

SCOTTISH PARLIAMENTARY STANDARDS COMMISSIONER ACT 2002

EXPLANATORY NOTES

INTRODUCTION

1. These Explanatory Notes have been prepared by the Non-Executive Bills Unit of the Scottish Parliament on behalf of Mike Rumbles, convener of the Standards Committee. They have been prepared in order to assist the reader of the Act. They do not form part of the Act and have not been endorsed by the Parliament.

2. The Notes should be read in conjunction with the Act. They are not, and are not meant to be, a comprehensive description of the Act. So where a section or schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.

SUMMARY OF AND BACKGROUND TO THE BILL

3. The Bill for this Act was a Committee Bill (i.e., a Bill initiated by a Parliamentary committee under Rule 9.15 of the Parliament's standing orders). The Bill resulted from an investigation and report published on 3 October 2000, Models of Investigation of Complaints (4th Report 2000, SP Paper 186) (the 4th Report) by the Standards Committee which was followed by a further report published on 6 April 2001, Proposal for a Standards Commissioner Committee Bill (2nd Report 2001, SP Paper 312). The proposal for a Committee Bill was debated and approved by the Parliament on 23 May 2001.

4. The Bill was developed from the Committee's conclusion that the Parliament should have statutory procedures for the independent investigation of complaints made under the Members' Interests Order and the Code of Conduct (see below). The creation of the office of a Scottish Parliamentary Standards Commissioner (the Commissioner) and the arrangements for investigating complaints are intended to supersede temporary investigation provisions set out in the Code of Conduct.

5. The Code of Conduct for members of the Scottish Parliament was adopted and approved by the Parliament on 24 February 2000. The Code underpins the approach that members are required to take in carrying out their Parliamentary duties. Under section 39 of the Scotland Act 1998 (c.46) provision requires to be made about members' interests by or under an Act of the Scottish Parliament (ASP). Transitional provisions to cover members' interests are set out in the Scotland Act 1998 (Transitory and Transitional Provisions) (Members' Interests) Order 1999 (SI 1999/1350) (the Members' Interests

Order). This Order will govern members' interests until the section 39 requirement is given effect to by or under an ASP. The Standards Committee is currently reviewing the Members' Interests Order with a view to bringing forward recommendations to the Parliament for a replacement of the existing Transitional Order by an ASP. Contravention of certain aspects of the Members' Interests Order is an offence. In addition, the Code of Conduct incorporates the relevant provisions of the Members' Interests Order so that a breach of the Order constitutes a breach of the Code of Conduct.

6. The 4th Report envisaged that, subject to certain exceptions, all complaints that a member of the Parliament has breached one of the above provisions, under the Act, would be sent directly to an independent Commissioner. After this, the 4th report envisaged that there would be a four-stage investigative model. Stage 1 would be an initial consideration by the Commissioner. Where the Commissioner was not satisfied that the complaint was admissible he or she would have in most cases the power to dismiss the complaint. In a few situations where there were procedural defects the Commissioner would require to report these failings to the Standards Committee who would be able to instruct that the investigation proceed or that the complaint be dismissed. Otherwise the Commissioner would be required to consider the complaint and carry out an investigation into it (Stage 2).

7. After completing an investigation the 4th Report envisaged that the Commissioner would report to the Standards Committee on the findings together with the conclusions reached. The Commissioner would not express any view upon what sanctions would be appropriate for any breach. Stage 3 would be the Committee's consideration of the report. The Standards Committee would consider the report of the Commissioner and could conduct their own investigations or require the Commissioner to carry out further investigations. The Standards Committee would report to the Parliament on the complaint with any recommendations and on whether sanctions were warranted for any complaint that they consider should be upheld. A copy of the Commissioner's report would be included in the Committee's report. The Parliament would then decide whether to accept the Committee's report and if appropriate impose sanctions (Stage 4).

8. The existing position is that the Parliament also has a four-stage investigative procedure for complaints against Members. Complaints in relation to the conduct of MSPs in carrying out their parliamentary duties should be made in writing and passed to the Standards Adviser. The Adviser can only investigate complaints that fall within the remit of the Standards Committee. The Adviser will initially seek to establish whether a complaint is warranted and requires further investigation (Stage 1). In doing so he will normally contact the complainer and notify the MSP concerned of the allegations and invite him or her to respond. Where the Adviser concludes that a complaint requires further investigation, he will conduct the investigation in private and independently of the Standards Committee (Stage 2). Once the Adviser has completed his investigation he is required to submit a report to the Standards Committee. At this stage the Committee may decide to conduct its own review of the Adviser's report (Stage 3). Having completed its examination of the Adviser's findings and reached a decision on sanctions if appropriate, the Committee is required to report to the Parliament. It is the Parliament on a recommendation from the Standards Committee that decides whether to impose sanctions on a Member or not (Stage 4).

9. The Act creates the post of Scottish Parliamentary Standards Commissioner with the function of investigating whether a member of the Parliament has breached a provision of the Code of Conduct, the Members' Interests Order, any provision in an ASP that replaces that Order or any provision of the standing orders of the Parliament. Standing orders regulate the proceedings of the Parliament and are made under section 22 of the Scotland Act 1998.

10. The Act is only concerned with the Commissioner's role in the complaints process envisaged under the 4th Report, i.e. Stages 1 and 2 of the investigative process.

11. This Act does not deal with the Parliamentary aspect of the investigation process because it is a matter for the Parliament itself by its own internal rules to set out the procedure that is to apply. This means that in order to give full effect to the investigative model set out in the 4th Report, it will be necessary for the Parliament to make separate provision in the standing orders and the Code of Conduct for the way in which the Commissioner will make reports to the Parliament and for the procedure that it will follow once the Commissioner has made a report to it (Stages 3 and 4).

12. As mentioned earlier the 4th Report envisaged that the Commissioner would make reports to the Standards Committee and that the Standards Committee would carry out Stage 3 of the process. However, the Act requires the Commissioner to report to the Parliament (the term "the Parliament" being defined in section 20 of the Act as including any committee of the Parliament). The approach taken in the Act is in recognition of the fact that the question of whether reports are made to a committee of the Parliament or the Parliament as a whole is a matter for the Parliament to determine in its own standing orders.

13. The 4th Report envisaged that the interaction at Stages 1 and 2 between the Commissioner and the Parliament will be between the Standards Committee and the Commissioner. If this model is followed, the standing orders would provide for the Commissioner to make reports to the Standards Committee and for the Standards Committee to have the power to give the Commissioner various directions. Standing orders would also give the Standards Committee the power to direct the Commissioner to proceed with or dismiss complaints that fail to meet certain procedural requirements.

14. In these Explanatory Notes where the 4th Report envisaged the interaction to be with the Standards Committee the reference is to that Committee. This is intended to be helpful to the reader in understanding how the procedure may operate, although it will be for standing orders to set out whether the Commissioner interacts with the Standards Committee.

15. Where these Explanatory Notes make reference to "the Parliament" this is because the 4th Report envisaged the particular function referred to being a matter for the whole Parliament rather than the Standards Committee.

16. The standing orders are made by the Parliament on a motion from the Procedures Committee. Any decision of the Parliament to amend standing orders requires an absolute majority. It will be for the Parliament following consideration by the Procedures Committee to decide whether the possible procedures outlined or some other procedures are appropriate.

COMMENTARY ON SECTIONS

Section 1 – Appointment of the Scottish Parliamentary Standards Commissioner

17. Subsection (1) creates the statutory office of the Commissioner.

18. Subsection (2) requires the Scottish Parliamentary Corporate Body (SPCB) to appoint the Commissioner but only with the agreement of the Parliament. The SPCB was created by section 21 of the Scotland Act 1998 to oversee the administration of the Parliament and represent it in legal matters. The SPCB carries out the functions that the Scotland Act conferred upon it and can have additional functions conferred on it by other enactments. The method of obtaining the Parliament's agreement to the appointment will be a matter to be set out in the standing orders. For example, it would be possible for the Parliament's agreement to be sought to an appointment on a motion of the Standards Committee.

19. Under subsection (3), eligibility for appointment to the post of Commissioner is restricted. Members of the Parliament and the staff of the Parliament are ineligible. In addition, a person who has been a member of the Parliament or a member of staff of the Parliament during the two years preceding the date the appointment commences is not eligible for appointment. This second restriction is to reduce the possibility of a Commissioner having to consider a complaint concerning matters that occurred when they were a member of the Parliament or member of the Parliament's staff. Should an older complaint arise it would be possible for the Commissioner to decline to investigate and for an acting Commissioner to be appointed in such cases (see section 2).

20. The maximum period of initial appointment is set out in subsection (4) as five years and is in conformity with the maximum period recommended by guidance issued by the Commissioner for Public Appointments in relation to appointments to Public Bodies.

21. The guidance by the Commissioner for Public Appointments also allows for re-appointment and this is provided for in subsection (5). There can only be one re-appointment which, although it need not be consecutive to the original appointment, cannot be for more than another five years. No further re-appointment is allowed. As a consequence the maximum period of time which one person can serve as Commissioner is ten years.

22. Subsection (6) allows the Commissioner to resign from office or be removed from office by the SPCB. The grounds for removal are not set out in the Bill but will be set out in the Commissioner's terms and conditions of appointment (see paragraph 1(1) of the

schedule). However, removal is subject to subsection (7) and can only follow upon a resolution by the Parliament. In the event of a vote on such a resolution it may only be carried if at least two-thirds of the total number of votes cast by those present, including any abstentions, are in favour.

Section 2 – Appointment of the acting Commissioner

23. Section 2 makes provision for the appointment of an acting Commissioner. The acting Commissioner may be appointed to deal with a number of different circumstances. For example, the acting Commissioner may be appointed to deal with an individual case. This could happen if a complaint results in a conflict of interest for the Commissioner. Alternatively, the acting Commissioner could be appointed to deal with a number of cases, e.g. if there is an exceptionally large number of cases at one particular time which the Commissioner is unable to deal with. Finally, the acting Commissioner could be appointed to deal with all cases for a specified period, e.g. if the Commissioner is ill.

24. Like the appointment of the Commissioner, the acting Commissioner is appointed by the SPCB. However because appointment is expected to be for a limited duration and might require to be made as a matter of urgency, to avoid delay in an investigation or investigations the agreement of the Parliament to the appointment is not required. In practice it is anticipated that in most circumstances the SPCB will, at the very least, consult the Standards Committee before making an appointment.

25. Identical conditions regarding eligibility for appointment to the post of acting Commissioner to that of the post of Commissioner are applied by subsection (3). In other words, like the Commissioner the acting Commissioner cannot be a member of the Parliament or of the staff of the Parliament, nor can the acting Commissioner have been a member of the Parliament or the staff in the two years prior to the appointment.

26. Subsection (4) sets out requirements for resignation and removal as well as stipulating that the conditions applying to the office are to be set by the SPCB. In addition the subsection makes clear that the acting Commissioner while holding office is to be treated for all purposes as the Commissioner.

Section 3 – Functions of the Commissioner

27. Section 3 sets out the general functions of the Commissioner and delimits the extent of the role.

28. Under subsection (1)(a), the Commissioner is required on receipt of a complaint to investigate whether a member of the Parliament has committed the conduct complained of and whether the relevant provisions cover that conduct. Investigation is restricted to the conduct complained of and the Act does not allow the Commissioner to investigate any other conduct without a specific complaint. This provision ensures that the Commissioner's role is limited to complaints that are made direct to him or her. For example, in the absence of a specific complaint, the Commissioner would not be able to investigate an allegation that had appeared in the press.

29. The term “member of the Parliament” is defined in section 18 of the Act. The definition makes clear that the Commissioner can investigate complaints about former members of Parliament in relation to conduct that took place when they were members. In addition the definition includes Scottish Law Officers and former Scottish Law Officers if they are not members of the Parliament. The Scottish Law Officers are the Lord Advocate and the Solicitor General for Scotland. Under Rule 4.5 of the standing orders, the Scottish Law Officers (if not MSPs) may participate in any of the proceedings of the Parliament but are not entitled to vote. This is also consistent with article 2(1) of the Members’ Interests Order that defines a member as including the Scottish Law Officers.

30. The Act uses the term “relevant provisions” to cover the range of measures with which a member of the Parliament must comply and these are set out in subsection (3). The 4th Report recommended that all complaints were to be referred to the Commissioner with the exception of those which are currently required under sections 10.2.13 to 10.2.17 of the Code of Conduct to be referred to the Presiding Officer, the SPCB or the Parliament’s Personnel Office. This includes, for example, complaints about a member’s treatment of a member of the Parliament’s staff. This aspect of the 4th Report is dealt with by subsection (2) which allows the standing orders or the Code of Conduct to specify classes of complaints that are to be excluded from the investigation powers of the Commissioner. However, the excluded complaints may still be investigated by the Commissioner subsequently, if the Standards Committee considers this to be appropriate and makes a direction to this effect under section 12. Subsection (2) therefore ensures that the exclusion of such complaints from the Commissioner’s jurisdiction is subject to any such direction.

31. On completion of an investigation the Commissioner is required under subsection (1)(b) to report the findings to the Standards Committee.

32. It is for standing orders to set out the means by which the Commissioner reports to the Parliament. If the model of the 4th Report is followed, standing orders will require the report to be made to the Standards Committee before the Parliament considers the matter although there could be instances where this is not appropriate, if for example the complaint concerned a member of the Standards Committee.

33. The relevant provisions covering the approach members are required to take to their duties are set out in subsection (3). At present these are the provisions contained in standing orders, the Code of Conduct and the Members’ Interests Order. Provision is also made for any ASP subsequently passed in relation to Members’ Interests to be covered. This subsection also makes it clear that the Commissioner considers the member’s conduct with reference to the relevant provision that was in force at the time of the conduct. In other words, any amendments subsequent to the conduct would be ignored by the Commissioner.

34. Subsection (4) gives the Act retrospective effect in relation to the time when the conduct complained about takes place. A retrospective provision is necessary to ensure the smooth transition of investigations from the current arrangements to those under the Act. For example, a complaint made after the Act comes into force but concerning matters that

are alleged to have occurred prior to the coming into force of the Act will be for the Commissioner to investigate under the provisions of the Act.

35. The Commissioner may give advice on the procedure for making a complaint (subsection (5)) but is prevented by subsection (6) from giving advice to a member of the Parliament or to a member of the public in relation to whether any proposed or previous conduct would constitute a breach of the relevant provisions. The clerks to the Standards Committee currently provide advice in this regard and will continue to be available after the Commissioner takes up office. This latter provision is designed to avoid the Commissioner having to investigate conduct upon which he or she might previously have expressed an opinion. Subsection (6)(b) also prevents the Commissioner, except within the context of an investigation, from commenting upon any of the relevant provisions. This prevents the Commissioner from making comments generally on the relevant provisions except where there has been an investigation involving those provisions. In such a case, it may be appropriate for the Commissioner to raise matters of principle, e.g. if he or she considers that the particular provisions in question are ambiguous or lacking in clarity.

36. Subsection (7) makes clear that the Commissioner has to undertake all other functions imposed by the Act or by directions made under the Act and also allows for standing orders to impose other functions.

Section 4 – Directions to the Commissioner

37. Section 4(1) requires the Commissioner to comply with any directions that are given to him or her by the Standards Committee. These could include such matters as record keeping.

38. Subsection (2) provides that directions may be given in relation to the procedure that the Commissioner should follow when conducting investigations. Procedural aspects could include requiring the Commissioner to ensure that all persons interviewed by him or her are given a right to have a third party present and are advised of this right. The directions can be general, so as to cover all complaints. In addition, the Standards Committee can make different provision in the directions to cover different classes of complaints. It might, for example, be considered appropriate to make different procedural provision to deal with unusual types of complaints, such as those that are anonymous or in which a member of the Parliament is not named, as compared with the vast majority of complaints which identify the complainer and the member. A direction could also be made under (2)(b) for example to require the Commissioner to report upon the reasons for the dismissal of complaints at Stage 1. Such information could assist in monitoring the efficacy of the relevant provisions. The Standards Committee could also direct the Commissioner to report on the existence, progress and investigation of a particular Stage 1 complaint, and on any decisions taken.

39. Directions may not be given in relation to the specifics of a particular investigation (subsection (3)). This restriction on the limits of the directions that the Standards Committee can give the Commissioner preserves the independence of the Commissioner in relation to the carrying out of individual investigations.

Section 5 – General provisions relating to an investigation into a complaint

40. The investigation by the Commissioner falls into two possible and distinct stages as set out in subsection (1). The first stage is concerned with an investigation and determination into admissibility and the criteria or tests to be met are given in the Act at section 6. At Stage 2 the Commissioner carries out further investigations into the complaint before reporting to the Standards Committee and the criteria for this is set out in section 8.

41. Subsection (2) provides that the investigation by the Commissioner shall be conducted in private. Section 10.2.1 of the Code of Conduct already provides that MSPs should not communicate any complaint to the press or other media until a decision has been made as to how the complaint is to be dealt with. Following upon a report by the Commissioner to the Standards Committee at the conclusion of Stage 2 the normal rules as set out in the standing orders governing meetings of the Parliament and committee meetings will apply. Rule 15.1 requires a committee meeting to be held in public unless the committee otherwise decides. The 4th Report envisaged that the Standards Committee would normally consider the Commissioner's report and the member's response in private in order to ensure the privacy of any further investigation by the Commissioner into the complaint. The 4th Report also envisaged that any hearing at which the member appears before the Committee would be in public unless special circumstances applied and that the committee's decision would be made in public.

42. Provision is made in subsection (3) for the Commissioner to make a report to the Standards Committee at any time as to the progress of an investigation. This provision could be utilised for example where an investigation was likely to take a lengthy period of time to conclude. The Standards Committee can also request a report on the progress of an investigation from the Commissioner. This could be used for example if the committee had concerns regarding the progress of an investigation or if there had been publicity about the complaint.

43. Subsection (4) provides that it is for the Commissioner to decide when and how to carry out an investigation. This subsection is subject to the provisions of the Act, in particular to the procedure which the Commissioner must follow during the 2 stages in undertaking an investigation, and the requirement on the Commissioner to comply with directions given under sections 4, 7(5) or 7(6).

Section 6 – Stage 1: Admissibility of complaints

44. Section 6 is concerned with the initial admissibility of complaints at Stage 1.

45. The admissibility of a complaint is a matter for the Commissioner to investigate and determine. Subsection (2) sets out three tests that require to be met.

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

- The second test (in subsection (2)(b)) is largely procedural. The complaint must comply with certain specified requirements listed in subsection (5). Failure to meet any of the specified requirements is a matter that the Commissioner must bring to the Standards Committee under section 7(4) for a decision on whether the complaint should nevertheless be accepted.
- The third test relates to an initial investigation of the complaint to determine whether it warrants further investigation. Subsection (6) provides further specification.

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

- The first matter is that the complaint must relate to conduct of a member of the Parliament. For example, this prevents complaints concerning the actions of SPCB staff for which separate arrangements are in place. Similarly, complaints about the conduct of other public officials are not relevant.
- The second matter is that the complaint falls within the jurisdiction of the Commissioner and is not one of the complaints for which separate arrangements are made (see section 3(2)) unless the Standards Committee has directed the Commissioner to investigate such a complaint under section 12.
- Finally, some part of the conduct complained about must relate to a matter that the Commissioner considers may be covered by the relevant provisions. The Commissioner is required to identify at this stage which provisions he or she thinks are the relevant ones.

47. The specified procedural requirements of a complaint which form the second test are set out in subsection (5).

- The complaint must be made in writing to the Commissioner; thus neither a verbal complaint nor matters published in a newspaper would be investigated.
- The complaint can only be from an individual and must include the complainer's name and address as well as being signed. This restricts the scope for anonymous complaints and prevents complaints from companies or organisations. The requirement for signature at present precludes the submission of complaints by e-mail.
- The member must be named. This requirement prevents the Commissioner from carrying out investigations into the actions of a group of members of the Parliament generally. It also recognises that it will be very difficult for the Commissioner to investigate complaints about the conduct of unnamed individuals and therefore ensures that the Commissioner is not required to undertake investigations which are unlikely to result in a finding that a particular member has breached a relevant provision. Where a name is not given this could be the subject of a class direction under section 4 setting out specific procedure that the Commissioner must follow. For example, the

direction might require the Commissioner to immediately refer all such complaints to the Standards Committee who will decide whether or not to waive this requirement. If for example the complaint concerned the leaking of a committee report or other confidential information a direction could specify that the complaint requires to be referred immediately to the Standards Committee to decide whether the Commissioner should carry out any further investigations. The Standards Committee might wish to obtain further information about the complaint from the Committee involved before deciding whether it would be worthwhile for the Commissioner to investigate the matter or whether some other inquiry should be carried out.

- Details of the facts relating to the alleged conduct must be given, and the complainer should provide any evidence they have to support the allegation. Section 3(1) of the Act makes clear that investigation is limited to the conduct complained about and cannot cover any other conduct.
- The conduct complained about must have occurred within one year of the date when the complainer could reasonably have become aware of it. This prevents old matters being brought to the Commissioner where the complainer has been aware of the conduct from an earlier date.

48. Subsection (6) provides that for the purpose of the third test (in subsection (2)(c)) further investigation of a complaint is required where it appears to the Commissioner, having carried out an initial investigation, that there is enough evidence to suggest that the conduct complained about may have taken place.

Section 7 – Procedures at Stage 1

49. Section 7 sets out the procedures applying to the Stage 1 process.

50. Subsection (1) requires that a member be notified that a complaint has been made and the subject matter of the complaint. In addition the member should also be informed of the name of the complainer unless the Commissioner considers that it would be inappropriate to do so. This could arise in circumstances where the complainer is a vulnerable person and might be distressed if their identity was revealed. Alternatively it could be judged that disclosure of the identity of the complainer at the initial stages could prejudice the investigation of the complaint. It would be possible for directions under section 4 to set out the circumstances in which the Commissioner should not reveal the identity of the complainer. Directions could also require the Commissioner to seek comment from the member complained about as part of the Stage 1 investigation. It is anticipated that there will be communications between the Commissioner and the member throughout this stage so that the member is kept informed of the progress of the investigation.

51. Where the Commissioner considers that each of the three tests at section 6 have been met and the complaint is admissible the procedure moves on to Stage 2. The Commissioner is required under subsection (2) to make a report to the Standards Committee informing it of that fact and also to inform the complainer and the member of

the Parliament concerned. The Commissioner must also inform the Parliament in the report of the relevant provision or provisions which enable the Commissioner to conclude that the complaint is relevant and that the second test is satisfied.

52. Where the Commissioner is satisfied that the complaint is either not relevant or he/she is able to determine that there has been no breach of the relevant provision (the first and third tests respectively) subsection (3) provides that the complaint shall be dismissed by the Commissioner. The complainer and the member of the Parliament concerned are each informed.

53. Subsection (4) prevents the Commissioner from dismissing complaints that have procedural deficiencies (the second test) without reporting the failure or failures to the Standards Committee and receiving a direction to dismiss the complaint. It provides, when read with subsection (6), that where a complaint meets the first and third tests but fails to meet one or more of the specified requirements the Commissioner cannot dismiss the complaint. Instead the Commissioner is required to report the failure or failures to the Standards Committee. However, see the explanation of subsection (6) in paragraphs 55 and 56 in relation to certain classes of complaints for which the Commissioner will not initially investigate the third test when there is a procedural deficiency.

54. Subsection (5) sets out the information which a report to the Standards Committee under subsection (4) must contain. Before reporting and as part of the investigation into the reasons for any procedural deficiency, the Commissioner will be able to give the complainer a chance to rectify any deficiency.

55. Subsection (6) makes clear that, except where the Standards Committee has made a direction in relation to specific classes of complaints, the Commissioner is required to investigate whether the complaint satisfies the third test before reporting a failure to meet any part of the second test. Where the third test is satisfied that fact must be included in the Commissioner's report. But where the third test is not satisfied the Commissioner is required to dismiss the complaint without having to make a report about the procedural deficiencies.

56. The direction-making power in this section is to be exercised in relation to classes of complaints. In other words, it cannot be exercised in relation to individual complaints. It is envisaged that in most cases the Standards Committee would want the third test to be investigated before the Commissioner submits the report about the failure to meet the second test. This ensures that reports are not made about complaints that would, in any event, fail the admissibility test. However, there may be certain types of procedural failures that the Standards Committee wishes the Commissioner to report on immediately before any investigation into the third test is carried out. For example, it may be considered appropriate for complaints that do not identify an MSP to be referred to the Standards Committee before the Commissioner takes any further action.

57. Subsection (7) requires the Standards Committee on receipt of a report under subsection (4) to direct the Commissioner whether to dismiss the complaint or to disregard

the procedural failure(s) and treat the complaint as if it did not have any procedural failures.

58. Under subsection (8) the Commissioner must dismiss a complaint when the Standards Committee so directs following a report of a procedural failure. In addition the Commissioner is required to notify the complainer and the member concerned.

59. Subsection (9) makes clear that when the complainer or the name of the member complained about is unknown, the requirements to intimate certain details or progress to that complainer or member under this section do not apply.

60. Subsection (10) allows the Commissioner, when a complaint has been dismissed to send to the Standards Committee a report setting out the reasons for the dismissal. There is no general requirement on the Commissioner to inform the Standards Committee of complaints that have been dismissed. This subsection however permits the Commissioner to keep the Standards Committee informed of dismissed complaints when circumstances dictate. This could arise where the lodging of a complaint has generated some publicity.

61. Since Stage 1 is an initial investigation, the Commissioner should not require to carry out extensive inquiries. The Commissioner is therefore expected to complete any inquiries necessary to determine Stage 1 within two months of a complaint being received. Where this is not possible subsection (11) requires the Commissioner to send a report as soon as possible thereafter on the progress of the investigation to the Standards Committee.

Section 8 – Stage 2: Investigation of an admissible complaint

62. Section 8 sets out the purpose and objective of a Stage 2 investigation into admissible complaints. This will include complaints that have satisfied the three tests at Stage 1 as well as those complaints that failed to satisfy the second test but which the Standards Committee decided should be treated as having satisfied the second test. Subsection (1) contains two matters that the Commissioner is required to reach a view upon.

- The first matter is whether the member concerned has committed the conduct which is the subject of the complaint. The Commissioner is required to set out the facts that are found to be established in relation to that conduct.
- The Commissioner is also required to reach a conclusion as to whether the conduct established under the above is in breach of one of the relevant provisions that he or she identified when deciding that the complaint was relevant.

63. Subsection (2) sets out the standard of proof that the investigation by the Commissioner must meet at stage 2. The test is that of the “balance of probabilities” and is equivalent to the test that applies in civil proceedings in Scotland.

64. Subsection (3) requires the Commissioner to report to the Standards Committee on any investigation that is not completed within six months of Stage 2 commencing. The provision could be utilised where for example an investigation was likely to take or was taking a lengthy period of time to conclude.

Section 9 – Report

65. This section sets out details concerning the report for the Standards Committee that the Commissioner is required to prepare on the completion of an investigation at Stage 2.

66. Subsection (2) lists matters that require to be included within the report. The subsection also prevents the Commissioner from commenting in relation to sanctions that may be imposed where a breach is established. Decisions on an appropriate sanction to be applied are for the Parliament alone.

67. Before any report that concludes that a member named in the report is in breach of a relevant provision is submitted to the Standards Committee, subsection (3) requires that the member be given a draft of the proposed report and an opportunity to make representations on the alleged breach and the proposed report. The inclusion of this provision is in line with the procedure followed by successive governments at Westminster following the 1966 report of the Royal Commission on Tribunals of Inquiry under the chairmanship of Lord Justice Salmon, the report having noted that it is more difficult to counter criticism when it appears in a report. The requirement is in addition to the right to be informed of the allegations and to be given an opportunity to respond during the investigation. The provision is similar to the rights afforded to councillors and members of devolved public bodies under section 14(2) of the Ethical Standards in Public Life (Scotland) Act 2000 (asp 7) in relation to proposed reports of the Chief Investigating Officer.

Section 10 – Action on receipt of a report

68. As has been explained in the introduction to these notes, the process that is to be followed by the Parliament on receipt of a report from the Commissioner (Stages 3 and 4 of the investigative process) will be contained in standing orders. However, there are two aspects of the subsequent process which require to be dealt with in this Act. First, this section makes it clear that the Standards Committee and the Parliament are entitled to reject both the facts found and conclusions reached in the Commissioner's report and allows the Standards Committee and the Parliament to reach its own conclusion on the complaint. Second, this section makes it clear that the Standards Committee can direct the Commissioner to carry out further investigations.

69. Subsection (3) applies all the provisions of the Act to any investigation and report carried out by the Commissioner following a direction under subsection (2). This ensures, for example, that the Commissioner has power to call witnesses and request documents. It also ensures that the Standards Committee has the same powers to request reports on the progress on any such further investigation.

Section 11 – Withdrawal of a complaint

70. Subsection (1) allows the complainer to withdraw a complaint while it is still with the Commissioner. A notice to the Commissioner withdrawing a complaint must be in writing and be signed by the complainer..

71. When a complaint is withdrawn during Stage 1 of the investigation process, subsection (2) requires that the Commissioner stop the investigation and inform the Standards Committee that the complaint has been withdrawn and of any reasons given for withdrawal.

72. When a complaint is withdrawn during Stage 2 of the investigation process subsections (3) to (6) set out the procedure to be followed. Under subsection (3) the Commissioner must inform the member concerned of withdrawal and of any reasons given. The member is invited to comment on whether the investigation should continue. For example, the member may wish the investigation to continue in the expectation that the report of the investigation will exonerate him or her in relation to a damaging allegation.

73. The Commissioner can recommend to the Standards Committee that an investigation should continue despite withdrawal of the complaint at Stage 2. Before deciding whether or not to do so the Commissioner is required to take into account any relevant information. This might include, for example, information obtained in the course of an investigation. The Commissioner is specifically required to take into account the reasons given by the complainer for withdrawal of the complaint and the views of the member concerned.

74. Subsection (4) applies where the Commissioner decides not to recommend that the investigation of a withdrawn complaint should continue. In such circumstances, the Commissioner stops the investigation and informs the member and the complainer. The Commissioner is also required to report to the Standards Committee that the investigation into the complaint has ceased and the reasons given for withdrawal of the complaint.

75. Under subsection (5), when the Commissioner recommends that the investigation into a withdrawn complaint should continue, a report is made to the Standards Committee. That report must set out the fact that the complaint has been withdrawn, the reasons given for the withdrawal of the complaint by the complainer, any views expressed by the member as to whether the investigation should continue and the reasons for the Commissioner's recommendation.

76. When the Standards Committee receives a report recommending continuation of the investigation they are, under subsection (6), required to give the Commissioner a direction as to whether or not to continue the investigation. The Commissioner is required to comply with the direction and to inform the member and complainer of the decision.

77. Subsection (7) makes it clear that where the Commissioner is required set out the reasons given by a complainer for a withdrawing a complaint, the reasons may be summarised.

Section 12 – Investigation into excluded complaints

78. Section 3(2) prevents the Commissioner from investigating complaints that are excluded from his or her jurisdiction by the standing orders or the Code of Conduct (see paragraph 30). However, this provision is subject to the terms of this section which enables the Standards Committee to direct the Commissioner to investigate such a complaint at any time.

79. Under subsection (2), the Commissioner can be directed to take into account any information that is available in relation to the complaint.

80. Under subsection (3), the Commissioner can be directed to treat the excluded complaint as admissible and, in such a case, the Committee would be required to identify the relevant conduct provisions that may have been breached.

81. Where no direction as to admissibility is made, subsection (4) requires the Commissioner to treat the complaint as if it were a new one. This will ensure the provisions of section 7 as to Stage 1 procedure apply before any investigation at Stage 2 can be undertaken.

Section 13 – Power to call for witnesses and documents

82. Section 13 of the Act contains various powers to assist the Commissioner in gathering information and undertaking an investigation.

83. Subsection (1) contains the Commissioner's powers to obtain information from witnesses at each stage of an investigation. The power relates to both oral information and the production of relevant documents and applies to persons who are in or outside Scotland.

84. The Commissioner's powers are to be in line with the Parliament's own powers under section 23 of the Scotland Act. The power to obtain information and documents is therefore restricted by subsection (2) so that the Commissioner cannot require information and documents from a person if the Parliament would not be able to require that person to attend its proceedings to give evidence or to produce documents under section 23 of the Scotland Act. Section 23 imposes various restrictions on the Parliament's powers in relation to persons outside Scotland, Ministers of the Crown, reserved matters, judges and members of tribunals.

85. The power is further restricted by subsection (3) to the limits applicable to court proceedings in Scotland. This is in line with the provision that applies to the Parliament's own powers in section 23(9) of the Scotland Act. These cover various privileges such as

the privilege against self-incrimination and privileges in connection with litigation. A person need not answer any question or produce any document that they would be entitled to refuse to answer or produce in a Scottish court.

86. Where a person makes a statement in answer to any question by the Commissioner which the person was obliged to answer, subsection (4) provides that any such statement would be inadmissible in any proceedings in a criminal court. The effect of this is that a person cannot incriminate him or herself during the investigation process. The one exception to this provision is in the event that perjury proceedings are initiated in respect of the statement made to the Commissioner.

87. Subsection (5) provides a similar restriction to that of the Scotland Act in relation to a Scottish Law Officer or a procurator fiscal declining to answer a question or produce a document in relation to the operation of the system of criminal prosecution in any particular case. Under the Scotland Act this applies to the fiscal if the Lord Advocate considers that answering or producing might prejudice the criminal proceedings in the case in question or would otherwise be contrary to the public interest and the Lord Advocate has authorised the fiscal to decline to answer the question or produce the document on that ground. Similarly, this applies to the Lord Advocate and the Solicitor General if he or she considers that answering the question or producing the document might prejudice criminal proceedings in the case in question or would otherwise be contrary to the public interest.

88. A person giving evidence can be required to do so under oath and subsection (6) authorises the Commissioner to administer such an oath. A person will be able to affirm as an alternative to taking an oath as this is expressly provided for in the Oaths Act 1978 (c.19).

89. Subsection (7) makes it an offence for a person who has been required to take an oath by the Commissioner to fail to do so. A person found guilty by a summary criminal court of an offence under this subsection is liable to a fine not exceeding level 5 on the standard scale (currently £5,000) (section 225 of the Criminal Procedure (Scotland) Act 1995 (c.46)) or to imprisonment for a maximum period of three months..

90. Subsection (8) makes provision for the payment of allowances and expenses to persons required to give evidence or produce documents. The level of expenses and allowances will be a matter to be determined by the Commissioner who must first seek agreement to rates with the SPCB.

Section 14 – Witnesses and documents: notice

91. Section 14 makes provision for the Commissioner to give notice to a person who is required to give information or produce documents in line with the equivalent notice provision for the Parliament that is contained in section 24 of the Scotland Act 1998. The notice requires to set out the subjects to which the required evidence will relate. In addition, in the case of the attendance of a person to give evidence, the time and place at which attendance is required must be given. In the case of documents, the date by which

they require to be produced must also be given. A notice requires to be sent by registered or recorded delivery post. In the case of an individual it has to be sent to their last known address and in any other case to the person's registered office or principal address.

Section 15 – Witnesses and documents: offences

92. Section 15 creates offences which are equivalent to those set out in section 25 of the Scotland Act in relation to failures to comply with requirements imposed by the Parliament as to the giving of evidence or the production of evidence. For instance, this section makes it an offence for a person who is required by the Commissioner to give information or produce documents to fail to do so unless they have a reasonable excuse. A person found guilty by a summary criminal court of an offence under this section is liable to a fine not exceeding level 5 on the standard scale (currently £5,000) (section 225 of the Criminal Procedure (Scotland) Act 1995 (c.46)) or to imprisonment for a maximum period of three months.

Section 16 – Restriction upon disclosure of information

93. This section restricts the disclosure by the Commissioner and the staff or any other persons appointed by the Commissioner (see paragraph 3 of the schedule for provision about such other persons) of any information contained in the complaint or any information that is obtained in relation to the complaint during the investigation. Disclosure is only permitted to enable or assist the Commissioner in carrying out the functions imposed by the Act or standing orders. For example in providing information about the complaint to members, the complainer and other parties who are questioned. The Commissioner also requires to disclose information about the complaint for the purpose of his or her report to the Standards Committee. In addition, disclosure is permitted for the purpose of the investigation or prosecution of any offence or suspected offence.

94. The restriction on disclosure in this section does not extend to the Standards Committee and the Parliament who may choose to publish the information as part of a report following upon any consideration of a report prepared by the Commissioner. In practice, it is envisaged that any report to the Parliament by the Standards Committee in relation to a complaint would include a copy of the Commissioner's report to it.

Section 17 – Protection from actions of defamation

95. Subsection (1) at paragraph (a) provides the Commissioner with absolute privilege for all reports, statements and communications on a complaint whether with the complainer, a witness or the member of the Parliament complained about. The provision of absolute privilege effectively places a bar on a person's right to pursue an action of defamation in respect of statements made by the Commissioner. This allows the Commissioner to carry out investigations without being fettered in relation to the repetition of any defamatory material received.

96. Paragraph (b) of subsection (1) provides individuals who make complaints or members or witnesses who respond to complaints with qualified privilege. Under qualified

privilege individuals can make complaints and can assist in the investigation of complaints without fear of an action for defamation provided statements are not motivated by malice or intent to injure. “Statement” has the same meaning as in the Defamation Act 1996 and therefore includes words, pictures, visual images, gestures or any other method of signifying meaning.

Section 18 – Annual report

97. Section 18 requires the Commissioner to produce an annual report which is to be laid before the Parliament. Subsection (2) lists certain matters that must be contained within the report without precluding the inclusion of any other matters that the Commissioner considers appropriate.

98. The matters required under subsection (2) are:

- the number of complaints received;
- the number of Stage 1 investigations and information concerning their outcome;
- the number of Stage 2 investigations and information concerning their outcome;
- the number of complaints withdrawn by the complainer together with information on the stage in the investigation when they were withdrawn; and
- the number of further investigations carried out on a direction from the Standards Committee after a Stage 2 report has been completed (see section 10(2)).

Section 19 – Transitional provision

99. Subsection (1) provides that the Standards Committee can direct the Commissioner to take over all existing complaints at the time the Act comes fully into force. This can apply whether the complaint has only recently been received or when it was under investigation by the existing Standards Adviser. The period between the passing of the Act and commencement will allow existing complaints to be finalised, enabling a transition of cases from the Standards Adviser to the Commissioner. The provisions here are similar to the provisions that have been made in section 12 in connection with complaints that are excluded from the initial jurisdiction of the Commissioner.

100. Subsection (2) enables the direction to require the Commissioner to take account of any information that the Parliament already has in connection with the complaint. This could cover information which has already been obtained by the Standards Adviser.

101. Subsection (3) makes clear that the direction from the Standards Committee to the Commissioner to investigate a pending complaint can also direct that the complaint be treated as admissible. In such a case, similar to the position with excluded complaints in

section 12, the direction requires to specify the relevant conduct provisions that may have been breached. The current Adviser follows Stages 1 and 2 of the model of investigation that is set out in the 4th Report. This provision would therefore enable the Standards Committee to direct the Commissioner to commence a complaint at Stage 2 in a case where the previous Adviser had concluded Stage 1 of the process and had already decided that the complaint should be subject to a full investigation.

102. Where no direction as to admissibility is made, subsection (4) requires the Commissioner to treat the complaint as if it were a new one. Like the excluded complaints, this will ensure the provisions of section 7 as to Stage 1 procedure apply before any investigation at Stage 2 can be undertaken. This may be appropriate in a case where the previous Adviser has been able to undertake only limited inquiries into the complaint and has not yet reached any conclusions.

Section 20 – Interpretation

103. Section 20 contains definitions of terms used throughout the Act. The term "the Parliament" includes any committee of the Parliament. As the preceding notes indicate, it was envisaged in the model of investigations in the 4th Report that the Standards Committee would have the day-to-day contact with the Commissioner namely calling for and receiving reports into investigations and giving directions to the Commissioner. The involvement of the Standards Committee in this way will require to be set out in the standing orders. It is however for the Parliament following consideration by the Procedures Committee to determine whether the possible procedures outlined above or some other procedures are appropriate.

Section 21– Short title and commencement

104. This section provides for the substantive provisions in the Act to come into force automatically six months after the granting of Royal Assent. Subsection (2)(a) makes provision for sections 1, 20 and 21 and the schedule to come into force the day after Royal Assent. This will enable recruitment of the Commissioner to commence immediately so that the Commissioner can be in post on the day that the rest of the Act comes into force.

105. The period of six months allowed in subsection (2)(b) enables the Parliament to recruit the Commissioner and put in place the required structures, procedures, staffing and resources. The Parliament will need time to formulate and adopt new standing orders and amend the Code of Conduct. Time will also be needed to prepare the directions provided for in section 4.

Schedule –The Scottish Parliamentary Standards Commissioner

106. The schedule makes further provision for the terms and conditions applying to the appointment of the Commissioner, staff of the Commissioner and other persons who may be appointed to assist or advise the Commissioner.

PARLIAMENTARY HISTORY OF SCOTTISH PARLIAMENTARY STANDARDS COMMISSIONER ACT 2002

The following table sets out, for each Stage of the proceedings in the Scottish Parliament on the Bill for this Act, the dates on which proceedings at that Stage took place, the references to the Official Report of those proceedings and the dates on which Committee Reports were published and the references to those Reports.

Proceedings and Reports	Reference
<i>Introduction</i>	SP Bill 48 (Session 1)
4 February 2002	
<i>Stage 1</i>	
<i>(a) Finance Committee</i>	
3rd Meeting, 2002	12 February 2002, col 1848
1st Report 2002 (13 February 2002) Stage 1 Report on the Scottish Parliamentary Standards Commissioner Bill	SP Paper 510
<i>(b) Consideration by the Parliament</i>	
28 February 2002	cols 9765-9784
<i>Stage 2</i>	
<i>Scottish Parliamentary Standards Commissioner Bill Committee</i>	
1st Meeting, 2002	16 April 2002, cols 1-2
2nd Meeting, 2002	14 May 2002, cols 3-16
<i>Stage 3</i>	
<i>Consideration by the Parliament</i>	
27 June 2002	cols 13122-13138
Royal Assent – 30 July 2002	