House of Commons

Committee on Standards

Review of fairness and natural justice in the House's standards system

Sixth 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.

Current membership

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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. In our November 2021 report, *Review of the Code of Conduct: proposals for Consultation*, we notified the House of our intention to commission a senior judicial figure to carry out a review of fairness and natural justice in the House's standards system. We commented as follows:

> We consider that the present system is fair, that it guarantees a Member a fair hearing, that it observes the norms of due process and is compatible with Article 6 ECHR, and that it protects the interests of the House at large and the wider public in upholding the House's rules. However, we have also considered whether there is more we can do to clarify the process, eliminate confusion, and ensure best practice in guaranteeing natural justice. We suggest ways in which the process for determining cases might be improved and are open to further suggestions as part of our consultation, including on the matter of appeals. We will invite a senior judicial figure to review some of these options for change. We will publish their conclusions and take them into account in making our final proposals to the House.[1]

2. We subsequently appointed Rt Hon Sir Ernest Ryder, former Senior President of Tribunals for the United Kingdom and Lord Justice of Appeal, and currently Master of Pembroke College, Oxford, as our legal adviser under Standing Order No. 149(7)(c) for the purposes of this review. The terms of reference for the review were set out in correspondence with Sir Ernest confirming his appointment.[2]

3. Sir Ernest has now completed his review and submitted it to the Committee. We are very grateful to him for his work.

4. **We publish Sir Ernest's review as Appendix 1 to this report and invite comments from within Parliament and from members of the public and external organisations. This consultation period will close on Monday 28 March 2021.**

5. The terms of reference of Sir Ernest's inquiry are published as Appendix 2 to this report. In addition, two significant documents referred to in Sir Ernest's review are published online:

- The Parliamentary Commissioner for Standards' Information Note which is sent to a Member at the start of an investigation, in its most recent version (2015). This is available on the Commissioner's website.[3]
- The Introductory Guide to the Committee on Standards which is sent to new members of the Committee on their appointment, in its most recent version (June 2021). This is available on our website.[4] We note that this is the first time that this document has been put in the public domain.

6. We will take into account consultation responses in taking our decisions on Sir Ernest's proposals. We intend thereafter to put a package of proposals to the House for

1 Committee on Standards, Fourth Report of Session 2021–22, *Review of the Code of Conduct: proposals for Consultation* (HC 270), para 9; see also para 196
2 The exchange of correspondence is published on the Committee's website.
3 https://www.parliament.uk/globalassets/documents/pcfs/pcs-information-note.pdf
4 https://committees.parliament.uk/committee/290/committee-on-standards/publications/8/scrutiny-evidence/

changes to the House's standards system. These will take into account Sir Ernest's review and feedback on it, as well as proposals arising from our November 2021 report on the Code of Conduct and the consultation which followed that. Our recommendations to the House will include any necessary changes to Standing Orders, alongside a proposed updated Code of Conduct and Guide to the Rules.

Appendix 1: Sir Ernest Ryder's review

Conclusions and Recommendations:

1) Parliamentary Privilege and exclusive cognisance are the constitutional basis for the standards jurisdiction of the House of Commons. It would be unwise to disturb the constitutional balance of interests which the law of Parliament reflects.

2) Trust, respect and confidence in Parliament requires leadership around the standards of conduct of Members of Parliament which the public are entitled to expect the House to deliver.

3) Codification of the law of Parliament in legislation and/or external regulation of standards by the exclusion of Members of Parliament from the process would damage the constitutional basis for the standards jurisdiction and would raise at least as many problems as it might solve.

4) A Code of Procedure which has the authority of the House would enhance fairness by improving understanding, perception, clarity and consistency.

5) Standing Order Nos. 149 and 150 should be reviewed at the same time as a Code of Procedure is drafted to ensure consistency and appropriate content in each document.

6) The inquisitorial procedure for standards inquiries in the House is fair and compliant with Article 6 ECHR.

7) The investigator should not be the first decision-maker.

8) Neither the Commissioner nor the Member who is the subject of an inquiry should be present during the Committee's deliberations.

9) Save in exceptional circumstances, the Committee should ask the Commissioner to interview any additional witnesses that the Committee may wish to hear.

10) When a member of the Committee is unable to attend a meeting of the Committee about an individual inquiry they should take no further part in the Committee's process in that inquiry.

11) There should be a right of appeal from the Committee where the process of investigation was materially flawed, the process of decision-making was procedurally flawed, credible fresh evidence has become available that could not reasonably have been presented and which, if accepted, has a real prospect of affecting the outcome or the sanction was unreasonable or disproportionate. That appeal should be to an independent body with judicial expertise.

12) On a report in respect of an individual inquiry or appeal from the Committee or the independent body to the House, there should be a division without amendment or debate.

Preamble:

1) The House of Commons Committee on Standards identified the issue for this Review in its Fourth Report of Session 2021–22 as:

> "whether the House's current system of investigating and deciding upon breaches of the Code of Conduct for Members of Parliament is compatible with fairness and natural justice, and with Article 6 ECHR…".[1]

2) The Committee described the context to their request as follows:

> "…it is a privilege to sit in the House of Commons – and…with that privilege comes a set of duties and responsibilities. The public expect MPs to exercise these duties conscientiously; and look to the House of Commons to encourage best practice, uphold standards and sanction misbehaviour."[2]

The proposal for consultation in the Committee's Fourth Report identifies the underlying problem that is to be solved as:

> "whether there is more we can do to clarify the process, eliminate confusion, and ensure best practice in guaranteeing natural justice…including on the matter of appeals".[3]

3) I am not asked to undertake a review of Parliamentary Privilege or *lex et consuetudo parliamenti*: the law of parliament which is the private law applicable to and administered solely by Parliament and which is the basis of the exclusive jurisdiction in each House to govern standards of conduct. There are authoritative precedents concerning the nature and extent of Privilege and the governance by Parliament over its internal affairs. They can be found, for example, in Erskine May's Parliamentary Practice (25th ed, 2019) and in the case law of the courts. I shall make some limited reference to these materials to highlight the understanding that exists between Parliament and the courts and the implications that has for the regulation of standards.

4) I am also not asked to consider the broad range of issues that exist around the impact of Privilege on the interests of third parties i.e., those who are not Members of the House of Commons, for example in relation to contempt and enforcement of sanctions. Nor am I asked to consider whether the protection of Privilege should be disapplied in respect of criminal conduct, for example incitement of a criminal act in proceedings of the House, or the use of parliamentary materials elsewhere, including in criminal and civil courts. These issues, among others outside my terms of reference, have been discussed in detail in authoritative reports[4] whose recommendations can no doubt be considered if a resolution of them is required.

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1 Committee on Standards, Fourth Report of Session 2021–22, *Review of the Code of Conduct: proposals for consultation*, (HC 270), 29 November 2021, at paragraph 196.

2 *Ibid*, paragraph 1.

3 *Ibid*, paragraph 8.

4 For example, Joint Committee on Parliamentary Privilege, Session 1998–99, (HC 214–1), 9 April 1999 and Joint Committee on Parliamentary Privilege, Report of Session 2014–14, *Parliamentary Privilege*, (HC 100), 3 July 2013 (hereafter referred to as the 1999 and 2013 Joint Committee Reports) and each of the Reports of the Committee on Standards in Public Life, in particular the Eighth Report, *Standards of Conduct in the House of Commons*, Cm5663, November 2002.

5) The terms of reference of this Review identify ten questions.[5] The following matters are relevant to those questions:

a) What is the nature of Privilege and its relevance to standards?

b) What is the relevance of domestic and European case law to the questions asked of this Review?

c) A Code of Procedure and Fairness: how can the procedural integrity of inquiries that are the responsibility of the Parliamentary Commissioner for Standards and the Committee on Standards be better protected so that they are fair?

d) How should appeals be determined?

The nature of Privilege and its relevance to standards:

6) Erskine May defines Parliamentary Privilege in the following terms:

> "Parliamentary privilege is the sum of certain rights enjoyed by each House collectively as a constituent part of the High Court of Parliament; and by Members of the House individually, without which they could not discharge their functions, and which exceed those possessed by other bodies or individuals. Some privileges rest solely on the law and custom of Parliament, while others have been defined in statute."[6]

7) Privilege is part of the common law. It is the private law that is applicable only to Parliament and which is administered by Parliament as a court. To a limited but important extent it is codified in statute: freedom of speech in Parliament is guaranteed by Article IX of the Bill of Rights 1689[7] and the Claim of Right Act 1689 in Scotland. Its development since the Middle Ages can be discerned in the Resolutions and Standing Orders of each House and rulings by the Speakers of each House which are the demonstrations of its authority as precedent. It is as much a part of the law as any decision made in the superior courts although I acknowledge that a Resolution of the House is binding only on Parliament.[8] Its purpose is inherent in and vital to the functioning of a democratically elected legislature as a sovereign body; it is integral to the constitutional role of Parliament.[9]

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5 Committee on Standards, *Review of committee processes: statement by the Committee, terms of reference*, 29 November 2021, at paragraph 2.

6 Erskine May, *Parliamentary Practice*, (25th Ed, 2019), paragraph 12.1. This was formerly described in more traditional language as follows: "Parliamentary privilege is the sum of the peculiar rights enjoyed by each House collectively as a constituent part of the High Court of Parliament, and by Members of each House individually, without which they could not discharge their functions, and which exceed those possessed by other bodies or individuals. Because neither House could perform its functions without the unimpeded services of its Members, privileges are required by each House for the protection of its Members and for the vindication of its own authority and dignity"; Memorandum by the Clerk of the House of Commons to the Report by the Select Committee on Parliamentary Privilege, (HC 34), 1966–67.

7 Article IX of the Bill of Rights (1 Will. And Mary sess. 2 c.2): "That the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament."

8 See, for example: *Izuazu (Article 8 – new rules)* [2013] UKUT 00045 (IAC).

9 For example, the House asserted on 20 May 1675 in response to a proposal before it "That the Reason of that Privilege is, that the Members of the House of Commons might freely attend the publick Affairs in that House without Disturbance or Interruption;", CJ (1667–87) 342.

8) Privilege includes the common law principle of 'exclusive cognisance' (or exclusive jurisdiction) by which Parliament has absolute control over the regulation of its own internal affairs.[10] What was asserted in the seventeenth century as the freedom of the legislature from encroachment by the monarch is in the contemporary context a freedom from encroachment by the courts and/or the Executive, that is Her Majesty's Ministers in Government. The existence of Privilege is no mere tradition or passing fancy; it is a claim of right that enables legislators like judges to discharge their constitutional responsibilities without fear of interference or improper pressure. The existence of Privilege is not susceptible of challenge in the courts or by the Executive.

9) With rights come responsibilities. It is a constitutional responsibility in each House to assert Privilege and to use it so that the public may see that it is being appropriately used. That is an aspect of the Rule of Law. The process that governs standards is accordingly a vital component of the exercise of the exclusive jurisdiction of Parliament over its collective rights. Breach of the rules involves departure from standards that if not acknowledged and redressed leads to a diminution or a perception of diminution in the quality of the administration of the legislature which has the consequence that trust, respect and confidence in the institution may be degraded.

10) The process that governs standards accordingly supports the public interest in the functioning of Parliament and the public interest in the maintenance of trust, respect and confidence in Parliament through the standards of conduct which are identified and upheld.[11] It is equally an aspect of leadership, one of the seven 'Nolan principles' that apply to all who hold office in public life.[12] When trust, respect and confidence in elected representatives is damaged, it is incumbent on the democratic legislature, as the representative voice of the people, to steel its nerve and provide the leadership around standards of conduct which the public expect. That is the real message of this Review.

11) The collective powers of both Houses and the rights derived from Privilege are controlled by Parliament in the exercise by both Houses of the jurisdiction of the High Court of Parliament. That exclusive jurisdiction is outside the competence of any other court. The rights arising out of Privilege are not free standing in the sense that Members can avail themselves of a relevant protection in any or all circumstances. The rights are limited to the exercise of their functions as part of the collective functions of each House.[13] The functionality of the rights is important; they do not otherwise protect Members when they are not exercising their parliamentary functions. The modern test is commonly referred to as the 'necessary connection to proceedings' test.[14] Members are not above the law: to a limited but constitutionally important extent they are also or alternatively subject

10 W. Blackstone, *Commentaries on the Laws of England* (1765), 58–59: "Whatever matter arises concerning either house of parliament, ought to be examined, discussed, and adjudged in that house to which it relates, and not elsewhere."

11 As Associate Justice Matthews said in an extended discussion about Magna Carta in the US Supreme Court in *Hurtado v. California* 110 U.S. 516 (1884), 531–532: the check on Parliamentary supremacy (or more accurately "the actual and practical security for English liberty against legislative tyranny") is Parliament itself through "the power of a free public opinion represented by the Commons".

12 Committee on Standards in Public Life, First Report, *Standards in Public Life*, Cm 2850–1, May 1995, page 14.

13 *Attorney General of Ceylon v. de Livera* [1963] AC 103 per Viscount Radcliffe at 120: "given the proper anxiety of the House to confine its own or its members' privileges to the minimum infringement of the liberties of others, it is important to see that those privileges do not cover activities that are not squarely within a member's true function."

14 From the 1999 Joint Committee Report, *supra*, at paragraph 4: "whether each particular right or immunity currently existing is necessary today, in its present form, for the effective functioning of Parliament".

to the law of Parliament. There is in consequence a delicate balance between the exercise of Privilege and equality before the law which is one of the pillars of the Rule of Law,[15] just as there is a delicate balance in the separation of powers between the courts, Parliament and the Executive.

12) The importance of Privilege to the constitutional function cannot be overstated. It is a 'fundamental liberty' and a principle of the 'highest constitutional importance'.[16] That is the starting point of any discussion about the rights which are the consequence of Privilege and how those rights are to be governed. The governance of matters that are within its scope is for Parliament alone.[17] The 1999 Joint Committee on Privilege put it this way:

> "As far as members are concerned, there can be no doubt that each House should remain responsible for disciplining its own members. The Joint Committee has taken this as axiomatic. It is inconceivable that power to suspend or expel a member of either House should be exercisable by the courts or some other outside body."[18]

In April 2012 the then Government's Green Paper on Parliamentary Privilege accepted this in the following terms:

> "The right to regulate their own Members is an essential aspect of the two Houses' control of their own internal affairs. It is an important aspect of parliamentary sovereignty that only a Member's fellow parliamentarians can ultimately determine what the rules are that apply to parliamentary conduct, whether a breach of those rules has occurred, and if so whether there should be parliamentary sanctions such as suspension or even, in the case of the House of Commons, expulsion."[19]

The relevance of domestic and European jurisprudence:

13) There is an understanding between our courts and Parliament about the sovereignty of Parliament. I do not underestimate the possibility that this will not always be the case. In my judgment, it would be wise to build upon that understanding and the nature and extent of the jurisdiction that already exists. There are understandable calls for external regulation but for the reasons I shall describe that adventure would diminish or damage the safeguards that are inherent in the jurisdiction that Parliament exercises over itself and would carry with it the risk that the courts or the Executive would of necessity have to encroach into the exclusive jurisdiction of Parliament, for example, in any subsequent interpretation that is required of a new jurisdiction or statutory scheme. That would tend to undermine the separation of powers.

14) I am emboldened in my view of the consensus that exists by recent case law in the courts. In the *Foreign and Commonwealth Office & Anor v. Warsama & Ors,*[20] the Court of Appeal (Civil Division) in England and Wales considered the effect of Parliamentary

15 Hansard HL Vol 378 col 631 Lord Salmond, Chair of the Royal Commission on Standards of Conduct in Public Life (1976), cited in *R v. Greenway* [1998] P.L. 357 per Buckley J at 362.

16 *Pepper (Inspector of Taxes) v. Hart* [1993] AC 593 per Lord Browne-Wilkinson at 638.

17 *Bradlaugh v. Gosset* (1884) 12 QBD 271 at 278–86 per Stephens J. and per Lord Coleridge CJ at 273–74.

18 1999 Joint Committee Report, *supra*, at paragraph 275.

19 Parliamentary Privilege, Cm8318, April 2012, paragraph 218.

20 [2020] EWCA Civ 142.

Privilege on a claim against the Foreign and Commonwealth Office to which the FCO had pleaded Privilege as a defence. The judgment of the court provides a comprehensive re-consideration of the principles that are engaged and amounts to a strong contemporary articulation of Privilege in terms that are consistent with the parliamentary law and customs identified in Erskine May. Having concluded that absolute privilege applied to the parliamentary materials in question, the court prevented their use in support or rebuttal of a civil claim for damages.

15) Comment about the nature and extent of Privilege has most recently focussed on the question whether Privilege should be codified. There are powerful arguments on both sides of the debate that can readily be demonstrated by the different conclusions reached on that question by the two Joint Committees on Parliamentary Privilege that reported in 1999 and 2013.[21] I do not believe that the detail of that discussion informs the answers to the questions that I am asked in this Review. Codification might provide more clarity but would do so by creating a different balance of principles and/or function that would still need to be articulated and that would give rise to at least as many questions as it might answer, not least in the interpretation of a new scheme. Regardless of any statutory limitation that might be imposed on the courts about who would have the exclusive function of interpretation of the scheme, the courts have a role in maintaining the Rule of Law and the existing delicate constitutional balance would be upset.

16) Despite their disagreement on the question of codification, both Joint Committees and almost all commentators are agreed that Privilege is the foundation of Parliament's exclusive right to regulate its own affairs. That is the key point which informs the questions I am asked because, so far as Members of Parliament are concerned and matters that relate to proceedings of the House of Commons, it is an exclusive power in the House.

17) If asked to make a judgment on the question of codification I would tend towards leaving well alone. It is better approached as an issue specific solution to an identified problem based in a factual circumstance that has arisen. There is no discernible appetite among the judiciary to encroach into Parliament's exclusive jurisdiction and the parameters of the risk of encroachment are clearly understood. As Lord Judge, a former Lord Chief Justice, said in answer to questions put by the 2013 Joint Committee on the point:

> "[u]nless you are dissatisfied with the way in which your privileges operate, I would leave this well alone".[22]

Speaking extra-judicially, the present Lord Chief Justice, Lord Burnett of Maldon, has not disagreed and importantly emphasised that:

> "[legislators] require protections to enable them to engage in robust debate, to canvass issues and press points that may be unpalatable to governments, to Heads of State, and to other powerful people or interest groups without fear of reprisal. Democracy depends upon such protection."[23]

21 1999 Joint Committee Report recommendation 39 and 2013 Joint Committee Report recommendation 47.

22 Transcript 5 March 2013 Q239

23 The Rt. Hon. The Lord Burnett of Maldon, *Parliamentary Privilege – Liberty and Due Limitation*, Livingstone, Zambia, 9 April, 2019.

18) Proceedings in Parliament are excluded from the Human Rights Act 1998. Although domestic courts may not encroach on the control of internal regulation by each House and do not have jurisdiction to entertain a challenge to the existence of Privilege, the scope of Privilege is a question within their competence. Furthermore, the Strasbourg court has asserted its competence to consider violations of Article 6 of the European Convention of Human Rights (ECHR) arising out of the exercise of the rights associated with Privilege. That has implications for the way in which the standards jurisdiction should be exercised.

19) In *R v. Chaytor*[24] the Supreme Court considered the overlapping relationship between the statutory codification of the freedom of speech in Parliament arising out of Article IX of the Bill of Rights and the common law principle of exclusive cognisance. The court noted[25] that exclusive cognisance or jurisdiction pre-dates the Bill of Rights and is wider. It cited with approval the proposition that the House of Commons as a court has the exclusive right to determine matters falling within its jurisdiction but that it cannot bring a matter within that jurisdiction by simply declaring it to be so[26] and it held that the decision as to the scope of exclusive cognisance is ultimately one to be made by the courts rather than by Parliament.[27]

20) The approach of the European Court of Human Rights (ECtHR) presents a different risk of encroachment and reflects a trend in both that court and the Court of Justice of the European Union (CJEU)[28] towards a balance being struck on the facts of individual cases between immunity (as the right which is the consequence of Privilege), equal treatment of citizens and the right of access to a court. The risk inherent in such an approach is that a particular right arising out of Privilege may be struck down as being disproportionate to the legitimate aim to which it relates. Although interested party comment has subsequently attempted to distinguish between absolute and non-absolute immunities, there is an object lesson in the European case law about what can happen if the delicate balance of the separation of powers and that between Parliamentary Privilege and the Rule of Law is altered.[29]

21) In *A v. United Kingdom*[30] the Strasbourg court proceeded on the basis that Article 6 ECHR was engaged when an MP described a constituent in allegedly defamatory terms in an adjournment debate in the House. The freedom of speech in Parliament accorded to its Members by Article IX of the Bill of Rights was the principle in issue rather than Parliament's exclusive cognisance. The court said that it accepted jurisdiction on the basis that Article IX is framed not in terms of a substantive defence to civil claims but as a procedural bar to the determination of a claim by a court[31] . Although the United Kingdom Government argued that Parliamentary Privilege was absolute and delimited

24 [2010] UKSC 52.

25 *Ibid* at [13].

26 *Ibid* at [14] relying on *Stockdale v. Hansard* (1839) 9 Ad & E 1, per Lord Denman CJ at 147–148.

27 *Ibid* at [15].

28 *Criminal Proceedings against Patriciello* (C-163/10) EU:C:2011:543, [2011] 9 WLUK 83, [2012] 1 C.M.L.R. 11, ECJ (Grand Chamber): for immunity to be capable of being relied upon – "*the connection between the parliamentary duties and the opinion expressed had to be direct and obvious.*" But see the opinion of AG Jaaskinen which follows the proportionality jurisprudence of the ECtHR.

29 An alternative analysis of the trend in the ECtHR and CJEU is to distinguish between absolute immunity which arises out of freedom of speech in Parliament (non-accountability) from non-absolute immunity for extra-Parliamentary acts and utterances (inviolability). See, for example: *Parliamentary immunity in a European context*, European Parliament Directorate-General for Internal Policies, Citizens' Rights and Constitutional Affairs, 2015.

30 (2002) EHRR 917, ECtHR.

31 *Ibid* at [64].

the existence of the substantive civil claim, the court did not analyse the nature and extent of the civil rights and obligations that were asserted to engage Article 6. The court proceeded on the basis that a State cannot remove from the jurisdiction of the courts a whole range of civil claims by procedural bars. The key question of whether on the facts Parliamentary Privilege limits the substantive content of a civil right and whether, as a consequence, Article 6 can be engaged at all, remains unresolved.[32]

22) Instead, the Strasbourg court's decision is an analysis of the procedural component of Article 6 and follows a conventional line in its consideration of whether the limitations on access to a court are within the margin of appreciation afforded to a State that is, whether the very essence of the right is not impaired, and whether the limitation pursues a legitimate aim and there is a proportionate relationship between that aim and the means employed.[33] The court concluded that the protection of free speech in Parliament and the maintenance of the separation of powers between the legislature and the judiciary were legitimate aims.[34] Having regard to the existence of parliamentary immunity across signatory States, the Council of Europe and the European Union, the court observed that restrictions on access to a court could not be said to be disproportionate and the immunity could not be said to exceed the margin of appreciation.[35] Although on the facts the court found that no violation of Article 6 had been established and that any restrictions to parliamentary immunity based on factual exceptions would seriously undermine the legitimate aims, the court did not decline jurisdiction and refuse to hear the application. In a powerful dissenting judgment, Judge Loucaides undertook the analysis of civil rights and obligations that was avoided by the court and concluded that a violation had taken place.

23) Claims are likely to be permitted to be heard in Strasbourg unless the substantive question is settled. Subsequent decisions by the court are inconclusive. At one end of the spectrum in Zollmann v. United Kingdom[36] an application relating to a statement made in the House of Commons by a Minister was declared inadmissible. In Konstas v. Greece,[37] the court admitted a claim arising out of the words said in proceedings in the legislature in Greece and found a violation of Article 6. Privilege was not apparently raised by the Government of Greece and formed no part of the reasoning of the court leaving the point moot for subsequent applications. At the other end of the spectrum, in Cordova v. Italy (No. 1),[38] the court held that there had been an interference with the applicant's right of access to a court under Article 6 in relation to extra-parliamentary conduct. The court again articulated[39] the need for there to be a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.

24) Given that it is apparent that the Strasbourg court will continue to consider hearing cases where Parliamentary Privilege is claimed, Parliament should regularly take steps to ensure that its own procedures are consistent with Article 6 case law and fair process to minimise the risk of a finding of violation. I am also of the opinion that Parliament should continue to assert the absolute nature of Privilege and should not entertain

32 *Ibid* at [63].
33 *Ibid* at [74].
34 *Ibid* at [77].
35 *Ibid* at [83–87].
36 (Application 62902/00), [2003] ECHR 731, ECtHR.
37 (Application 53466/07), Unreported May 24 2011, ECtHR.
38 (Application 40877/98), [2003] ECHR 47, ECtHR.
39 *Ibid* at [54].

external schemes of regulation which could be regarded as a derogation from Privilege and which would without doubt be regarded by the Strasbourg court as schemes that are within the competence of that court. The encroachment of the courts into the jurisdiction of standards of conduct in Parliament will not solve any of the issues that have been identified and is to be avoided. For the reasons I set out below, I am of the opinion that a code of procedure which has the authority of the House is the best solution to the related questions of understanding, perception, clarity and consistency and hence fairness, and the existence of such a scheme is the best protection against encroachment.

Code of Procedure:

25) The scheme of the law of Parliament is very clear. It is set out in the Standing Orders and Resolutions of each House and the rulings of the Speakers which are described in Erskine May. The standards of conduct that apply to Members of Parliament are to be found in the 'Code of Conduct and the Guide to Rules relating to the Conduct of Members' which was published in its existing form in 2019.[40] All of the relevant Resolutions and Standing Orders relating to Members' conduct are helpfully set out in the Appendix to the Guide. The scheme was significantly influenced by the recommendations of the Committee on Standards in Public Life (CSPL) which reported in May 1995 and which recommended the adoption of a code of conduct for Members of Parliament.[41] The resulting document provides a coherent scheme that is comprehensible. The Committee on Standards is considering amendments to the Code and the Guide. The existence of a Code which has the authority of the House and which describes the general principles of conduct separately from the detail of the Rules which are to be observed is a model of good practice that I would wish to preserve and build upon.

26) In 2009 the CSPL again reviewed the regulatory scheme and concluded that Parliamentary Privilege should remain at its core but recommended that lay members who have not been parliamentarians should sit on the Committee.[42] The House began the process of implementation of that recommendation in 2010[43] and the present membership of the committee which is comprised of seven Members (including the Chair who is a member of the Official Opposition) and seven lay members[44] was authorised by a Resolution of the House on 17 March 2015.[45] The quorum for the Committee is three elected Members and three lay members.[46]

27) It is axiomatic that the existence of lay members on the Committee is intended to be and is a reflection of the public's interest in the regulation of standards and that the balance provided by an equal number of parliamentarians is intended to reflect the composition of the House and the imperative that the governance of standards should be by Members of the House. By convention, the Chair only uses his vote if the members of the Committee are tied in a formal division: and formal divisions are very rare because the Committee proceeds by consensus. I do not recommend altering the balance of the Committee. It is itself a balance between the application of Parliamentary Privilege and the wisdom to

40 The Code of Conduct together with The Guide to the Rules relating to the Conduct of Members, (HC1882), 10 October 2019.

41 First Report of the Committee on Standards in Public Life, *Standards in Public Life*, Cm 2850-I, 11 May 1995.

42 Committee on Standards in Public Life, Twelfth Report 2009, *MPs expenses and allowances*, recommendation 51.

43 HC Deb, 2 December 2010, col 1017.

44 Standing Order No. 149 (2).

45 Votes and Proceedings, 17 March 2015, item 6

46 Standing Order No. 149 (6).

be brought to the deliberations of the Committee by lay members who have the public interest at heart. There is nothing in the way that it works in practice that causes me to believe that there is a problem which needs to be solved.

28) I do not agree with the recent evidence to the Committee from the Committee on Standards in Public Life that the integrity and fairness of standards determinations requires them to be conducted by a panel which removes Members from the regulatory process. For the reasons I have given, Members are integral to the understanding of what is a parliamentary function, i.e. they must own that responsibility. They are also integral to the control of the House over its own internal affairs, i.e. a role that is inherent in the sovereignty of Parliament. There is a separate requirement for a formal appeal mechanism for Members both from the findings of the Committee and sanctions which I shall address. The House can provide for a protection against inappropriate political interference by limiting Resolutions of the House on decisions to suspend or expel a Member to divisions without a debate and without amendment. I do not recommend the removal of decision-making from the Committee but I shall recommend an appeals mechanism that uses the Independent Expert Panel or a similar independent body.[47]

29) The procedure for inquiries into the conduct of Members can be found in paragraphs 19 to 21 of the Rules under the heading 'Upholding the Code' and at part 4 of the Guide. The Rules specifically incorporate and are subsidiary to Standing Orders Nos. 149 and 150 of the House which deal with the powers to undertake inquiries. The procedural content of the Rules and the Guide is clear but lacking in the detail of good practice which is to be found in other guidance materials. The materials include an 'Information Note' published by the Parliamentary Commissioner for Standards[48] and the 'Committee on Standards Members – Introductory Guide'[49] which is issued to Committee members by the Committee.

30) There is a common misapprehension that if the outcome of a standards inquiry is decided by the House, the Committee or by an agreement leading to 'rectification' between a Member and the Parliamentary Commissioner for Standards, then in some way the alleged conduct has not been judicially determined in the sense that a 'justiciable claim' would be, with the implication that procedural protections arising out of the principles of fairness and natural justice that would be applied in the courts are absent. That is wrong. The jurisdiction of the House is a procedure to which the principles and protections set out by the House apply. That the House is responsible for the procedures that are to be applied is beyond doubt and the House now has an opportunity to decide whether to make improvements to the same.

31) Erskine May sets out the principle that "Both Houses retain the right to be the sole judge of their own proceedings, and to settle – or depart from – their own codes of procedure."[50] Furthermore, the courts in England and Wales have agreed that "It would be impracticable and undesirable for the High Court of Justice to embark upon an inquiry whether in any case those procedures were effectively followed".[51] Exclusive control by the

47 In answer to the question posed by the Committee in its Fourth Report of Session at paragraph 200.
48 Published on the Commissioner's website.
49 Published on the Committee's website.
50 Erskine May, op cit, paragraph 11.16.
51 *British Railways Board v. Pickin* [1974] AC 765 per Lord Morris of Borth-y-Gest at 790. See also *Fairfold Properties Ltd v. Exmouth Docks* (1990) TLR 660 per Millet J.: "Parliament has to be left in unfettered control of its own procedure".

House of its procedures also extends to the functions of the Parliamentary Commissioner for Standards because the Commissioner 's functions focus on the propriety of the working and activities of those in Parliament.[52] The Commissioner's functions are prescribed by the House and are described in Standing Order No. 150, Chapter 4 of the Guide to the Rules, the Commissioner's Information Note and Appendix 3 to the Introductory Guide.

32) The Parliamentary Commissioner for Standards has published a 'Commissioner's Information Note' which was approved by the Committee on 3 February 2015. This Note, which is presently being re-drafted, is a very helpful aide memoir in plain language. It is not, however, a Code of Procedure because it does not have the same authority as the Code of Conduct. That would require a Resolution of the House. Likewise, the Committee's Introductory Guide is accurate and helpful and sets out matters that I would also expect to see in a code of procedure. I understand that the Committee is considering whether a version of the Introductory Guide should be published which might reflect the content of the Commissioner's Information Note so that the procedure before the Committee is comprehensively set out and can be better understood.

33) I am of the firm view that existing good practice should be brought together into one document which has the same status as the Code of Conduct and Guide to the Rules. All aspects of procedure should be put together into the form of plain language rules and authoritative guidance about those rules. If appropriate, principles can be described as the basis for the rules, in particular where the House has already made decisions in its previous Resolutions, where there are Standing Orders which have the authority of the House and where the procedure for Select Committees is integral to the process and must be taken into account. The use of Privilege to create a binding scheme of rules based upon principles in plain language reflects both good practice in respect of the governance of standards and is an important use of Parliament's exclusive jurisdiction to protect the public interests that are engaged. It would also settle questions which repeatedly arise out of misapprehensions that exist about the standards jurisdiction and natural justice and fairness.

34) I have sympathy with the 2013 Joint Committee on Parliamentary Privilege when it recommended at paragraph 85 that in some circumstances good practice should be formalised as part of the Standing Orders of the House. A review of good practice that brings together all materials into one code and guide might usefully consider whether Standing Order Nos. 149 and 150 might more overtly deal with some headline aspects of procedural fairness.

52 *R v. Parliamentary Commissioner for Standards, ex parte Al Fayed* [1998] 1 WLR 669 and see also *R v. Parliamentary Commissioner for Administration, ex parte Dyer* [1994] 1 WLR 621.

35) There are minor infelicities of language in the existing good practice documents to which I have referred and I would recommend that the opportunity is taken to review their content at the same time as publication of that content in a code of practice.[53] I have considered the Standing Orders of the House which are relevant and subject to what I say above about an appropriate separation of material between Standing Orders and a code, there are only minor amendments that are necessary to ensure that these reflect existing good practice. In Standing Order No. 150 where reference is made to the Commissioner coming to the conclusion that there has been a breach of the Rules, that should read the "she is of the opinion that" rather than that she makes "findings". That accords with the Memorandum procedure which is in place where in any case that is not the object of rectification, the Commissioner gives her opinion to the Committee about the inquiry and it is for the Committee to decide if the Member's conduct has breached the Code. I shall return to the question of the Commissioner's role and the difficulty that would exist if that role were to become the first decision-maker in non-ICGS cases later in this Review.

36) The existence of a code of procedure which has the authority of the House would focus minds on the detailed content and I would advise that the regular opportunity that already exists for the Commissioner to suggest to the Committee revisions to the Code of Conduct should be enlarged so that procedural matters are also reviewed in the same way and at the same time. I would respectfully urge the House to provide a regular opportunity for debate on both the Code of Conduct and a code of procedure. I would suggest that this is an annual fixture. In this way the law of Parliament would overtly include procedural rules that are to be applied and that will answer many of the detailed questions that I have been asked to consider. The existence of an authoritative procedural rule book would provide an answer to those who acknowledge that the procedural rules of the courts and the law of evidence do not and should not apply strictly to Parliament but who criticise the exercise of the standards jurisdiction by inappropriate comparison with processes in the courts. Similarly, a code would improve clarity and consistency in the way procedural questions are dealt with which both Members and decision-makers are entitled to expect.

37) Although it is not necessary to point to similar or analogous solutions, the New Zealand Parliament has for some while published a procedural guide for use by Committees of its House of Representatives.[54] The content of the New Zealand guide is illustrative of two things: a) the fact that a code of procedure and guidance in plain language and without over complex provisions can be put in place, and b) the content of existing good practice notes and guides in the UK Parliament are already very close to the code that I recommend. The essential difference is that the code would have the authority of the House and its provisions would be binding and if necessary enforceable. If it is necessary to meet the argument that a code of procedure may itself become rigid and complex, I would emphasise that I am not recommending something in the style of the Civil Procedure Rules 1998 but rather something like the New Zealand guide or the headline

53 For example, the Commissioner's Information Note at paragraph 3 has not yet been updated to reflect the decisions of the House of Lords and the Supreme Court in Re B *(Children) (Care Proceedings: Standard of Proof) (CAFCASS intervening)* [2008] UKHL 25, [2009] AC 11 and Re S- B [2009] UKSC 17, [2010] 1 AC 678 concerning the application of the civil standard of proof although it is common ground that the practice adopted by the Commissioner and the Committee has at all times reflected the decisions, i.e. the standard of proof on an inquiry is the balance of probabilities; there is no higher standard but the more serious the allegation the more attention should be paid to the quality of the evidence that is needed to satisfy the standard.

54 New Zealand Parliament, *Procedural Guides: Natural Justice before Select Committees*, Office of the Clerk of the House of Representatives, 2010.

procedural rules published by the Tribunals Procedure Committee.[55] These permit some flexibility so that the Committee would be able to make decisions on procedural points that are tailored to the circumstances of the individual case. Similarly, the ICGS Policies and Procedures which are approved by the House and provide a precedent achieve the same result.[56]

Fairness:

38) The Committee has concluded that it does not propose to move from an inquisitorial procedure to an adversarial one.[57] I agree. The standards jurisdiction of the House is quite different from criminal or civil proceedings in a court but, more importantly, it is a unique jurisdiction in Parliament that has no comparators. The question is: whether it is fair? I have avoided the implication of the question asked of me ('is it compatible with fairness and natural justice') because strictly 'natural justice' is just one theory of foundational principle which is usually associated with morality and/or common values and the utilitarian theory of rules of procedural fairness is another. In order to answer the questions I am asked, I shall pragmatically treat natural justice as the principles that are engaged and procedural fairness as the rules which should be in place.

39) Principles, however expressed, are not intended to be directly applied; they inform rules. This is important in the context of the existing Code of Conduct. The principles described in the Code, which include the Nolan Principles, are not intended to be enforced or to be the subject of an inquiry, but they are the basis for the Rules. I agree with the Committee that the principles are a series of shared values. It is the Rules that are described in terms which are capable of enforcement. The House has carefully separated the two and it is important to understand that a Member is not at risk of being the subject of an inquiry for a failure of leadership, selflessness or objectivity (which, by way of example, are three of the principles that are described). Aside from questions of principle and interpretation, there is another good reason for the distinction. A Member is entitled to know what the standard is that s/he is at risk of breaching and that is what the Rule provides. The Member can take advice upon it including from the Commissioner and it is a principle of fairness that someone must be able to discern the Rule just at it is that they must know the nature of the allegation made against them if there is an alleged breach of a Rule. The existing structure of the Code of Conduct provides that clarity so that it is fair.

40) In that context it is important to note that there is one Rule in the Code of Conduct that is described in general terms. The Rule contained in paragraph 17 is as follows: "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 its Members generally." There is no guidance in support of the Rule. The high threshold described in the Rule is indicative that it is intended to be used for a hitherto unparticularised and serious default which cannot be ignored because of its impact or a contumelious (flagrant and aggravated) breach which may include but goes beyond an existing Rule. I would recommend that the guide to the Rules makes this explicit without restricting the use of the Rule which is properly designed to prevent significant damage to the House and its Members. I would also recommend that in the code of procedure it is made clear that because of the unparticularised nature

55 See, for example, the Tribunals Procedure (Upper Tribunal) Rules 2008.

56 https://www.parliament.uk/about/independent-complaints-and-grievance-scheme/

57 Committee on Standards, *Review of committee processes: statement by the Committee, preamble*, 29 November 2021.

of the protection this affords the House, allegations made under this Rule will not be the subject of rectification and will lead to a Resolution by the House if determined to be a breach by the Committee. The Rule is, in its very nature, a serious 'catch all' that would ordinarily lead to the sanction of suspension or expulsion from the House.

41) I have considered paragraph 8 of the Code of Conduct which sets out general principles of conduct, refers to the Nolan Principles and continues: "In carrying out their parliamentary and public duties, Members will be expected to observe the following general principles of conduct, identified by the Committee on Standards in Public Life in its First Report as applying to holders of public office. These principles will be taken into account when considering the investigation and determination of any allegations of breaches of the rules of conduct in Part V of the Code." It is suggested that this wording has caused a problem because of a misapprehension that the principles might become enforceable as a consequence. The principles are clearly relevant to mitigation or aggravation in relation to the question of sanctions. They are not relevant to the proof of a breach of a Rule and hence are not relevant to an investigation save in respect of an alleged breach of the Rule contained in paragraph 17 where of necessity the derivation of the allegation from first principles may be required. I would recommend that the wording of paragraph 8 is altered to make this clear.

42) Turning then to procedure. It is important to understand that an inquisitorial or investigative procedure is not the same as an adversarial procedure which is the commonplace in common law criminal and court-based civil hearings. Furthermore, there is no single model for an inquisitorial procedure.[58] The standards jurisdiction of the House is a modified inquisitorial process. It is investigator-led by the Commissioner but with ultimate control resting with the Committee as the primary decision-maker. In common with all inquisitorial or investigative procedures, the public interest is in determining the truth rather than the more limited adversarial concept of procedural and substantive justice.[59] In other words, the standards jurisdiction is not simply a dispute resolution procedure where the issues to be decided and the evidence to be relied upon are decided by the parties.

43) In an inquisitorial process the State is classically in control of the public interest rather than the parties (conventionally either the decision-maker/judge, a procedural decision-maker/judge or the investigator). In the House of Commons, the officer of the House charged with the investigatory role is the Commissioner.[60] That is a conventional inquisitorial responsibility and in the context of the House's standards jurisdiction where the Committee is the decision-maker, it would be inappropriate for anyone else to have that role as there would then be duplication and room for inconsistency. The Committee is not easily able to assume the role itself without creating a panel of the Committee which would be inherently unrepresentative of the Committee as a whole and for that reason inadvisable. Furthermore, if the Committee were to assume the role it would likely have

58 Since at least 1935 when the French courts began one of a series of reforms involving the *juge chargé de suivre la procédure* and certainly after 1965 when the more powerful *juge de la mise en état* was given extensive case management powers, the French civil courts pioneered an inquisitorial judicial case management model. That was mirrored in Lord Woolf's reforms in England and Wales and Lord Gill's reforms in Scotland, with the consequence that civil adversarial and inquisitorial models are now much closer together: see *JA Jolowicz, Adversarial and Inquisitorial Models of Civil Procedure*, (2003) 52 ICLQ 281–295.

59 See, for example *Air Canada v. Secretary of State for Trade* [1983] AC 394 per Lord Edmond-Davies at 441 and in the Court of Appeal per Lord Denning MR at 411.

60 Standing Order No. 150 (1) et seq.

to deal with a disproportionate volume of procedural points. In any event, arguments about fairness would be raised about a dual role of investigator and decision-maker if both responsibilities were to be exercised either by the Committee or the Commissioner.

44) In summary, the Commissioner's process is as follows:

a) She must identify whether a matter engages a Rule which permits her to make an investigation;

b) She must consider whether the evidence brought to her attention is sufficient to begin an investigation into an alleged breach of the Rules;

c) She must determine what enquiries are necessary and proportionate to conduct a fair and impartial investigation;

d) She must come to an opinion on the evidence whether there has been a breach of the Rules;

e) Where she is of that opinion:

i) she may enter into an agreement with the Member which involves the 'rectification procedure' in Standing Order No. 150 (4) which is a form of informal dispute resolution and inform the Committee of that agreement; and

ii) she will otherwise set out her opinion in the form of a Memorandum to the Committee. The Memorandum sets out the alleged facts and her reasons together with the evidence upon which the opinion is based.

45) The Commissioner takes no further part in the Committee's deliberations or decision making. She does not orally advocate a position to the Committee or advise them further about the merits of an individual inquiry, the sanctions that they may consider or parliamentary law and procedure. Advice to the Committee on these matters is provided by the dedicated team of Clerks and Speaker's Counsel. The Commissioner will only be involved in further investigations on a matter before the Committee where the Committee refer an inquiry back to the Commissioner with a request for additional evidence or an answer to a question.

46) The Committee's process is then as follows:

a) The Committee will receive the Memorandum and make any procedural decisions about the further conduct of the inquiry, including the summoning of persons, papers and records, whether to sit in public or in private and whether to restrict the broadcasting of its proceedings;

b) The Committee will consider any request by the Member for the attendance of witnesses or for specific questions to be put to witnesses (that is, whether there is to be a form of oral evidence);

c) The Committee may order the Member to appear before it and will give the Member the opportunity to be heard;

d) The Committee will deliberate in private;

e) The Committee will come to its own decision on whether the member has breached a Rule;

f) Where the Committee decides there has been a breach, the Committee will recommend to the House whether any further action needs to be taken and if a sanction should be imposed, what that sanction should be.

47) There is a tendency that is apparent in the questions that I am asked and the narrative of the Committee's Fourth Report of Session at paragraphs 228 to 233, to regard the Commissioner as both the investigator and the first decision-maker in non-ICGS standards investigations. Although examples of the joinder of these roles can be found in inquisitorial procedures, it is generally regarded in the common law tradition as inappropriate because questions about impartiality or perceived impartiality may arise. I do not recommend that the Commissioner's role develops in this way. The Commissioner's 'findings' are her opinion, a conclusion that is then referred to the Committee for decision. Paragraph 228 of the Committee's Fourth Report of Session 2021–22 accurately summarises that position. The Committee's decision is the determination on the merits and is accordingly not a substitute for an appeal. In my judgement, it is unhelpful to characterise the Commissioner's findings as a first-instance decision or to treat the Committee's decision as an appeal from the Commissioner in non-ICGS cases.

48) The origin of the description of her role as including findings may arise out of the circumstance that in the majority of cases there is no dispute with the Member about the facts (the findings) that may give rise to an allegation of breach of a Rule. For the avoidance of doubt, I would regard rectification as a dispute resolution procedure not a first-instance decision with the consequence that the existence of rectification is not determinative of what the Commissioner is doing and in any event is an example of good practice. If a practice has developed of regarding the Commissioner's Memorandum as a first-instance decision then I recommend that it is made clear in a code of procedure that is not the case as that would arguably offend one of the principles to which I will now come. The Commissioner should not be both the investigator and a decision-maker. I note that in the ICGS scheme protection is afforded to the Commissioner as the first-instance decision-maker by the existence of independent investigators who provide her with an independent analysis of the evidence and recommendations on whether to uphold the complaint.

49) There are, among others, two fundamental principles by which a process will be judged to be fair. The first is the principle of contradiction and the second is the principle that no person may be a judge in their own cause. Provided that the procedures put in place are reflective of these principles then, all other things being equal, an inquisitorial process is likely to be adjudged to be fair and compliant with Article 6 ECHR.

50) The principle about contradiction is concerned with whether and how a person is to be heard. There are also important ancillary questions concerning procedural fairness which include the disclosure of materials to the person who is being investigated and onward disclosure of materials to the decision-maker, the opportunity to answer or comment upon relevant evidence and to understand the context and the opportunity to contradict by asking questions. The evidential concept of relevance is accordingly engaged.

51) I begin with Lord Reed's description in Osborn v. Parole Board[61] that fairness requires a procedure that gives practical expression to the "respect due to persons whose rights are significantly affected by decisions taken in the exercise of administrative or judicial functions". There is also an established analysis that public acceptance is a relevant factor in that.[62] The principle is not just that the dignity of the individual is the foundation of the content of the rules but that the manner in which dignity is respected is important.[63] In Osborn the need for an oral procedure was acknowledged where credibility and reliability or an assessment of the risk that the person presents are in issue and the sanction/effect might be serious. An individual should have the opportunity to put his or her case in such a way that, before any assessment of credibility or reliability is undertaken, their case is treated as being put in good faith. Osborn is also of note for Lord Reed's admonition about over reliance on ECtHR case law when domestic law on procedural fairness is so well developed.

52) The two Joint Committees on Parliamentary Privilege made recommendations about procedural fairness.[64] Since then, the nature and extent of an administrative tribunal's case management and inquisitorial responsibilities have developed[65] and the standards jurisdiction of the House has been acknowledged to be overtly inquisitorial. I would summarise modern inquisitorial good practice in the context of the standards jurisdiction as follows:

a) A prompt and clear statement at the beginning of the investigation of the precise allegations against the Member (that is, the Rules that it is alleged have been breached);

b) Disclosure of all evidence that is provided to the Commissioner (divided into used and unused material);

c) The opportunity to take legal advice and have legal assistance (as distinct from legal representation) throughout the process;

d) The opportunity to comment on the evidence that is relevant and to identify other relevant evidence or witnesses;

e) The opportunity to comment on the draft Memorandum before it is submitted to the Committee;

f) The opportunity to be heard in person by the Committee;

g) The opportunity to suggest questions that may be asked of other witnesses (orally or on paper), in particular in the circumstance where facts are not agreed and credibility and/or reliability may be in issue;

61 [2013] UKSC 61, [2013] 3 WLR 1020 at [68].

62 See, for example Amartya Sen, *The Idea of Justice*, (2009) 12–14.

63 Although it is not a matter for this Review, I note the coincidence between procedural respect and the proposal to add a provision or principle to the Nolan Principles so that holders of public office should "treat others with respect".

64 At paragraph 281 of the 1999 Joint Committee Report and, for example, at paragraph 85 of the 2013 Joint Committee Report.

65 The investigative jurisdictions of the Tribunals in the United Kingdom are instructive. They occurred as a consequence of the fundamental reforms that occurred following the enactment of the Tribunals and Courts Enforcement Act 2007 and the Rules promulgated by the Tribunals Procedure Committee.

h) The opportunity to attend all meetings of the Committee at which evidence is given and to receive transcripts of evidence.

53) I have taken careful note of the way in which the Commissioner and the Committee undertake their roles. I have seen examples of the decisions and procedures which have been published. It is in the nature of procedural decisions that they involve value judgements based on factual circumstances and representations made in individual cases at the time they are made which is why they should be challenged immediately if an issue arises. Perceptions of events change even among decision-makers. For the avoidance of doubt, I advise that nothing I recommend for the future should be retrospectively applied to cases that are concluded. Each of the elements of good practice I have described can be found in the practices adopted by the Commissioner and the Committee. What is needed is for that good practice to be clearly set out and explained. I shall endeavour to do that with some limited recommendations in what follows.

54) Taking each element of practice in turn:

a) The Commissioner sends the complaint or request for an investigation to the Member as soon as it is decided that it is admissible i.e. when it is capable of amounting to a breach of a Rule and is supported by sufficient evidence to warrant an investigation. The evidence submitted in support is also disclosed. The complainant is also requested to send a copy of a complaint to a Member as a matter of courtesy. If it not already regarded as such, that should be a requirement.

b) The Commissioner routinely discloses all evidence that she receives during her investigation to the Member. That includes 'unused material'.

c) A Member may use legal advisors of his/her choice to advise upon any aspect of the investigation. The legal advisor may attend with the Member at any meeting with the Commissioner or the Committee. Legal advisors do not have the right to make oral representations, to answer questions on behalf of the Member or to ask questions of witnesses. Legal advisors may suggest questions that the Member can request the Commissioner or the Committee to ask of a witness. It is for the Commissioner and the Committee to decide whether a question is asked. That is inherent in the nature of the inquisitorial process that the House has developed and is good practice in an inquisition.

d) The Commissioner asks the Member for comment upon the evidence that is provided to her and to identify witnesses who may provide relevant evidence. The member is given the opportunity during the investigation to give evidence in writing and to provide such records or documents as may be relevant.

e) If the Commissioner is unable to obtain evidence from the Member or a witness or disclosure of the records or documents that appear to be relevant, she may ask the Committee to exercise its power to require the same. The use of that procedure should be made more explicit.

f) The Commissioner provides the Member with a number of opportunities to read the draft Memorandum before it is presented to the Committee and to suggest alterations to it. The final decision on the content of the Memorandum is for the Commissioner.

g) There is a provision for the Commissioner to make an oral statement to the Committee when the Memorandum is presented. Given that all of the Commissioner's conclusions about questions of fact and alleged breach of the Rules have to be contained in the Memorandum, this provision is redundant. Equally, the Commissioner does not advise upon procedural questions that may arise once the Committee is seized of the inquiry and does not advise upon sanction if breach is proved. The Commissioner agrees that this provision is unnecessary and should be removed.

h) If the Committee decides it is necessary to consider further evidence, either on the application of the Member or of the Committee's own motion, the Committee has power to refer the inquiry back to the Commissioner with a request to obtain that evidence. I recommend that this is made clear in the code of procedure and that a process of remittal to the Commissioner is followed whenever the Committee accepts that further evidence is necessary unless the urgency of the requirement to take further evidence necessitates oral evidence before the Committee. That provides an assurance that consistent standards are applied to the gathering of all evidence that is the consequence of the investigation into each case. It is important to acknowledge that the Commissioner's operational independence is real. She may decline to accept a request about evidence that is not relevant and the resolution of that question is an urgent appeal to the independent body which I deal with below.

i) The Member is always given the opportunity to make an oral statement to the Committee or to adduce further written evidence in response to the Memorandum. The Committee has power to require a Member to attend but there may be good reasons why a Member may not wish to add anything orally to their written materials and the Member is not required to do so. The Committee is astute to ensure that the Member's case is treated as being in good faith and no adverse inferences are drawn from the member choosing not to give oral evidence.

j) In the overwhelming majority of cases, the facts described by the Commissioner in the Memorandum are not in dispute or can be agreed. In the relatively rare case where facts are not agreed and the factual circumstances are key to the allegation of breach, oral evidence may be necessary to test credibility and reliability through questions to the Member and a witness. Where oral evidence is taken by the Committee, questions of the Member and any other witness should be those decided by the Committee and only with the Committee's permission. Cross examination in the conventional adversarial sense is not a feature of an inquisitorial inquiry. Although this form of oral procedure is already used by the Committee, the limited requirement for it should be made clear in a code of procedure.

k) The Member is able to attend all evidence sessions whether in private or in public and to have a transcript of the same. Neither the Member nor the Commissioner should be present or take part in the deliberations of the Committee which are private.

55) A well managed inquisition starts with the identification of the breach which is alleged and the facts which it is said support that breach. There then follows an identification of the matters in dispute. This applies to both the Commissioner's investigation and the Committee's subsequent proceedings. I am not suggesting that there should be a procedure in which the Commissioner's investigation can be challenged before it results in the Memorandum being presented to the Committee. The Commissioner is operationally independent of the Committee and the House and any challenge should be to the Committee when the Memorandum has been presented.

56) The question of the relevance of proposed evidence and witnesses has been raised in the Committee's terms of reference. This is a topic for a text book.[66] To take just one of many summary definitions, "the evidence that is relevant in a proceeding is evidence that, if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding".[67] In addition, what is sometimes referred to as narrative relevance is the admission of evidence to fill gaps which might otherwise exist in the story that a witness is presenting.[68] I do not propose to advise further on relevance save to say that it will be a question of judgement for the Commissioner in each case arising out of the factual dispute and the Rule that it is alleged has been breached. Likewise, if the Committee are asked to decide whether additional evidence is necessary, the same judgement will be required. The Commissioner and the Committee may need to ask for legal advice on the question of relevance in a more complex case.

57) In more complex cases it has become a commonplace for the Committee to have an 'initial case discussion' after receipt of the Memorandum to set the procedural ground rules for the subsequent meetings. That is good practice. These discussions are deliberations and should be private i.e. without the Commissioner or the Member concerned. Where initial case discussions have taken place the Clerks to the Committee have performed an essential neutral role by canvassing in advance with the Member and his/her legal representative out of Committee and in written correspondence the procedural questions that might arise. I recommend that this is always committed to writing but that this practice continues as an effective means of preparation for the case management of the Committee's meetings.

58) In order to allow the Committee to undertake initial case discussions, the Member should be asked by the Clerks to the Committee to make clear whether in addition to any additional written evidence the member may wish to give, s/he intends to ask permission to rely on other witnesses whose materials are not contained in the Memorandum. It is at this discussion that a decision should be made by the Committee whether oral evidence involving the Member and other witnesses should take place because issues of credibility and reliability arise i.e. there is a factual dispute that is of significance to the

66 An example of a helpful narrative can be found at *Phipson on Evidence*, 20th Ed, (Sweet & Maxwell 2021) at chapter 7.

67 See for example section 55(1) of the Evidence Act 1995 in Australia.

68 *Rogers v. Hoyle* [2013] EWHC 1409 (QB) per Leggatt J and [2014] EWCA Civ 257, [2015] QB 265 in the Court of Appeal of England and Wales. See also *Phipson supra* at [217].

decision whether there has been a breach and/or of significance to the sanction that might be recommended. Initial case discussions lead to procedural decisions that allow the Member and witnesses to prepare their cases and give the Committee the opportunity to plan their meetings. This helps expedite decision-making which is inherent in procedural good practice.

59) The second headline principle of fairness is that 'no-one should be a judge in his own cause'. The perception of fairness, impartiality and freedom from apparent bias can be as important as ensuring that actual bias does not vitiate an otherwise fair procedure. Modern good practice is informed by In Re Pinochet[69] where the House of Lords decided that Lord Hoffman's connection to a party to the case was of such a character, duration and proximity that it amounted to a sufficient interest to disqualify him from being a decision-maker despite him having no financial or pecuniary interest. The principle was explained in these terms by Lord Browne-Wilkinson who gave the lead opinion:

> "The fundamental principle is that a man may not be a judge in his own cause. This principle, as developed by the courts, has two very similar but not identical implications. First it may be applied literally: if a judge is in fact a party to the litigation or has a financial or proprietary interest in its outcome then he is indeed sitting as a judge in his own cause. In that case, the mere fact that he is a party to the action or has a financial or proprietary interest in its outcome is sufficient to cause his automatic disqualification. The second application of the principle is where a judge is not a party to the suit and does not have a financial interest in its outcome, but in some other way his conduct or behaviour may give rise to a suspicion that he is not impartial, for example because of his friendship with a party. This second type of case is not strictly speaking an application of the principle that a man must not be a judge in his own cause, since the judge will not normally be himself benefitting, but providing a benefit for another by failing to be impartial."

60) In the context of the standards jurisdiction in the House of Commons, that translates into the investigator having a discrete function from the decision-maker. Or to put it another way, the investigator does not join in the deliberations of the decision-maker so that the impartiality of the decision-maker is perceived as well as real. The practice of the Committee is not to engage with the Commissioner when they are deliberating, either in advance of a Committee meeting that is considering an individual inquiry, when, for example, procedural issues may need to be decided or after evidence has been considered and representations heard.

61) In order for existing good practice to be understood by Members and the public alike, I recommend that the Commissioner withdraw from any meetings of the Committee when the Member is not present so that no inadvertent impression of irregularity or unfairness is given. The perception then accords with the reality. The Commissioner agrees. That will have the effect that the Commissioner will not be as directly aware of issues that arise in Committee that might affect recommendations she might make in due course about the Code of Conduct or a code of procedure.[70] That is regrettable and I do not in any way suggest that the Commissioner's important role in advising the Committee generally on

69 [1999] UKHL 52.

70 In accordance with Standing Order No. 150 (2)(d).

these matters should be inhibited but however unreasonable the perception of partiality may be, its effect is out of all proportion to the benefit to be obtained from the existing practice and I recommend that the practice is changed.

62) I emphasise that my recommendation is not the same as a request to the Commissioner to 'recuse herself' from the Committee's deliberations. That request is based on the erroneous misapprehension that the Commissioner takes part in the deliberations of the Committee. She does not. Her presence was to facilitate her general advisory functions to the Committee not to take part in the decision in relation to the individual case.

63) Although my recommendation on the division of functions is pragmatic, there are precedents in the courts. An extreme example of a lack of perceived impartiality or apparent bias can be found in *Roebuck v National Union of Mineworkers (Yorkshire Area) (No 2), O'Brien v. Same (No 2)*[71] In that case Mr Arthur Scargill as president of the NUM Yorkshire Area was a party to defamation proceedings in the High Court brought by members of his union. He subsequently was "the complainant, the pleader, the prosecutor, the advocate and the chairman in the union proceedings, which followed". The court held that the appearance of bias was inevitable. The court's reasoning was broad:

> "It is not in accordance with the principles of natural justice to have as president of the tribunal a person who has promoted the charge and supports it as a prosecutor…"[72]

64) Although this relates to adversarial process, the same principles have been applied in employment law. For example, ACAS in its 'Code of Practice on disciplinary and grievance procedures' describes good practice in the following terms: "In misconduct cases, where practicable, different people should carry out the investigation and disciplinary hearing." The Code does not apply to the regulation of standards of conduct by the House but it is illustrative of the way in which fairness is applied in the employment law context and Employment Tribunals will take the code into account when considering cases that are before them.[73]

65) In the ECtHR a similar principle is repeatedly rehearsed. For example, in *McGonnell v. United Kingdom*[74] the Strasbourg court dealing with the independence and impartiality of the Bailiff of Guernsey, who was president of the legislature and the court and head of the administration in the Bailiwick, held that there had been a violation of Article 6 ECHR because the appearance of independence and the objective impartiality of the offices held could be called into doubt.[75]

66) It is for these reasons that the Commissioner should not be regarded as both the investigator and the initial decision-maker.

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71 [1978] Ch 676 per Templeman J.

72 The reasoning was taken from and relied upon *Australian Workers' Union (No 2)* (1948) 77 C.L.R. 601 per Dixon J. at 631.

73 The Code of Practice on disciplinary and grievance procedures is issued under section 199 of the Trade Union and Labour Relations (Consolidation) Act 1992 and was laid before both Houses on 16 January 2015. It came into effect by order of the Secretary of State on 11 March 2015.

74 (Application 28488/95) (2000), ECtHR.

75 The court relied upon *Findlay v. United Kingdom*, (Application 22107/93) (1997) 24 EHRR 221 at [73], ECtHR.

67) A separate question arises about whether the Select Committee practice in relation to attendance and deliberations of members should be varied for the Committee on Standards. The simple point is this: both parliamentary and lay members may be unavoidably detained, for example on urgent constituency business or in the proceedings of another committee or in the case of lay members because of their unavoidable personal and professional commitments. When this occurs, the member may miss hearing the evidence that is being considered or a part of the deliberations of the Committee. I am of the firm view that when this happens, the member concerned should take no further part in the meetings or deliberations of the Committee relating to the individual inquiry. It cannot be a fair procedure to have a changing constitution of decision-makers in an individual case.

Appeals:

68) It follows that if the Committee's determination is the first-instance decision, then there is no appeal process. There is no need for an appeal in relation to the facts unless there is new evidence that could not reasonably have been provided to the Commissioner or the Committee and which would have a real prospect of affecting the outcome. A Member will have had at least two opportunities to challenge facts with the Commissioner and a further opportunity before the Committee. I agree that a right of appeal on similar limited grounds to those that exist in ICGS cases to the Independent Expert Panel would be good practice.[76] I recommend that the Independent Expert Panel be used to determine appeals from the Committee. The grounds of appeal would be: a) The investigation was materially flawed in a way that affected the decision of the Committee; b) The process followed by the Committee was procedurally flawed; c) The decision of the Committee on sanction was unreasonable or disproportionate; d) Credible fresh evidence has become available, which could not reasonably have been presented before the Committee made its decision, and which, if accepted, has a real prospect of affecting the outcome; and/or e) Exceptionally, there is another compelling reason that an appeal should be heard or allowed.

69) Decision-makers in courts are well aware of the need for procedural appeals to resolve matters that would otherwise taint the subsequent decision on the merits. I recommend that consideration be given to an urgent procedural appeal being heard by the independent body where a serious issue has arisen, for example the relevance of a volume of evidence that has not yet been considered by the Committee or where the Commissioner decides that the proposed additional evidence that the Committee requests her to consider investigating is irrelevant. The resolution of issues such as this before the Committee considers all of the relevant evidence in an inquiry would be on benefit to everyone involved.

70) Because appeals would be about matters of procedure and proportionality and not about standards of parliamentary conduct, it is appropriate for them to be determined outside the Committee and by a panel with legal expertise rather than by a tribunal of

76 An ICGS appeal from a Commissioner's decision can be brought under one or more of the following grounds: a) The investigation was materially flawed in a way that affected the decision of the Commissioner; b) The process followed by the Commissioner was procedurally flawed or her decision was unreasonable; c) The decision of the Commissioner on sanction was unreasonable or disproportionate; d) Credible fresh evidence has become available, which could not reasonably have been presented before the Commissioner made her decision, and which, if accepted, has a real prospect of affecting the outcome; and/or e) Exceptionally, there is another compelling reason that an appeal should be heard or allowed.

mixed parliamentarians and lay members. I do not recommend that appeals extend to the interpretation of whether a Rule has been breached – that is a matter of judgment for the Committee on the facts of an individual inquiry.

71) If there is to be a right of appeal then experience suggests that the quality and integrity of that process will be significantly affected by advance notice of the reasons. That is normally provided for by grounds of appeal in writing setting out the evidence that was not available, why it was not available and why it will make a difference to the outcome and/or particulars of the error that is alleged. In the case of a sanctions appeal, the grounds should include the suggested sanction that should have been imposed together with reasons why that is the preferable/proportionate outcome by reference to the mitigating and aggravating circumstances and the facts as agreed or determined by the Committee. There should be a time limit for appeals and the IEP or independent body should have the power to be able to reject an appeal because the grounds do not disclose an admissible error or sufficient new evidence that could not reasonably have been provided earlier.

72) I respectfully agree with the Committee in its Fourth Report of Session at paragraphs 235 to 241 that whether the IEP or a similar independent body undertakes appeals, the implication is that when a division occurs on the report from the independent body to the House it is taken without amendment or debate. I am also of the opinion that when a division occurs on the Committee's Report to the House on an individual inquiry that should be taken without amendment or debate.

73) Finally, the existing investigatory panel procedure in Standing Order No. 150 (6) to (11) has not been used, should be regarded as redundant and should be removed from the Standing Order.

Annex: Responses to questions arising out of the terms of reference

i. Should the Parliamentary Commissioner for Standards be (as at present) both the investigator and the decision-maker on whether there has been a breach of the Code; if so, whether the investigatory and decision-making roles within the Commissioner's office should be separated; if not, what new system should be introduced?

No. The roles should be separate and I have dealt with the detail of the roles in the Review.

ii. If the Parliamentary Commissioner for Standards remains both the investigator and the decision-maker:

(1) under what conditions should the Commissioner interview witnesses in person during an inquiry? Specifically, is there an obligation to interview all witnesses, whether they appear on paper to be relevant to the issues or not?

This remains relevant whether or not the Commissioner has a dual role. The Commissioner should be able to interview witnesses in person and also to request a witness to answer questions in writing. If the witness declines, then the Commissioner asks the Committee to exercise its powers to compel the witness.

There is no obligation to interview all witnesses. The Commissioner will make a judgement on the relevance of proposed evidence and that is a matter for

her. She has operational independence from the House and the Committee. If a member is of the opinion that a witness should have been interviewed and the Commissioner has disagreed, then the Member has the right to ask the Clerks to the Committee to inform the Committee. That is best done when the Memorandum is presented and the Member is consulted about procedural points by the Clerks but in any event the Member has the right to address the Committee when making an oral statement.

(2) under what (if any) conditions should the Committee interview witnesses in person during an inquiry by the Commissioner? What about in considering the Commissioner's memorandum? Specifically, is there an obligation to interview all witnesses, whether they appear on paper to be relevant to the issues or not?

If the Committee decide that further evidence is required they should remit the matter to be dealt with by the Commissioner. The Committee may ask for specific questions to be answered or for a witness to be interviewed who has not previously been involved. Only if there is a time imperative or other exceptional circumstance should the Committee become directly involved in taking evidence as part of the investigation.

iii. If the Parliamentary Commissioner for Standards remains the investigator, the decision-maker and presenter of a case, should the Commissioner also be present and answer questions, in her separate advisory role to the Committee, when the Committee deliberates on individual cases, notably after the Commissioner has provided a memorandum? Should the Member under investigation have an equivalent right to attend the Committee's deliberative meetings and answer questions?

I recommend that the Commissioner does not remain during deliberations of the Committee. The Commissioner is not a witness and should only be asked to answer questions about her investigations or the facts where the Committee has made a decision that the information required is necessary. That could be provided by the Commissioner in writing as a supplement to the Memorandum.

iv. If the Parliamentary Commissioner for Standards did not remain both the investigator and the decision-maker, but was to investigate and then report to the Committee, so that the latter became the decision maker, under what (if any) conditions should the Committee interview witnesses in person during an inquiry by the Commissioner? What about in considering the Commissioner's memorandum? Specifically, is there an obligation to interview all witnesses, whether they appear on paper to be relevant to the issues or not?

The Committee should not as a matter of course interview witnesses. That is the function of the Commissioner and save in exceptional circumstances a request to interview witnesses and/or to adduce additional answers to questions from a witness should be made to the Commissioner. An exceptional case might include a decision to have oral evidence from a witness and/or the Member on a matter where credibility is in issue. Where that happens, it is good practice in an inquisition for questions to be put to the witness through the Chair. There is no obligation on the Committee to consider evidence from every witness suggested by a Member who is the subject of the inquiry. The evidence needs to be relevant.

v. If that in the current system the commissioner is the decision maker, a Member has a de facto (but not formalised) right of appeal against the Commissioner's findings to the Committee. The Committee's practice has been to allow the Member to address them on any point they wish to raise. Were the Committee to become the decision maker, should that practice continue?

There is no obligation on the Committee to permit a member to address them on any point the Member wishes to raise. That said, it is a commonplace in courts and tribunals that the person in the position of the Member is permitted considerable discretion to put their case in the way they see fit.

vi. If the Commissioner remains the decision maker, does natural justice require that the Member be allowed to address the Committee on any point they wish to raise? Would it be compatible with natural justice for specified grounds of appeal to be introduced? If a formalised right of appeal against findings were to be introduced, what would be the pros and cons in terms of the Member's rights, contrasted with the present arrangement?

I do not recommend this. The answer to the question is 'No'. I recommend that grounds of appeal be used in any appeal process that is put in place. A separate appeals process would be an enhancement to a Member's rights.

vii. If the Committee were to become the decision maker, would natural justice require a right of appeal? Would it be compatible with natural justice for one sub-panel of the Committee to take the initial decision, followed by a second sub-panel to hear an appeal? In that case, would it be compatible with natural justice for specified grounds of appeal to be introduced? If a formalised right of appeal against findings were to be introduced, what would be the pros and cons in terms of the Member's rights, contrasted with the present arrangement?

There is no obligation in a circumstance that does not interfere with civil rights and obligations to have an appeal process. It is, however, strongly recommended that there is an appeals process given the reputational harm that might be caused to a Member by an adverse conclusion that may lead to suspension or expulsion. To be clear, that is not an automatic or indiscriminate right of appeal in all circumstances and would not be against findings of fact.

viii. Under current practice, the Committee takes the decision on sanction in cases referred to it by the Commissioner. Is it desirable to introduce a right of appeal from the Committee against the decision on sanction? If so, what options would be most appropriate (for example, successive sub-panels within the Committee on Standards; or an appeal with membership from the Committee and some independent external membership; or a separately constituted appeals panel? If the latter two, what composition of any appeals body would be appropriate (e.g. lay membership, MP membership, involvement of somebody with judicial experience)?

Yes. I recommend that sanctions appeals be sent to the IEP or a similar independent body with legal expertise.

ix. Whatever form of decision making or appeal body is recommended is it compatible with fairness and natural justice if the individuals making up that body change during the consideration of an individual case?

No. I recommend that a member of the Committee who has to be absent during a Committee hearing should thereafter not take part in any further hearings in the individual case or the deliberations leading to the decision.

x. Within the constraints of practicality and proportionality are there any other ways in which the fairness of the existing system can be enhanced?

I recommend a Code of Procedure that has the authority of the House and that is reviewed on a regular basis.

Appendix 2: Terms of reference of Sir Ernest's review

1) To consider whether the House's current system of investigating and deciding upon breaches of the Code of Conduct for Members of Parliament is compatible with fairness and natural justice, and with Article 6 of the European Convention on Human Rights; and if appropriate to make recommendations or set out options for improvements to the system.

2) In particular, to consider:

a) Should the Parliamentary Commissioner for Standards be (as at present) both the investigator and the decision-maker on whether there has been a breach of the Code; if so, whether the investigatory and decision-making roles within the Commissioner's office should be separated; if not, what new system should be introduced?

b) If the Parliamentary Commissioner for Standards remains both the investigator and the decision-maker: (1) under what conditions should the Commissioner interview witnesses in person during an inquiry? Specifically, is there an obligation to interview all witnesses, whether they appear on paper to be relevant to the issues or not? (2) under what (if any) conditions should the Committee interview witnesses in person during an inquiry by the Commissioner? What about in considering the Commissioner's memorandum? Specifically, is there an obligation to interview all witnesses, whether they appear on paper to be relevant to the issues or not?

c) If the Parliamentary Commissioner for Standards remains the investigator, the decisionmaker and presenter of a case, should the Commissioner also be present and answer questions, in her separate advisory role to the Committee, when the Committee deliberates on individual cases, notably after the Commissioner has provided a memorandum? Should the Member under investigation have an equivalent right to attend the Committee's deliberative meetings and answer questions?

d) If the Parliamentary Commissioner for Standards did not remain both the investigator and the decision-maker, but was to investigate and then report to the Committee, so that the latter became the decision maker, under what (if any) conditions should the Committee interview witnesses in person during an inquiry by the Commissioner? What about in considering the Commissioner's memorandum? Specifically, is there an obligation to interview all witnesses, whether they appear on paper to be relevant to the issues or not?

e) If that in the current system the commissioner is the decision maker, a Member has a de facto (but not formalised) right of appeal against the Commissioner's findings to the Committee. The Committee's practice has been to allow the Member to address them on any point they wish to raise. Were the Committee to become the decision maker, should that practice continue?

f) If the Commissioner remains the decision maker, does natural justice require that the Member be allowed to address the Committee on any point they wish to raise? Would it be compatible with natural justice for specified grounds of appeal to be introduced? If a formalised right of appeal against findings were to be introduced, what would be the pros and cons in terms of the Member's rights, contrasted with the present arrangement?

g) If the Committee were to become the decision maker, would natural justice require a right of appeal? Would it be compatible with natural justice for one sub-panel of the Committee to take the initial decision, followed by a second sub-panel to hear an appeal? In that case, would it be compatible with natural justice for specified grounds of appeal to be introduced? If a formalised right of appeal against findings were to be introduced, what would be the pros and cons in terms of the Member's rights, contrasted with the present arrangement?

h) Under current practice, the Committee takes the decision on sanction in cases referred to it by the Commissioner. Is it desirable to introduce a right of appeal from the Committee against the decision on sanction? If so, what options would be most appropriate (for example, successive sub-panels within the Committee on Standards; or an appeal panel with membership from the Committee and some independent external membership; or a separately constituted appeals panel? If the latter two, what composition of any appeals body would be appropriate (e.g. lay membership, MP membership, involvement of somebody with judicial experience)?

i) Whatever form of decision making or appeal body is recommended is it compatible with fairness and natural justice if the individuals making up that body to change during the consideration of an individual case?

j) Within the constraints of practicality and proportionality are there any other ways in which the fairness of the existing system can be enhanced?

Formal minutes

Tuesday 1 March 2022

Members present:

Chris Bryant, in the Chair

Tammy Banks

Jane Burgess

Andy Carter

Alberto Costa

Rita Dexter

Allan Dorans

Yvonne Fovargue

Dr Michael Maguire

Mehmuda Mian

Dr Arun Midha

Paul Thorogood

Draft report (*Review of fairness and natural justice in the House's standards system*), proposed by the Chair, brought up and read.

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

Paragraphs 1 to 6 read and agreed to.

Two papers were appended to the Report.

Resolved, That the Report be the Sixth 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.

The following written evidence was ordered to be reported to the House for publication:

Introductory Guide for Committee on Standards Members (June 2021).

Ordered, That embargoed copies of the Report be made available, in accordance with the provisions of Standing Order No. 134.

Adjournment

The Committee adjourned.

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
2nd	Mrs Natalie Elphicke, Sir Roger Gale, Adam Holloway, Bob Stewart, Theresa Villiers	HC 582
3rd	Mr Owen Paterson	HC 797
4th	Review of the Code of Conduct: proposals for consultation	HC 270
5th	Daniel Kawczynski	HC 1036

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