020. That hearing had been arranged to consider the specific issues concerned with the release of the character references, including the potential risk of harm to the referees.

15. The wording of the letter of 19 November 2020 did include broad points of principle but it also included much commentary on the specific issues connected to the possible decision to release the character references that were provided in the course of Mr Elphicke's criminal trial. The letter concludes, in its penultimate paragraph, with a request that the two senior judges act ahead of the pending court hearing scheduled for 25 November 2020.

16. It is clear that the letter was not solely about a point of principle but also pertained to a specific judicial proceeding and sought action ahead of an imminent hearing connected to that proceeding.

Acting on behalf of constituents

17. I have also been told that the letter of 19 November 2020 was written on behalf of constituents who had written pre-sentencing character references for Mr Elphicke and who were now concerned at the harm that might arise from the release of their references to the public domain.

18. However, only Mrs Elphicke could confirm that the constituents in question fell under her constituency. In light of the usual parliamentary convention that a Member does not

59 Pages 54 to 55 of WE13 evidence bundle
60 Page 80 of WE16 evidence bundle
61 Page 103 WE20 evidence bundle
62 Page 125 WE22 evidence bundle

get involved in constituency casework from outside their own constituency, the other Members did not advance any argument that they had any constituency responsibility for these constituents. Nor did Mrs Elphicke provide any correspondence from her constituents requesting her specific involvement in this way.

19. I have also noted that the letter talks about the affected constituents in a general way without names being mentioned. If protection, or special consideration, for these constituents was being sought (for example, the non-disclosure of their reference or redaction of extensive personal details from their reference), then the letter of 19 November 2020 is a poor means of securing that protection or consideration. If a concerned constituent had asked Mrs Elphicke to act on their behalf, it is hard to see how they would be satisfied with the letter of 19 November 2020 alone. Given these issues, I do not agree that the letter of 19 November 2020 can be said to form part of correspondence dealing with constituency casework.

20. I am also mindful that Mrs Justice Whipple had invited written submissions from all the character referees, which was to be facilitated by Mr Elphicke's former defence team, who were acting as officers to the court. I am unclear why the Members did not either submit their concerns directly to Mrs Whipple or, alternatively, encourage the affected constituents to make use of the mechanisms provided by the court. If the Members felt that Mrs Whipple's pending hearing should be heard privately, which may have been a means to allay the fears of the affected referees and facilitate their participation, I am unclear why an application to that affect was not made to the court through Mr Elphicke's former defence team.

The recipients of the letter of 19 November 2020

21. The Members' letter of 19 November 2020 was copied to Mrs Justice Whipple. The Private Secretary to the Lord Chief Justice, responded to this letter on 20 November 2020. The Members wrote to the Lord Chief Justice on 22 November 2020 to seek to provide an assurance that were not in any way attempting to improperly interfere with the judicial process, only to draw attention to the important principles involved in the case. At the same time, they wrote to Mrs Whipple to provide her with a similar assurance. In addition, Mrs Whipple was provided with a copy of the letter to the Lord Chief Justice. I accept that none of the Members publicised these letters to the judiciary.

22. The Members are clear that they were in no way seeking to '*go behind the back*' of Mrs Justice Whipple and they supported this position by their decision to copy Mrs Whipple into both letters to the senior judges. I am unable to accept this reasoning.

23. My view is that these actions risked being perceived by Mrs Justice Whipple as undermining behaviour; by-passing Mrs Whipple, the judicial decision maker, not submitting a direct application to the court ahead of her hearing, but letting her know that she has been by-passed and the issues have been raised with her senior colleagues.

24. I was also told by the Members that these two senior judges were written to in their "*administrative/legislative capacity*". I remain unclear what that means as judges do not write legislation.

25. The penultimate paragraph of the Members' letter of 19 November 2020 to the two senior judges says:

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

Although neither judge has a day-to-day supervisory role managing Mrs Justice Whipple's work, it seems likely that the Members believed that the two senior judges could exercise an *"oversight responsibility"* and as such could issue a ruling or direction to Mrs Whipple ahead of her pending hearing.

26. I also note that if the letters to the senior judges were sent only in connection with principles, and related solely to the content of future practice directions, there appears to be no need to have sent copies of the letters to Mrs Justice Whipple as her contribution to future procedural directions would not be required.

The later letters

27. As I have outlined above, the Members told me that their two later letters of 22 November 2020, to the Lord Chief Justice and to Mrs Justice Whipple, were written in an attempt to provide assurances about their earlier letter of 19 November 2020.

28. However, having considered the content of those two letters carefully, I accept that may have been the intention but it is my view that the letters were likely to have been read and perceived by the recipients as further attempts by the Members to intervene and direct judicial decision making.

29. I note the letter of 22 November 2020 to the Lord Chief Justice repeats the Members' desire that Mrs Justice Whipple take into account their earlier private representations made to Dame Kathryn Thirlwall and Dame Victoria Sharp:

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

It continues later by stating:

> *Secondly, as Parliamentarians, we do feel it is legitimate to set out concerns about the long-term implications of publication of character references submitted to the judge solely to assist sentencing, and containing private and confidential information. This has been confirmed as properly a matter for Parliament and Parliamentarians.*

This letter to the Lord Chief Justice is copied to Mrs Whipple, which, as above, I consider could have been perceived as undermining Mrs Whipple. I am also mindful that the Members' separate letter of 22 November 2020 to Mrs Whipple further repeats some of the earlier submissions made by the Members to Dame Kathryn Thirlwall and Dame Victoria Sharp.

30. It is my opinion that the two later letters of 22 November 2020 compound the impression that the Members thought it appropriate to correspond privately with the judiciary, including the Lord Chief Justice, about matters that were to be imminently heard and decided in open court. This should not have happened.

The media application

31. The Members included in their letter to the judiciary of 19 November 2020 a statement that reads:

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

32. The Guardian, The Times, and the Daily Mail applied for the release of the pre-sentencing character references supplied on behalf of Mr Elphicke that had been relied on by the court.

33. Following legal representations, a full hearing was convened and heard by Mrs Justice Whipple on 25 November 2020 and concluded that:

> *The correct position is that the references were put before the Court at a public hearing. Any part of any reference could have been referred to openly at that hearing and reported by the press.*
>
> …
>
> *The default position is that the references should be released. This is not to create any new law or break any existing convention or practice.*

34. Based on this information, my conclusion is that the release of the character references provided to assist the court in sentencing Mr Elphicke was not a departure from the usual practice of the courts and therefore was not a reasonable basis for the Members to write to the senior judges in the way they did on 19 November 2020.

The draft of the 19 November 2020 letter

35. During the course of my inquiry, Sir Roger provided me with an early draft of the letter of 19 November 2020 to the senior judges.[63] I was concerned about the following paragraphs contained within the draft:

> **Ongoing consideration of Appeals in the Elphicke case**
>
> *You will be aware that Mr Charlie Elphicke was convicted and sentenced to two years in prison by Mrs Justice Whipple (Whipple J). We are aware that Mr Elphicke is appealing his sentence, together with conviction on grounds which include the conduct of Whipple J. These are matters for the Court of Appeal to resolve and are not the subject of this letter nor do we make*

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comment in relation to them. We draw attention to such matters solely so your Ladyships are aware that this Judge and this case have not proceeded on a basis that is without controversy, and it is already the subject of substantive appeal applications.

…

In relation to the upcoming hearing on 25 November 2020, Whipple J has ordered the hearing to be in open court, and she recognises that there is considerable media interest. She has made no provision for any aspect of representation to made privately by individuals whose privacy would be so affected. As such, it is impossible for such individuals to reasonably be expected to attend or make written representations about their private matters with any degree of assurance or certainty that the Judge will treat the matters as such. This is, in our view, an irresponsible approach about which we make formal complaint.

…

Given the above, it is our strong view that Whipple J should be removed from taking any further part in these proceedings and in this case. This particular decision, if release of the information is ordered, could change current and future practice for sentencing. Such a decision should not be made lightly by a single judge. It is a decision that, were it to be taken, should surely be taken by an appropriate authority, such as the sentencing council or a group of leading judges who are responsible for such matters - such as yourselves.

36. The tone of the letter appears to be in the form of a formal complaint directly against Mrs Justice Whipple. The letter also asks the senior judges to take steps to remove Mrs Whipple from the pending hearing about the possible release of the character references.

37. I have asked all the Members about their recollection of this draft.

- Mr Holloway and Colonel Stewart told me they had no personal knowledge of this draft and had never seen it.
- Sir Roger stated, *"I actually don't recall this particular draft but if I sent it to you, it must have been in my possession"*. Sir Roger did not know who had drafted it.
- Ms Villiers told me, *"It looks very much, I think, like the initial draft that Natalie circulated, and I provided some comments"*.
- Mrs Elphicke explained, "*I am fairly sure this looks like the draft letter I was referring to being from the first to the last draft there were some 150 revisions. The final draft reflects our intention and this draft, if you like, reflects the smorgasbord of issues that there were…"*

38. I reminded Sir Roger, Mr Holloway, and Colonel Stewart that their names appear at the bottom of the draft.

39. My attention to this draft is not as a means of ascertaining whether a breach of the rules has taken place in relation to this particular version, as it is clear this is not the

version which was sent. However, it is of interest that this appears to be an early draft of the letter finally sent and it is likely to indicate the early intention of at least one of the Members. I accept and recognise that there are major differences between this version and the eventual letter sent but it is difficult to ignore the impression that at some point at least one of the Members wished to seek the removal of a Judge from a live proceeding.

Raising the issue in Parliament

40. On 19 November 2020 the Leader of the House, Rt Hon. Jacob Rees-Mogg, led a session in Parliament on the Business of the House.[64] During the questions that followed, Colonel Bob Stewart asked Mr Rees-Mogg:

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

41. Mr Rees-Mogg replied:

> *It would obviously be wrong for me to comment on a specific case, but my hon. Friend raises a concerning point. If people have, in a generality, given evidence to a trial on the understanding that is confidential, it risks people not being willing to give such evidence in future if what is believed to be confidential turns out not to be. A just system requires certainty, whatever degree of certainty that is. In individual cases, I understand that it is a matter for the trial judge, under rule 5 of the criminal procedure rules, but I will of course refer this matter to my right hon. and learned Friends the Lord Chancellor and the Attorney General.*

42. The primary purpose of Business of the House sessions is to set the timetable for the House; hence Colonel Stewart's Question is concerned with seeking time in parliamentary schedule for a debate on the principle of the release of pre-sentencing character references.

43. In his reply, the Leader of the House does not commit to such a debate, but confirms his understanding that the decision to release pre-sentencing character references is a matter for the trial judge and that he will pass this issue onto the Lord Chancellor and Attorney General for their comment.

44. I have been told by Mrs Elphicke that the raising of this matter in a parliamentary Question had been approved by the Speaker in advance and that as such Parliament's sub judice rule was not breached by the Question.

45. I do not doubt that information to be true. It is for the Speaker, or his deputies, to rule whether a Question is orderly or not. My inquiry is not concerned with the Question asked by Colonel Stewart, only the connected letter of 19 November 2020 and whether that letter puts the Members in breach of a rule of conduct.

46. I have also been told that having raised the matter on the floor of the House, the subsequent letter of 19 November 2020 was protected by parliamentary privilege.

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47. Mrs Elphicke in her evidence has quoted from the Joint Committee on Parliamentary Privilege's Report of the 2013–14 Session on Parliamentary Privilege.[65] However, the section Mrs Elphicke has relied on is connected to correspondence with constituents and constituency casework. As I have already outlined in this memorandum, and as the Members themselves primarily contend, the letter of 19 November 2020 was not correspondence with constituents nor constituency casework but a raising of an issue of general principle.

48. Paragraph 3 of the same Report also defines Parliamentary Privilege as:

> *Privilege refers to the range of freedoms and protections each House needs to function effectively: in brief, it comprises the right of each House to control its own proceedings and precincts, and the right of those participating in parliamentary proceedings, whether or not they are Members, to speak freely without fear of legal liability or other reprisal*

49. The letter of 19 November 2020 does not follow a full debate, a motion, a reading of a Bill, a Committee session, but a request made in the House by Colonel Stewart for time to be put aside for a debate. Given the limited definition quoted above, it would be a surprising extension of privilege if such a request then granted unlimited power of action for the Member concerned and granted any follow-up action undertaken by the Member blanket immunity from a further proceeding of the House (i.e. an inquiry conducted by the Parliamentary Commissioner for Standards).

Advice of Speaker's Counsel

50. On 26 January 2021 I requested advice from Speaker's Counsel on the principles involved in this inquiry, namely parliamentary privilege and the separation of powers.[66] When Speaker's Counsel replied on 9 February 2021 she was clear that her role does not extend to the provision of advice to Members and would not have been able to advise any of the five subjects of this inquiry had they approached her before writing their letter of 19 November 2020.[67] I have therefore decided to consider the advice of Speaker's Counsel to be an expert opinion but have been mindful that the Members would not have had access to this expertise before writing their letter. I also draw no adverse findings on the basis that the Members did not approach Speaker's Counsel for advice.

51. I note the opinion of Speaker's Counsel is that the debate sought by Colonel Stewart would have been unlikely to have been granted before the court hearing of 25 November 2020 concluded due to Parliament's sub judice convention.[68] This is helpful in clarifying that standing of the pending court hearing and that Parliament would likely to have acted cautiously so as not infringe on the rights of the court to freely determine the matter before it. That caution would have been a wise position for the Members under inquiry to have adopted.

65 Parliamentary Privilege – Joint Committee on Parliamentary Privilege (Session 2013–14, Joint Committee on Parliamentary Privilege, Parliamentary Privilege, HL Paper 30/HC 100, published 3 July 2013)

66 WE27 evidence bundle

67 WE9 evidence bundle

68 Matters awaiting judicial decision and matters under investigation – Erskine May – UK Parliament

52. Speaker's Counsel has also included a quote from the Joint Committee on Parliamentary Privilege's Report of the 1998–99 Session on Parliamentary Privilege,[69] which I think strikes at the heart of this matter and which I have shortened to the key sentences only:

> *The proper relationship between Parliament and the courts requires that the courts should be left to get on with their work. No matter how great the pressure at times from interest groups or constituents, Parliament should not permit itself to appear as an alternative forum for canvassing the rights and wrongs of issues being considered by the judicial arm of the state on evidence yet to be presented and tested.*

53. This is the position rightly adopted by Mr Rees-Mogg on 19 November 2020 when responding to Colonel Stewart's Question, but is a position that the Members under inquiry have ill-advisedly disregarded.

54. I also note Speaker's Counsel opinion that:

> *In addition to those general considerations, in the light of the observations of the Joint Committee on Parliamentary Privilege, and of the courts, on the importance of respecting and maintaining the constitutional separation between the courts and Parliament, I would have said that it would be particularly improper for them to use the authority and status conferred on them as Members of Parliament to influence the outcome of legal proceedings (or, as a minimum, in a way that could appear to be attempting to influence those proceedings).*

55. I have already outlined why I think the joint letter of 19 November 2020 was not solely concerning a matter of principle but, even if I were to accept that argument, I cannot see any evidence that the Members under inquiry have considered the risk that their letter might have been perceived by the recipients and by Mrs Justice Whipple as an attempt to influence the conduct and outcome of the hearing scheduled for 25 November 2020. That risk was particularly acute in this instance because the intervention was sent to senior judges and not directly to the judge holding the hearing; this increased the risk that the letter could be perceived as an attempt to influence the conduct and outcome of the hearing.

Correspondence with Ministers

56. In their written responses, the Members also told me that writing to a judge about a matter is the same as writing to a Minister. This is not a valid comparison.

57. Ministers are drawn from the legislature to form the government of the day (the executive) and remain Members of Parliament during their time as a government Minister. A specific role of Parliament, undertaken by the remaining Members of Parliament, is to scrutinise and challenge the work of the government and its Ministers. In that way, Ministers are to some degree directly accountable to Parliament and their fellow Members of Parliament. Writing to Ministers about matters of policy, points of principle, and individual cases forms part of the parliamentary function of all Members of Parliament.

69 Parliamentary Privilege – First Report (Session 1998–99, First Report, Joint Committee on Parliamentary Privilege, Parliamentary Privilege Vol I, HL 43-I/HC 214-I, published 9 April 1999)

58. The judiciary is independent. Appointments to the judiciary are not made or ratified by Parliament. Judges are not accountable to Parliament. Judges apply the laws written and agreed by Parliament. Judicial decisions are not endorsed or approved by Parliament. Express sub-judice provisions prevent live legal matters from being discussed in Parliament so to prevent undue interference with the independence of the judiciary and, as importantly, to avoid the risk of being perceived as interfering with the independent decision making of the judiciary. Writing to two senior judges requesting that they consider and act on a point of a principle ahead of a pending court hearing risked undermining that independence and is very different to writing to a Minister.

Acting to protect the confidentiality of constituents

59. In his response of 11 December 2020 Sir Roger directed my attention to an email that he had sent to the Lord Chief Justice on 26 November 2020.[70] Sir Roger told me that this email laid out his reasoning for joining the earlier letter of 19 November 2020 to Dame Kathryn Thirlwall and Dame Victoria Sharp.

60. His email to the Lord Chief Justice suggests that the pre-sentencing references submitted by former constituents of Mr Elphicke, and now constituents of Mrs Elphicke, were a form of what Sir Roger described as parliamentary correspondence. Sir Roger's email also suggests that the references were protected by parliamentary confidentiality on the basis that some referees had included details about earlier constituency casework that Mr Elphicke had assisted with. Sir Roger states that it is for these two reasons he sought action from Dame Kathryn Thirlwall and Dame Victoria Sharp ahead of the imminent hearing that was to be heard by Mrs Justice Whipple.

61. I accept that some referees may have referred in their references to constituency casework issues that involved Mr Elphicke, and although I am not clear whether Sir Roger claims that these letters are therefore subject to parliamentary privilege, but as they are not concerned with proceedings in Parliament, but with constituency work, this is unlikely. In any event, if the referees wanted elements of their references kept confidential, they had the opportunity to apply to the court for this. Furthermore, to assist the court, each referee was free to make their own assessment as to how much of their personal information they wished to disclose, including how much detail about any earlier constituency casework matters that Mr Elphicke had assisted them with. The references were submitted to the court under the court's rules on confidentiality not Parliament's.

62. I also do not agree that the references were a form of parliamentary correspondence. The referees who were former constituents of Mr Elphicke are not parliamentarians, their references were not written with the authority or consent of Parliament, the content of their references was not checked or approved by Parliament, and nor were their references written to Parliament for consideration by Parliament. These were references written by private citizens to the court for consideration by the court. The content they included was their own and not Parliament's.

70 Pages 53 and 54 WE13 evidence bundle

The relevant rules of the House

63. The House of Commons' Code of Conduct for Members states at paragraphs 16 and 17:

> *16. Members are personally responsible and accountable for ensuring that their use of any expenses, allowances, facilities and services provided from the public purse is in accordance with the rules laid down on these matters. Members shall ensure that their use of public resources is always in support of their parliamentary duties. It should not confer any undue personal or financial benefit on themselves or anyone else, or confer undue advantage on a political organisation.*
>
> *17. Members shall never undertake any action which would cause significant damage to the reputation and integrity of the House of Commons as a whole, or of its Members generally.*

64. The over-arching principles for the use of House-provided stationery are found in paragraph 2 of those rules, which states:

> *The rules cannot be expected to cover every eventuality; Members should therefore always behave with probity and integrity when using House-provided stationery and postage. Members should regard themselves as personally responsible and accountable for the use of House-provided stationery and postage...*

65. Paragraph 3 of the rules lists examples of uses for which House-provided stationery should not be used. That list is not exhaustive. Paragraph 9 of the rules relates specifically to the use of the crowned portcullis. It includes the following statement:

> *The principal emblem of the House is the crowned portcullis. It is a royal badge and its use by the House has been formally authorised by licence granted by Her Majesty the Queen. It should not be used where its authentication of a connection with the House is inappropriate, or where there is a risk that its use might wrongly be regarded or represented as having the authority of the House….*

My findings

Use of House stationery for character references (paragraph 16)

66. Part of my inquiry involved investigating whether Sir Roger, Mr Holloway and Colonel Stewart had breached paragraph 16 by using House-provided stationery to write a character reference for Mr Elphicke, to assist the court with sentencing.

67. I sought the advice of both the Director of Customer Service and Delivery and the Clerk of Journals in relation to this matter.

68. The Clerk of the Journals advised:[71]

71 WE8 evidence bundle

> *The MPs concerned say they were asked by Mr Elphicke's legal representatives to assist by providing references. They received no personal benefit, this was not electioneering and it was not in direct support of a political party. I see no reason why they should not have used House of Commons note paper to give these references. In addition, these particular character references in all cases referred to knowledge the respondents had as a result of their association with the ex Member precisely because they were MPs.*

69. I agree with this position. The Members have told me that they provided the reference for Mr Elphicke as fellow parliamentarians and not as a personal friend. I think this distinction is important. My view is that providing a reference for a fellow Member, in the terms that they did, can be categorised as a "parliamentary function"[72] and so is permitted under the current rules.

70. I find that Sir Roger, Mr Holloway, and Colonel Stewart did not breach rule 16 by using House-provided stationery to write a reference for Mr Elphicke to the court for sentencing purposes.

Writing to the judiciary about a pending hearing (paragraph 17)

71. My inquiry also considered whether the letters written to the judiciary amounted to a breach of paragraph 17 of the Code of Conduct. I have set out my considerations above, and I have concluded that the letters of 19 November and 22 November 2020 to the judiciary do amount to a breach of paragraph 17.

72. An application to the court by the media had been legitimately made, and accepted, regarding the release of pre-sentencing character references submitted on behalf of Mr Charlie Elphicke. The court had recognised that competing interests were involved in that request and set a date to hear the application. The court had recognised that the referees may all have differing views and concerns about the release of their references and had appointed Mr Elphicke's former defence team to act on a collective basis for the referees. Ahead of that hearing, the Members bypassed the court, opting not to submit their concerns directly, and wrote to two senior appeal judges. They then followed that initial letter of 19 November 2020 with two further private letters of 22 November 2020; one to the Lord Chief Justice and a second to Mrs Justice Whipple, the judge in charge of the pending hearing.

73. The draft of their letter of 19 November 2020, although not sent, questioned the fitness of Mrs Justice Whipple, who had also been Mr Elphicke's trial judge, and called for her removal from the pending hearing. The final version of the letter sent to the two senior judges, whilst encompassing a point of principle, sought their intervention ahead of the pending hearing, raising privately the very issues that the pending hearing had been convened to hear and consider publicly.

74. Had the two senior judges acted on that letter, a live judicial matter would have been interfered with due to the act of a group of parliamentarians. That would have seriously compromised the separation of powers that underpins our unwritten constitution.

72 House-provided stationery and pre-paid envelopes are provided only for the performance of a Member's parliamentary functions (para 3 of the stationery rules)

75. The later letters of 22 November 2020 repeat the Members' position, again intervening ahead of a pending court hearing and seeking to raise privately the issues that hearing was due to consider. Those letters compound the initial mistake of 19 November 2020.

76. By privately requesting the intervention of two senior judges, and then following that letter with further correspondence, the Members attempted to interfere with independent judicial decision making. That was not appropriate and is an action that caused significant damage to the reputation and integrity of the House of Commons and amounts to a breach of paragraph 17 of the Code of Conduct.

Use of stationery for the letters to the judiciary (paragraph 16)

77. Having determined that the letters of 19 November 2020 and 22 November 2020 were inappropriate and a breach of paragraph 17, it follows that the letters cannot reasonably be said to form part of a legitimate parliamentary duty. On that basis, I have also concluded that House-provided stationery should not have been used in this way and that this is an aggravating factor that also amounts to a breach of paragraph 16 of the Code of Conduct.

Decision

78. I investigated whether, Mr Holloway, Sir Roger and Colonel Stewart had breached paragraph 16 of the Code of Conduct and the associated stationery rules by using House-provided paper to write a reference for Mr Elphicke. I find that the three Members did not breach paragraph 16, as writing a character reference to assist the court, in the terms that they did, was a legitimate parliamentary duty.

79. I do not accept that the Members wrote to the judiciary on the point of principle only. I find that the contents of the letters referred significantly to the proceeding that was before Mrs Justice Whipple and which was to be heard on 25 November 2020. The letter of 19 November 2020 also directly sought the intervention of the two senior judges in the pending hearing. That cannot be said to be writing on a point of principle only.

80. I find that it was wholly inappropriate for the Members to write to the judiciary about live judicial proceedings. This is in direct contradiction with the doctrine of the separation of powers, which is an essential component of the UK constitution. The letter of 19 November 2020 to the judiciary was an attempt to influence the outcome of the hearing on the 25 November 2020 that was before Mrs Justice Whipple. The later letters compounded that error of judgement. I find that by using their authority as Members of Parliament in this way, the Members have breached paragraph 17 of the Code of Conduct for Members. The action the Members have taken, regardless of their intentions, has caused significant damage to the reputation and integrity of the House of Commons.

81. Following my conclusion that the Members should not have written to the judiciary, I find that using House-provided stationery for this purpose was a breach of paragraph 16 of the Code of Conduct for Members, which only permits the use of House-provided resources in support of parliamentary duties.

Comments from the Members on my draft decision

82. As is my usual practice, on 7 May 2021 I shared a draft of this memorandum with the Members for their comments on its factual accuracy.

83. Colonel Stewart replied on 11 May 2021 to confirm he accepted my draft.[73]

84. Sir Roger replied on 12 May 2021 to confirm that he did not intend to comment at this point.[74]

85. Mr Holloway replied on 29 May 2021 to confirm that he did not want to make any comments on the draft.[75]

86. Ms Villiers replied on 18 June 2021[76] and stated that she accepted my decision and that she recognised that the correspondence to the judiciary *"was not appropriately drafted and it was wrong of us to send it"*. Ms Villiers highlighted that her workload meant that the letters were not adequately considered before being sent and that incorporating the views of five Members had made the matter confused.

87. Ms Villiers also now recognised that the letters entangled two distinct aims; firstly, protection for the members of the public who had acted as character references for Mr Elphicke and, secondly, the wider policy issue on the release of character references. In respect of the entangling of those issues, Ms Villiers told me:

> *Regrettably, we allowed the point we wished to make on general principles and their impact upon the criminal justice process to become entangled with the hearing of the Guardian's application. I accept your conclusion that elements of the 19th November 2020 letter went beyond mere illustration of the potential impact of the general principle. I accept that it created the impression that we were asking the judges to intervene in the case before Whipple J. Although our intention was to correct that misunderstanding in our letters of 22nd November, they did not achieve that aim and I accept your finding on that as well.*

88. Ms Villiers told me that the letters to the judiciary should be seen not as an isolated act but as part of a wider approach consisting of three parts:

> *The letter to judges was only one part of a three stranded approach: firstly to encourage the members of the public affected to engage with the court process; secondly to highlight the policy concerns in Parliament; and thirdly to raise those policy questions with senior judges.*

And for that reason, Ms Villiers's stated that the letters to the senior judges should not be seen as bypassing Mrs Justice Whipple and the pending hearing. I accept the point that the Members may not have intended to bypass Mrs Whipple, but I remain concerned that in writing to senior members of the judiciary the Members did bypass Mrs Whipple.

73 WE37 evidence bundle
74 WE38 evidence bundle
75 WE39 evidence bundle
76 WE40 evidence bundle

89. Further, Ms Villiers pointed out that judicial practice on the release of character references is not straightforward and is a developing area of law with few existing authorities to rely on. Ms Villiers highlights that due to this, Mrs Justice Whipple's decision was not a simple one and involved a balancing act of the various factors involved. I accept those points and my finding in paragraph 34 should be read in light of this.

90. Finally, Ms Villiers suggested some further amendments to our interview transcript, which I was happy to accept and have incorporated into the attached bundle of evidence (see item WE23).

91. Mrs Elphicke also replied on 18 June 2021[77] and told me that she accepted my decision. Mrs Elphicke told me that she had seen a draft of Ms Villiers's response and concurred with its content.

92. Mrs Elphicke also told me that she had always been seeking to act in the best interests of her constituents and particularly due to her concern that adverse press and social media coverage might harm her constituents. I accept that Mrs Elphicke was attempting to act in the interests of her constituents.

93. In light of my findings at paragraphs 18 and 19, Mrs Elphicke also offered to produce additional private evidence from some of her constituents who had contacted her with concerns about the possible publication of their character references. As the outcome of my inquiries, and the evidence collected, is placed on the public record, and due to the time this inquiry has already taken, I have decided that this is not an offer that I can take up. I am also content this late evidence would not change the substance of my conclusions, as my decision does not rest on the issue of whether the correspondence to the senior judges was constituency casework or not. Nor do I question the genuineness of the concerns raised by these individuals with Mrs Elphicke, only the appropriateness of the way these concerns were conveyed to senior judges.

94. Mrs Elphicke commented on the early draft of the letter of 19 November 2020 that is referenced in this report, at paragraphs 35 to 39, and the request in that letter that a different judge be assigned to hear the application to release the character references, and told me that:

> *I now recognise that it is not for me to make these sorts of judgments or seek to be involved in them in any way, and I would take care not to do so if a similar situation occurred in the future.*

95. Finally, Mrs Elphicke suggested some further amendments to our interview transcript, which I was happy to accept and have incorporated into the attached bundle of evidence (see item WE11).

Conclusions

96. I have found Mrs Natalie Elphicke MP, Rt Hon. Sir Roger Gale MP, Mr Adam Holloway MP, Colonel Bob Stewart MP, Rt Hon. Ms Theresa Villiers MP to be in breach of paragraphs 16 and 17 of the Code of Conduct for Members when writing to Dame

77 WE41 evidence bundle

Kathryn Thirlwall and Dame Victoria Sharp on 19 November 2020, when writing to the Lord Chief Justice on 22 November 2020, and when writing to Mrs Justice Whipple on 22 November 2020.

97. Breaches of paragraph 17 of the Code of Conduct cannot be resolved by use of my own powers under Standing Order No. 150. This is because a breach of this paragraph is, by its nature, an extremely serious matter.

98. A breach of paragraph 16 can on occasion be resolved by use of my own powers under Standing Order No. 150. However, in this instance, the breach of paragraph 16 is intrinsically connected to the breach of paragraph 17 and to resolve the matters separately would not be appropriate.

99. I am therefore referring this inquiry to the Committee on Standards for their consideration and resolution.

Kathryn Stone OBE

Parliamentary Commissioner for Standards

25 June 2021

Appendices to the Commissioner's memorandum

Appendix 1: Chronology of my inquiry

Date	Event
5 August 2020	Date of Colonel Stewart's reference for Mr Elphicke
5 August 2020	Date of Sir Roger's personal reference for Mr Elphicke
2 September 2020	Date of Mr Holloway's personal reference for Mr Elphicke
7 September 2020	Date of Ms Villiers's personal reference for Mr Elphicke
15 September 2020	Mr Elphicke's sentencing hearing
19 November 2020	Bob Stewart poses question on floor of the House during Business Questions
19 November 2020	Media statement and publication of the Members' characters references
19 November 2020	Members send letter to Their Ladyships Dame Kathryn Thirlwall and Dame Victoria Sharp ccing Mrs Justice Whipple
20 November 2020	The Private Secretary to the Lord Chief Justice responds to the Members' letter
22 November 2020	The Members send a letter to Lord Chief Justice and Mrs Justice Whipple
25 November 2020	Hearing in relation to disclosure of character references before Mrs Justice Whipple
8 December 2020	My inquiry commences
23 December 2020	Sir Roger's initial response received (dated 11.12.20)
9 January 2021	Colonel Stewart's initial response received
11 January 2021	Ms Villiers's initial response received
14 January 2021	Mrs Elphicke's initial response received

Date	Event
14 January 2021	Mr Holloway's initial response received
26 January 2021	Advice sought from Director of Customer Service and Delivery (re Mr Holloway, Colonel Stewart and Sir Roger only)
26 January 2021	Advice sought from Speaker's Counsel
29 January 2021	Response from Director of Customer Service and Delivery
9 February 2021	Response from Speaker's Counsel
15 February 2021	Advice shared with the Members
3 March 2021	Interviews undertaken with Mr Holloway, Colonel Stewart, and Sir Roger
4 March 2021	Interview undertaken with Ms Villiers
4 March 2021	Advice sought from the Clerk of the Journals (re Mr Holloway, Colonel Stewart and Sir Roger only)
5 March 2021	Response from the Clerk of the Journals
16 March 2021	Interview undertaken with Mrs Elphicke
22 March 2021	Interview transcripts shared with the Members and final evidence or submissions invited
26 March 2021	Ms Villiers's final submissions
30 March 2021	Mrs Elphicke's final submissions
31 March 2021	Sir Roger's final submissions
7 May 2021	Draft memorandum shared with the Members for their review and comments
11 May 2021	Response from Colonel Stewart received
12 May 2021	Response from Sir Roger received
29 May 2021	Response from Mr Holloway received
18 June 2021	Response from Ms Villiers received
18 June 2021	Response from Mrs Elphicke received

Appendix 2: The conduct of my inquiry

1. I started my inquiry on 8 December 2020 by writing to the Members and inviting their response to my concern that their actions had potentially put them in breach of paragraph 16 and/or 17.[78] I also asked the Members the same specific questions about:

- their understanding of the rules on the use of House-provided stationery and the use of the crowned portcullis;
- whether they had sought any advice before writing to the judiciary;
- whether they had considered using different stationery;
- what the background was to their letters to the judiciary;
- whether the other character referees referenced in their letters to the judiciary were their own constituents; and

- requesting a copy of own pre-sentencing character reference, if one had been written, and any other correspondence submitted to the court.

2. Sir Roger Gale replied promptly on 11 December 2020 enclosing a draft of the Members' letter of 19 November 2020 to Dame Kathryn Thirlwall and Dame Victoria Sharp. Also enclosed was a further email from Sir Roger to the Lord Chief Justice of 26 November 2020 plus a copy of Sir Roger's pre-sentencing character reference that was on House-provided stationery.[79]

3. The other four Members all requested additional time for their replies, which I allowed. Their replies were then received in mid-January and submitted by way of a template response, although the reply from Mrs Elphicke included additional details about her constituency connection to at least some of the other character referees.[80]

4. Of the other four Members, Mr Holloway and Colonel Stewart both confirmed they had submitted pre-sentencing character references using House-provided stationery, Ms Villiers confirmed that she had also submitted a character reference but had used her own stationery, and Mrs Elphicke clarified that she had not submitted a pre-sentencing character reference.

5. The replies from the other four Members also directed my attention to a press statement that had been put out on 19 November 2020 by Sir Roger, Mr Holloway, Colonel Stewart, and Ms Villiers, which concerned the same issue (i.e. the imminent hearing to determine if the pre-sentencing character references provided on behalf of Mr Elphicke should be released to the public) and to which their own character references had been appended.

6. As is my usual practice, I decided to seek advice from the relevant House authorities on the issues raised by my inquiry. On 26 January 2021 I wrote to the House's Director of Customer Service and Delivery for his advice on the use of House-provided stationery and to Speaker's Counsel for her advice on the propriety of parliamentarians writing to the judiciary about a live judicial matter.[81]

7. On 15 February 2021 I was able to write to the Members sharing the advice I had received from the Director of Customer Service and Delivery and Speaker's Counsel.[82]

8. In the meantime, I had decided it would be appropriate to interview all the Members to better establish their aims in writing to the judiciary and, in light of the draft provided by Sir Roger, the contribution that each Member individually made to the drafting of the letters sent to the judiciary as well as their contribution to the press statement of 19 November 2020. I also saw this an opportunity to get the Members' individual comments on the advice that I had received. My letter of 15 February 2021 therefore also invited the Members to arrange an interview with me for the week of 1 March.

79 WE13 evidence bundle
80 WE10, WE16, WE20, and WE22 evidence bundle
81 WE26 and WE27 evidence bundle
82 WE30 and WE31 evidence bundle

9. I interviewed Sir Roger, Mr Holloway, and Colonel Stewart, on 3 March 2021,[83] and Ms Villiers on 4 March 2021.[84] For diary reasons I was not able to meet with Mrs Elphicke until 16 March 2021.[85]

10. While planning for these interviews responsibility for providing advice on the use of House-provided stationery changed in the House, with responsibility moving from the Director of Customer Service and Delivery to the Clerk of the Journals. In the interests of fairness, I wrote to the Clerk of the Journals on 4 March 2021 to seek her supplementary advice on Sir Roger's, Mr Holloway's, and Colonel Stewart's use of House-provided stationery.[86]

11. Having interviewed all the Members, I shared the interview transcripts with the Members on 22 March 2021, and where relevant the advice from the Clerk of the Journals, and invited final comments on the various pieces of advice I had received and any final points they wished me to considered before I finalised my decision.[87]

12. Mrs Elphicke,[88] Mr Holloway,[89] Sir Roger[90] and Ms Villiers[91] all took this opportunity to make final submissions.

83 WE14, WE17, and WE21 evidence bundle
84 WE23 evidence bundle
85 WE11 evidence bundle
86 WE32 evidence bundle
87 WE34, WE35, and WE36 evidence bundle
88 WE12 evidence bundle
89 WE19 evidence bundle
90 WE15 evidence bundle
91 WE24 evidence bundle

Appendix 2: Letter dated 1 July 2021 from Mrs Natalie Elphicke MP to the Chair of the Committee

Dear Chair and Committee

I am writing following receipt of the memorandum submitted by the Parliamentary Commissioner for Standards dated 25 June 2021 and the letter from Dr James of the same date.

As you will see from paragraphs 82 to 95 of the Commissioner's decision I had sight of a draft and made clear in a letter dated 18 June 2021 that I accept her decision and apologise for what has occurred.

I have also had sight of Ms Villiers' letter and agree with the contents.

Before I was elected, another Member of Parliament told me of the great weight of responsibility that there is in serving constituents as their single representative. So often their last hope against injustice, unfairness or bureaucracy. It is a great honour to serve, but it carries with it such a responsibility, which I treat with utmost seriousness and commitment to the people of Dover and Deal.

A discharge of that responsibility fell on my shoulders within a few months of my election, when some of my constituents found themselves deeply alarmed that very personal and private matters of the most sensitive nature might be made public. Hearing from them, I was deeply concerned by this.

These were not Members of Parliament or Lords. Many were local people who had provided what they understood to be character references for the confidential assessment of the judge alone. Suddenly, they found themselves in a situation where they had written about some intensely personal and private matters with which their previous MP had helped them and which they feared would appear in the media and on social media. Matters affecting their children, finances, serious illness and mental health.

Some of the constituents were themselves extremely vulnerable and indeed fragile, I was worried. The release of their private information caused them severe harm and distress. I was very concerned that they were not able to address the judge privately about their deep concerns without the media applicants hearing what was being said.

I am pleased that the Commissioner has accepted that I was attempting to act in the best interests of my constituents and also that there were genuine concerns raised by individuals with me (paragraphs 92 and 93). Whilst she did not feel that she should consider additional private evidence from some of my constituents, I have put that material before the Committee (with their personal details redacted to protect their privacy) to demonstrate the strength of feeling of some of my constituents and the genuineness of the concerns.[92] I also provide a letter from BCL solicitors which confirms the position in relation to the representation of my constituents at the hearing before Whipple J.[93]

92 Note by Committee: This material has not been published, at the request of Mrs Elphicke.

93 Note by Committee: see below, annex to Appendix 2.

Having had time to think about these matters carefully and to read and reflect upon the Commissioner's draft report, I accept that the correspondence that was sent to senior judges, and which the Commissioner found to be a breach of paragraphs 16 and 17 of the Code of Conduct for Members, was not appropriately drafted and it was wrong of us to send it. When concerns were raised by the Lord Chief Justice, we should have paused and retracted.

I also accept, as the Commissioner has noted at paragraph 94, that I was wrong in the original draft to raise whether a different judge should have heard the application. This was a genuine concern from a number of constituents, as they have expressed in the material provided to the Committee but as I have said, it was not for me to engage with.

I take my share of responsibility for what occurred and for the fact that we did not think through carefully enough what we wanted the letters to achieve.

In considering the sanction to apply, I would ask the Committee to have regard to the following:

- As a new Member having been elected in 2019, I fully recognise I still have a great deal to learn. I would like the Committee to know that I am someone who does learn from her mistakes and always strives to improve.
- I have co-operated fully at every stage of this process. I have accorded it the utmost seriousness and respect and have accepted that our actions were wrong.
- The above explanation and supporting evidence showing why I was so concerned about the impact upon some of my constituents.
- The fact that the correspondence whilst wrong was well-intentioned and aimed at protecting constituents and drawing attention to an important point of principle as the Commissioner acknowledged (paragraph 14).

Yours sincerely

Natalie Elphicke OBE MP

Encl: Letter from BCL

Constituent pack

Letter dated 24 June 2021 to the Parliamentary Commissioner for Standards from BCL Solicitors LLP

Dear Ms Stone

As you may be aware, this firm acted on behalf of Charles Elphicke in respect of criminal proceedings before the Crown Court at Southwark. This firm did not act on behalf of Mrs Elphicke although we provided assistance to her in relation to the matters the subject of this letter. We are writing to you at the request of the Rt Hon Theresa Villiers MP and Mrs Natalie Elphicke MP to confirm the accuracy of the following facts.

In the sentencing hearing of Mr Elphicke of 15 September 2020, reliance was placed on character references that had been obtained by this firm from 34 individuals. The references were deliberately not read out in open court in order to protect the privacy of those individuals. After the hearing, requests were made to the court by third parties for the formal release of those character references. Some of the references were from members of Parliament ('the Parliamentarian Referees')

On 3 November 2020, the Court made a direction that this firm should notify all the character referees that they were entitled to make written submissions about disclosure of their reference by Friday 20 November 2020, with BCL to collate and provide such submissions to the Court. None of the character referees was themselves legally represented, by this firm or at all.

Representations were received and advanced on behalf of a total of 34 individuals. This firm collated the representations under a Schedule of Responses. In addition to the representations so collated, this firm was aware that the Parliamentarian Referees had written directly to the Court on 19 November 2020. The schedule recorded the following entry in respect of the Parliamentarian Referees' direct submission to the Court: "Joint representations understood to have been made in a letter directly to the Court on 19 November 2020."

The Schedule of Responses provided to the Court by this firm and uploaded to the Digital Case System on 20 November 2020 also included the following entry:

> *"The Rt Hon Theresa Villiers MP*
>
> *Joint representations understood to have been made in a letter directly to the Court on 19 November 2020.*
>
> *As you may be aware, the Parliamentarians who wrote references for Charlie published them in the Mail Online yesterday. I continue to believe that it would be wrong in principle to disclose references from members of the public, but now that mine is in the public domain, I am neutral on the judge's decision regarding the one I provided."*

The second paragraph above represents the Rt Hon Theresa Villiers MP's "submissions", which we provided to the Court in accordance with her request and the Court's direction.

We can also confirm that on 19 November 2020, we wrote to the Court about the Order that had been made on 3 November. That correspondence included the following:

> *"We understand that some character referees are concerned about their submissions being sent on to the Court if those submissions:*
>
> a) *might in turn be shared with the press or any lawyer acting for the press; and/or*
>
> b) *might be read out or referred to in open court in a way that allows the individuals to be identified; and/or*
>
> c) *reveals publicly that they (by name) have 'objected' to disclosure (which risks being portrayed in the press as 'an attempt to block publication' or something similar).*

Please could the Court confirm what assurance, if any, we can provide to these individuals. We are particularly concerned about obviously vulnerable constituents who are not public figures and who appear, at present, to be concerned that their representations might not be received in private / in confidence. Please could the Court also kindly confirm whether anyone wishing to attend the hearing on Wednesday to address the Court directly would be required to do so in public or whether it is the Court's intention to receive any in-person representations on this issue in private."

That email was sent in consequence of concerns raised by constituents, both directly with this firm and via their MP, Mrs Elphicke and communicated in turn by her to us. Whilst the Court confirmed that our enquiry had been passed to Mrs Justice Whipple, the trial and sentencing judge, no response was received. At least one referee did not advance any representations as a consequence.

We confirm these matters as matters of record, communicated to the Court and recorded in turn on the Court file. For the avoidance of doubt we are of the view that nothing in this letter engages the question of legal professional privilege. Mr Elphicke's legal professional privilege in instructing and receiving advice from this firm is maintained and is not waived.

Yours faithfully

BCL Solicitors LLP

Appendix 3: Letter dated 28 June 2021 from Rt Hon Roger Gale MP, Adam Holloway MP and Colonel The Rt Hon Bob Stewart MP to the Chair of the Committee

To the Chair and Members of the Committee on Standards

We write in response to the Parliamentary Commissioner for Standards' memorandum to your Committee regarding correspondence on the matter of publication of character references submitted by constituents to the Courts.

We are grateful to the Parliamentary Commissioner for an invitation to comment on the memorandum but as this invitation extended only to matters of fact rather than substance or argumentation we wish to assist the Committee with our own response as set out below.

The Lords' Commissioner's findings

First, it is unfortunate that the Lords Commissioner for Standards reached her decision in the case relating to Lord Freud's participation without access to all of the available evidence. Members of The House of Commons involved in the matter were offered no opportunity to provide evidence or explanation to assist in consideration of issues pertinent across both inquiries. This silo effect led to the regrettable situation in which Lord Freud found himself obliged to accept the Lords Commissioner`s determination.

Furthermore, this placed the Commons Standards Commissioner in the difficult position of having either to contradict her Lords` colleague or to find against the Commons Members. We have no reason to wish to challenge or undermine the authority of the Commissioner in this respect – she carries out vital work in service of the House. We do, though, regret she has been placed in an invidious position owing to the Lords' Commissioner's findings.

We mean no disrespect to Lord Freud or to any other Member of the Upper House in saying that Members of the House of Peers are bound by a different Code of Conduct which reflects that Members of Parliament are elected and therefore have a special duty to their constituents under Section III Paragraph 6 of the relevant Code of Conduct. Whilst there are similarities between the substance of the two inquiries, there are also some crucial differences.

The Lord Macdonald's letter to The Times

The Lord Macdonald of River Glaven wrote, on 23rd November, to The Editor of The Times. In that letter he asserted that character references should not be published. His letter was printed two days prior to Justice Whipple's ruling. It would surely be perverse to permit the former Director of Public Prosecutions and former Head of the Crown Prosecution Service to write in public an open letter to the Court and to then censure elected Members of Parliament for writing similarly but in private.

Public release of Character References: Mr Elphicke

We should emphasise that the substantive matters before the Committee go far beyond the singular case of Mr Charlie Elphicke. However, in that particular case, and notwithstanding the impression conveyed by some sections of the media, we have never been engaged in an attempt to justify the behaviour that led to his conviction. The pre-sentence references that were provided in mitigation were offered in the knowledge of Mr Elphicke`s conviction on serious charges and simply in the expectation that his previous public service to his Country and to his constituents would be taken into account when determining his future. By the time that three national newspapers sought the release of all of the references—some containing confidential and private constituents' information —Mr. Elphicke had been sentenced and the case had concluded. Our actions were taken in defence of the rights of ordinary and innocent citizens and not of Mr. Elphicke.

Public release of Character Reference: General Principle

Section III Paragraph 4 of The Code of Conduct for Members of Parliament notes as a priority that Members have 'a special duty to their constituents'. This relates to all constituents without distinction in the Code and is therefore a matter concerning all MPs. The general principle engaged in the release of unredacted character references potentially affects all constituents. Beyond the singular case of Mr Elphicke the point at stake is whether constituents in writing character references could reasonably be expected to understand that those references could be made public in unredacted form or with no anonymity applied, either during Court proceedings or on request at any later date.

Under Section III the duty to all constituents is clear and all Members of Parliament are equally bound by the responsibility that we have sought, faithfully and diligently, to honour. Furthermore, our constituents have human rights under the UK's own Human Rights Act 1998 which incorporates into domestic law the rights enshrined in the European Convention on Human Rights (ECHR). Of particular note is Article 8 of the ECHR – the right to private and family life. In addressing that particular right and interpreting its content we take account that the Courts' approach has been to apply a test of proportionality; not to apply blanket-style interpretations but to consider the relative balance of argumentation for each individual's rights within the circumstances of a particular case.

Letters sent to Dame Kathryn and to Dame Victoria Sharp

Our letters were sent to the addressees in their capacities as the Senior Presiding Judge for England and Wales and the President of the Queen`s Bench Division respectively. This reflected the wider principle at stake rather than the immediate matter under consideration by Justice Whipple. However these letters were copied to Judge Whipple both as a professional courtesy and as a response to her invitation to referees to make submissions. They were sent by Members of Parliament, correctly using parliamentary notepaper, very specifically in defence of referees' rights to confidentiality and privacy. They were not, as The Lord Chief Justice claimed in his letter, 'issued to the Press Association'.

No attempt was made to 'influence the course of a live case' and neither, in the letter sent on 19 November 2020, was there any criticism, actual or implied, of Justice Whipple. To the contrary, the original and all other letters were sent in confidence and made it clear

that we were seeking a consideration of the potential 'chilling effect' of the release to the press, who had requested them under the terms of a Freedom of Information request, of letters provided by ordinary people, and containing confidential and private information.

Inevitably, because of the timescale required to offer protection to the constituents concerned, the normal Parliamentary route of a debate was denied to us. It was for this reason alone that we took the course of writing to those Members of the Judiciary who we believed had the authority and the duty to assess such matters from a standpoint of principle. The letters were sent in privacy and made it abundantly plain that while we were asking for the underlying principles of a release of confidential and private information to be considered the decision, of course, had to remain with the judiciary.

In the light of the suggestion that this has in some way 'brought the House into disrepute' we should emphasise that it is only these proceedings that have attracted any attention to the matter and that is not of our making. The Lord Chief Justice was incorrect to suggest that we had ignored the 'separation of powers' convention.

We note that the Commissioner sought the advice of the Speaker`s Counsel. Having said that she was not able to offer legal advice to Members, Ms Saira Salimi then proceeded to offer advice to the Commissioner without any consultation with, or information provided by, those involved in this matter. We believe that her contribution should be discounted.

The Commissioner has made much of an early draft of our letter—one of a number of drafts, containing over a hundred amendments, that were not intended to be sent—to imply that this constituted malice aforethought in respect of Justice Whipple. Nothing could be further from the truth. Indeed, the difference between that draft and the letter that was finally sent demonstrates clearly, if we are to be judged by this, that very great care was taken to ensure that no criticism or interference in the work of Justice Whipple was intended or implied. The Committee's standards of applying consideration in such cases cannot give weight to the content of letters which are only draft in form and were not sent.

Justice Whipple's hearing and ruling of 25 November 2020

The Commissioner has quoted, in her memorandum, two paragraphs taken from Justice Whipple's ruling which, she says, demonstrate that our letter to the judiciary was unwarranted. The effect of those two paragraphs taken out of context is to suggest that a blanket and public release of unredacted character references was not only permissible but also reflected past practice of the Court system. This is profoundly incorrect, as the remainder of Justice Whipple's ruling, published on 9 December 2020, illustrates sharply and extensively.

Justice Whipple`s ruling is lengthy and complex, and to draw out two paragraphs which sit heavily qualified in substance within her conclusions and summary misrepresents the substance of Justice Whipple's findings.

Referring to what she describes as 'The balancing exercise' Judge Whipple cites the case of Cape Holdings Vs The Guardian and says that:

'it is necessary to conduct a fact-specific balancing exercise weighing the potential value of information sought in advancing the open justice principle against any risk of harm which its disclosure might cause to the maintenance of an effective judicial process or to the legitimate interests of others'.

She adds, in respect of the case before her, that

'some referees had particular personal reasons for seeking anonymity and/or confidentiality relating to the content of their references (For example details about medical conditions)'.

and she concluded that for–

'Constituents and employees (short of civil servants and political advisers) the balance could best be drawn by anonymising the character references (i.e. redacting names and passages which could identify the author) but otherwise allowing the disclosure of the content. This would permit discussion of the substance of the references without risking harm to the private lives of these individuals'

and it was on this basis she determined that the references should be published with some identifying information redacted.

As a result of this ruling not only has the matter been clarified but Justice Whipple has indicated that potential distress and privacy need to be taken into account in such cases – which is precisely what we had requested in our original letter to the judiciary.

Given this satisfactory outcome we believe that far from 'bringing the House into disrepute` we have done our duty by the electorate, honoured the Code of Conduct and if anything have enhanced the reputation of the House for taking proportionate, timely and appropriate action under difficult, sensitive and pressing circumstances.

Turning to the matter of the misuse of headed notepaper we note that the Commissioner sought the advice of The Clerk of Journals in respect of the references only and accepted that advice. No such request was made in respect of the letter sent to the judges by Members of Parliament on matters directly related to our electorate. The reasons for this omission are unclear but failed to take the opportunity for our letter to the judges also to be considered as falling within permissible activity under the Code of Conduct. Precisely the same determination offered by the Clerk of the Journals would apply; these were not letters `sent for personal gain or for party-political purposes'. They were sent in respect of matters that had been raised, albeit briefly, in the House. To suggest therefore that headed paper was improperly used for this purpose is wrong.

Conclusion

During the eight months since our original letter was written no evidence to substantiate the claim that we have (Section V Paragraph 17) 'taken action which would cause significant damage to the reputation of the House of Commons as a whole or to its Members generally' has been proffered and there is no evidence to support the claim that we have not adhered to the instruction that (Paragraph 16) 'members shall ensure that the use of public resources is always in support of their parliamentary duties'.

We have adhered resolutely to Section III Paragraph 6 of the Code of Conduct for Members of Parliament and have been mindful of the United Kingdom's obligations under the

Human Rights Act 1998 and Article 8 of the European Convention on Human Rights. As such we do not see a case for an apology in the terms offered with regard to the Lords' Commissioner's findings and we respectfully request that the Committee does not accept the Commons Commissioner`s findings in full or in part.

We look forward to the opportunity to meet the Committee to answer questions and offer any further clarification in person.

Sir Roger Gale MP

Mr. Adam Holloway MP.

Col. Bob Stewart, DSO, MP

Appendix 4: Letter dated 1 July 2021 from Rt Hon Theresa Villiers MP to the Chair of the Committee

Strictly private and confidential

Dear Chris

I am writing following receipt of the memorandum submitted by the Parliamentary Commissioner for Standards dated 25 June 2021 and the letter from Dr Robin James of the same date.

As you will see from paragraphs 82 to 95 of the Commissioner's decision I had sight of a draft and made clear in a letter dated 18 June 2021 that I accept her decision. I have had also seen Mrs Elphicke's letter and agree with the contents. I am very sorry for what has occurred.

Having had time to think about these matters carefully and to read and reflect upon the Commissioner's draft report, I accept that the correspondence that was sent to senior judges, and which she found to be a breach of paragraphs 16 and 17 of the Code of Conduct for Members, was not appropriately drafted and it was wrong of us to send it. When concerns were raised by the Lord Chief Justice, we should have paused and retracted.

I take my share of responsibility for that and for the fact that we did not think through carefully enough what we wanted the letters to achieve.

I am pleased that the Commissioner has accepted that Mrs Elphicke was attempting to act in the best interests of her constituents and also that they had raised genuine concerns with her (paragraphs 92 and 93).

The Commissioner goes on to note that what was of concern to her was the appropriateness of the way that those concerns were conveyed to senior judges (paragraph 93). I accept that and agree.

As I explained to the Commissioner and wish to reiterate to the Committee, what we were trying to do in our approach to these matters was to achieve two outcomes which should have been kept rigorously separate:

- Firstly, to protect ordinary members of the public, who had agreed to provide character references for Mr Elphicke, from criticism and abuse in the media and on social media online, if it was revealed that they had done so. Many of these people were private individuals who did not have the benefit of their own legal representation, some of whom we were told were vulnerable and distressed. We are all only too aware of the abuse that is regularly meted out to people in the public eye and we did not wish others who are not public figures, or even parties to litigation, to have to experience the same. Disclosing our own references was one way in which we were hoping to shield them from the abuse that elected representatives regularly receive; and

- to raise more general concerns of policy because case law creates precedents and, if character references could be obtained by the media in this case, they could, in principle, be obtained in every other case. If that is so, I believe that people will be less willing to provide them and judges will be deprived of an important source of information to assist them in sentencing decisions. I cannot put this more eloquently than Lord MacDonald did in an article in The Times on 23rd November 2020[94], published just two days before the hearing in front of Mrs Justice Whipple (Whipple J). This is a matter for Parliament but also for the courts, including senior judges, who have a role in providing practice guidance and sit on procedural rule committees.

Regrettably, we allowed the point we wished to make on general principles and their impact upon the criminal justice process to became entangled with the hearing of the Guardian's application to the court. That confusion is reflected in the three items of correspondence which are the subject of this complaint. This was a serious mistake which has led to very grave consequences and I apologise sincerely for my part in it.

In considering the sanction to apply, I would ask the Committee to have regard to the following:

i) At no stage did we seek to excuse the behaviour of Charles Elphicke that led to his conviction. Pre-sentencing references are submitted to courts to assist them in determining sentence by providing information on the defendant's past conduct. Nor did our correspondence ask for anything in relation to the references we had ourselves provided. We had already placed them in the public domain. The focus was on the general principles at stake and on securing fair treatment for members of the public who had provided references. Although the individuals in this case were not my constituents, I hope that Committee will recognise that MPs frequently do provide assistance to colleagues in highlighting matters directly concerning that other MP's constituents. It is also the case that the general principle could have affected my constituents in the future if any of them were to be asked to write a pre-sentencing reference.

ii) We took a number of steps to try to ensure we approached this matter in the correct way. Regrettably, we did not succeed in that, but I hope these actions are an indication that we at least tried to act responsibly. This includes over a hundred changes to the early draft of the letter referred to by the Commissioner in her report; raising the issues of principle in the House at Business Questions; and responding immediately to the Lord Chief Justice try to reassure him about the 19th November letter (though I accept the Commissioner's finding that, regrettably, the errors of our first item of correspondence were repeated in the second).

iii) The Commissioner acknowledges at paragraph 14 of her memorandum that the point of principle we raised on privacy and disclosure was an important one. She also accepts that the law in this area is not straight-forward

94 https://www.thetimes.co.uk/article/court-character-references-should-be-kept-private-vb7mlc52s

(paragraph 89). Mrs Justice Whipple carried out a balancing exercise in her judgement assessing the weight of the different human rights principles which were engaged.

iv) A number of Mrs Elphicke's constituents were suffering real distress and anxiety, as is shown by the redacted statements from them which she has provided to the Committee. The way we sought to help them was, as I have accepted, flawed and wrong, but we were well intentioned. We did want to help them.

v) I have co-operated fully at every stage of this process. I have accorded it the utmost seriousness and respect and I have accepted that our actions were wrong. In my years in Parliament, I have always sought to maintain the highest standards of diligence and propriety. I have sent many tens of thousands of letters and emails in that time and have always attempted to ensure that each one was correct and appropriate. I hope that very many of them will have helped secure important assistance for my constituents. So far as I am aware, this is the only time a complaint of impropriety has been made in relation to any of that correspondence. I deeply regret that in this instance the three letters I co-signed have not stood up to scrutiny. I will learn very serious lessons from what has happened and will do all I can never to make such a mistake ever again.

In conclusion, I deeply regret the errors made and I apologise.

Kind regards

Theresa

Formal minutes

Monday 19 July 2021

Virtual meeting

Members present:

Chris Bryant, in the Chair

Tammy Banks	Sir Bernard Jenkin
Andy Carter	Dr Michael Maguire
Rita Dexter	Mehmuda Mian
Allan Dorans	Dr Arun Midha
Chris Elmore	Paul Thorogood
Mark Fletcher	

Draft report (*Mrs Natalie Elphicke, Sir Roger Gale, Adam Holloway, Bob Stewart and Theresa Villiers*), proposed by the Chair, brought up and read.

Ordered, That the draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 77 read and agreed to.

Four papers were appended to the Report.

Resolved, That the Report be the Second Report of the Committee to the House.

None of the lay members present wished to submit an opinion on the Report (Standing Order No. 149 (8)).

Ordered, That the Chair make the Report to the House.

Ordered, That the transcript of the oral evidence taken by the Committee on 13 July be reported to the House.

Written evidence was ordered to be reported to the House for printing with the Report.

[The Committee adjourned.

Witnesses

The following witnesses gave evidence. Transcripts can be viewed on the publications page of the Committee's website.

Tuesday 13 July 2021

Sir Roger Gale MP	Q1–37
Bob Stewart MP	Q38–57
Adam Holloway MP	Q58–73

Published written evidence

The evidence listed below will be published on the Committee's website: www.parliament.uk/standards

Primary Evidence

1 Letter of 19 November 2020 from the Members to Dame Kathryn Thirlwall, and Dame Victoria Sharp

2 Letter of 20 November 2020 from [name redacted], Private Secretary to the Lord Chief Justice of England & Wales, to the Members

3 Letter of 22 November 2020 from the Members to the Lord Chief Justice, Lord Burnett of Maldon

4 Letter of 22 November 2020 from the Members to Mrs Justice Whipple

5 Letter of 23 November 2020 from [name redacted], Private Secretary to the Lord Chief Justice of England & Wales, to the Members

6 Draft of the letter of 19 November 2020 from the Members to Dame Kathryn Thirlwall, and Dame Victoria Sharp

Advice from House authorities

7 From the House's Director of Customer Service and Delivery, 29 January 2021

8 From the Clerk of the Journals, 5 March 2021

9 From Speaker's Counsel, 9 February 2021

Evidence provided by Mrs Natalie Elphicke MP

10 Letter to the Commissioner, 14 January 2021

11 Interview transcript, 16 March 2021

12 Letter to the Commissioner, 30 March 2021

Evidence provided by Rt Hon Sir Roger Gale MP

13 Letter to the Commissioner, 11 December 2020

14 Interview transcript, 3 March 2021

15 Email to the Commissioner, 31 March 2021

Evidence provided by Mr Adam Holloway MP

16 Letter to the Commissioner, 14 January 2021

17 Interview transcript, 3 March 2021

18 Email to the Commissioner, 16 March 2021

19 Email to the Commissioner, 29 March 2021

Evidence provided by Colonel Bob Stewart MP

20 Letter to the Commissioner, 9 January 2021

21 Interview transcript, 3 March 2021

Evidence provided by Rt Hon Ms Theresa Villiers MP

22 Letter to the Commissioner, 11 January 2021

23 Interview transcript, 4 March 2021

24 Letter to the Commissioner, 26 March 2021

Correspondence sent by the Commissioner

25 Initiation letter sent to the Members, 8 December 2020

26 To the House's Director of Customer Service and Delivery, 26 January 2021

27 To Speaker's Counsel, 26 January 2021

28 To Sir Roger Gale, Mr Holloway, and Colonel Stewart, 26 January 2021

29 To Mrs Elphicke and Ms Villiers, 26 January 2021

30 To Sir Roger Gale, Mr Holloway, and Colonel Stewart, 15 February 2021

31 To Mrs Elphicke and Ms Villiers, 15 February 2021

32 To the Clerk of the Journals, 4 March 2021

33 To Sir Roger Gale, Mr Holloway, and Colonel Stewart, 4 March 2021

34 To Sir Roger Gale, Mr Holloway, and Colonel Stewart, 22 March 2021

35 To Ms Villiers, 22 March 2021

36 To Mrs Elphicke, 23 March 2021

Responses to the Commissioner's draft memorandum

37 From Colonel Stewart, 11 May 2021

38 From Sir Roger Gale, 12 May 2021

39 From Mr Holloway, 29 May 2021

40 From Ms Villiers, 18 June 2021

41 From Mrs Elphicke, 18 June 2021

List of Reports from the Committee during the current Parliament

All publications from the Committee are available on the publications page of the Committee's website.

Session 2021–22

Number	Title	Reference
1st	Boris Johnson	HC 549

Session 2019–21

Number	Title	Reference
1st	Kate Osamor	HC 210
2nd	Stephen Pound	HC 209
3rd	Greg Hands	HC 211
4th	Conor Burns	HC 212
5th	Mr Marcus Fysh	HC 213
6th	Confidentiality in the House's standards system	HC 474
7th	Sanctions in respect of the conduct of Members	HC 241
8th	David Morris	HC 771
9th	Dr Rosena Allin-Khan	HC 904
10th	The House of Commons and the criminal law: protocols between the police and the Parliamentary Commissioner for Standards and the Committee on Standards	HC 883
11th	ICGS investigations: Commons-Lords agreement	HC 988
12th	Sanctions and confidentiality in the House's standards system: revised proposals	HC 1340