Consultation Response: Consultation on the Compliance Officer

Contents

Introduction

1. This document is the post-consultation report for the IPSA consultation paper: *Consultation on the Compliance Officer.* This consultation was published on 16 June 2010 and closed on 7 July 2010. The consultation covered proposals for:

    a. guidance on the investigations procedures of the Compliance Officer;

    b. guidance on the recovery of overpayments;

    c. guidance on penalty notices;

    d. a scheme for the calculation of costs charged to MPs; and

e. joint statements on working practices between IPSA, the Compliance Officer and:

   i. the Parliamentary Commissioner for Standards;

   ii. the Director of Public Prosecutions; and

   iii. the Metropolitan Police Commissioner.

2. IPSA was required by the Parliamentary Standards Act 2009 to consult with the Compliance Officer, the Speaker of the House of Commons, the Leader of the House of Commons and the Standards and Privileges Committee[1]. In addition, IPSA launched a public consultation, and notified all MPs when it was launched.

3. The consultation closed on 7 July 2010. IPSA received nine responses, including from MPs, the Parliamentary Commissioner for Standards, interested organisations and members of the public. Copies of the response can be read here on IPSA's website.

Role of the Compliance Officer

4. A small number of respondents questioned the role of the Compliance Officer, believing that the Compliance Officer could conduct an investigation into a refusal by IPSA to reimburse an expense claim, or that he had a function in investigating complaints about IPSA. Hugh Bayley MP, for example, wrote:

> *The consultation paper makes no provision for an MP to claim that an expense claim was wrongly not paid – that is that IPSA made a mistake, say, by not applying its scheme rules fairly, losing an MP's claim or receipts, or failing to process MPs' claims and salaries efficiently, accurately and promptly.*

5. A number of responses were received on the independence from IPSA of the Compliance Officer. For example, Mr Joe Igerton considered that the Compliance Officer's presence in IPSA's office raised issues about his independence, as did his being required to act in accordance with guidance produced by IPSA. In addition, the 1922 Committee questioned the need for the resources expended on the role, writing that:

> *With the tightening of the Second Home Allowance, the scope for any wrongdoing in the use of expenses has been greatly reduced. Therefore, it is unclear whether the Compliance Officer will have little more to do than investigate clerical errors.*

[1] The Standards and Privileges Committee was not constituted during the consultation, and dispensation was obtained to disapply this requirement.

6. One respondent called for the Compliance Officer to be politically neutral to avoid conflicts of interest, proposing that the Compliance Officer should immediately declare any political office or candidature he has held in the past.

7. There was a clear agreement from the respondents that where an MP is suspected of having committed a criminal offence in respect of an expense claim, this should be referred to the police.

IPSA's position

8. The role of the Compliance Officer was created by the Constitutional Reform and Governance Act 2010 (the 2010 Act). That Act, which passed into law on 8 April 2010, required IPSA to appoint a Compliance Officer, and to provide that Compliance Officer with adequate resources for his functions. IPSA has therefore provided the Compliance Officer with his office facilities and other resources to enable him to fulfil his function. We do not consider that this will compromise the Compliance Officer's functional independence.

9. Under the 2010 Act, the Compliance Officer has two functions; to:

    a. review a determination by IPSA to refuse an MP's expense claim in whole or in part; and

    b. conduct an investigation if he has reason to believe that a member of the House of Commons may have been paid an amount under the expenses scheme that should not have been allowed.

10. These review and investigatory functions of the Compliance Officer are set out separately in the 2010 Act. Under that Act, IPSA is responsible for providing guidance on the Compliance Officer's investigations procedures, but not on the review procedures. These are for the Compliance Officer to determine, and were not the subject of the consultation.

11. The Compliance Officer's functions do not include investigating complaints about IPSA's services. These should be addressed to IPSA's Director of Operations at info@parliamentarystandards.org.uk.

12. There is no requirement under the 2010 Act for the Compliance Officer to be politically neutral, although IPSA would expect the Compliance Officer to have procedures in place to manage any conflicts of interest. Nonetheless, IPSA has requested the Compliance Officer voluntarily agree to uphold the principles of the Cabinet Office Guidance Note on the Political Activities of Civil Servants. The current Interim Compliance Officer has agreed to uphold these principles.

Initiating an Investigation

13. Some respondents emphasised the need for the Compliance Officer to be accessible to members of the public who wanted to request investigations, taking account of difficulties that might be experienced by complainants with disabilities, or who do not have access to the internet.

14. Several comments were received on the proposal that a complaint would not be pursued if it referred to an expense claim that was over twelve months old. The Taxpayers' Alliance, for example, strongly disagreed with a twelve month limitation period, arguing that:

> *Financial malpractice may come to light some time after the initial offence was committed if IPSA was experiencing a high volume of claims, which created a backlog. A limitation period could also encourage attempts to cover up breaches for the period so that the misconduct was identified after the limitation period.*

IPSA's position

15. IPSA agrees with the need for the Compliance Officer to take account of the need to be accessible to people from a range of backgrounds, with disabilities or who do not have access to the internet, when creating his standard complaints form, and throughout his investigations. These comments have been passed to the Compliance Officer.

16. IPSA is satisfied that a limitation period of twelve months should remain, supplemented by the provision for the Compliance Officer to pursue older complaints if exceptional circumstances apply. This provides sufficient discretion to the Compliance Officer to pursue older complaints, but prevents issues being effectively stored up for a parliament and then submitted immediately prior to an election.

The Preliminary Investigation

Timeframe for Investigations

17. Several responses commented that the guidance for investigations did not include a timeframe for the Compliance Officer to work within.

Vexatious complaints

18. Opinions were mixed in relation to what criteria the Compliance Officer should apply to judge whether a complaint was vexatious. The 1922 Committee and Anne McKechin MP were concerned that the majority of the complaints from the public may be vexatious. Conversely, the Taxpayers' Alliance held that the Compliance Officer should err on the side of caution before judging a complaint to be vexatious.

Anonymous complaints

19. Opinions were also divided on whether the Compliance Officer should accept anonymous requests for an investigation. The Taxpayer's Alliance raised the concern that:

> *...procedures that allow the Compliance Officer to always or usually reject complaints that are anonymous are likely to deter many important claimants. For example, someone closely involved in local politics, or a business that provides services to an MP, may have substantial information about breaches but be deterred from making a complaint if they are not able to do so anonymously, out of concern at potential consequences.*

20. Countering this, the Parliamentary Commissioner for Standards questioned whether pursuing an anonymous complaint was in accordance with the principles of natural justice. Anne McKechin MP raised concerns that launching an investigation on the basis of an anonymous complaint may contravene the Human Rights Act:

> *I can see no convincing argument in the public interest as to why any anonymous complaints should be accepted as a basis to allow a Compliance Officer investigation to commence... I believe consideration of anonymous complaints would be incompatible with the terms of the Human Rights Act provisions on fair hearings.*

<u>IPSA's position</u>

21. IPSA agrees that the Compliance Officer should work to a published timeframe, but considers it to be the responsibility of the Compliance Officer to decide what that timeframe is. As a result, this timeframe is not included in the guidance.

22. Vexatious complaints can and most likely will be made, and the Compliance Officer should have the power to reject them. The guidance reflects this, and provides the Compliance Officer with a discretion to exercise his own judgement when determining whether a complaint is vexatious. We do not believe that additional guidance as to what constitutes a vexatious complaint is either necessary or desirable.

23. On anonymous complaints, IPSA's position is that the Compliance Officer must assess all requests for an investigation on the basis of the information or evidence provided. It is perfectly possible that an anonymous complaint may supply sufficient evidence – documentary, say – for the Compliance Officer to conduct a preliminary investigation. Conversely, the evidence may be lacking, based on hearsay or otherwise unverifiable, and in those circumstances the Compliance Officer will not be able to ask the complainant for further information. This may lead him to decide not to open an investigation.

24. As the investigation would proceed on an analysis of the evidence, IPSA does not consider it would be contrary to the principles of natural justice or the Human Rights Act for it to originate in an anonymous complaint.

Information-gathering

25. Only one respondent commented on the provisions in the guidance relating to information-gathering by the Compliance Officer. This commented that the guidance only covered the gathering of information from the MP and IPSA, and not from any other party.

IPSA's position

26. For clarity, the guidance has been amended to make provision for the Compliance Officer to request information from any source that the Compliance Officer deems appropriate.

Meetings and Hearings

27. The issue of hearings being held in public prompted a number of comments from respondents, particularly MPs. The 1922 Committee, for example, was concerned that hearings conducted in public would create an adversarial process, and further commented that:

> *The background to these hearings will inevitably be that the Member of Parliament is at fault and guilty of some crime. Even if the reality of the situation is that the Member is being investigated/prosecuted for a mistake that it transpires was made by IPSA.*

28. Anne McKechin MP commented that the hearings would be quasi-judicial in nature, and that:

> *The fact that... there is to be a presumption of the public access to such a meeting and the reference [in the consultation] that justice must be seen to be done underlines the real nature of such an event.*

29. Practical considerations were also raised, relating to when the Compliance Officer would notify the media that an MP was the subject of an investigation, and how the Compliance Officer would select members of the public to attend hearings.

30. One response, from Mr Joe Igerton, questioned the implications of article 6(1) of the European Convention on Human Rights (ECHR) for the Compliance Officer's investigations, and particularly the need for a fair and open trial. Mr Igerton argued that:

> *...every single decision of the Compliance officer is subject to reference to the independent tribunal – 'The Lower Tribunal' which is to conduct a re-hearing. That satisfies Article 6.*

IPSA's position

31. This area of the guidance has caused confusion. In its consultation, IPSA explained that these were to be considered as 'meetings' rather than 'hearings' but it is clear this has not clarified the position. A distinction should be made between the following:

    a. a meeting held during and as part of the investigatory process; and

    b. a 'meeting' or 'hearing' offered by the Compliance Officer to the MP to hear representations prior to the Compliance Officer making his provisional findings and/or his findings. For clarity, this shall be referred to as a 'hearing'.

32. There is no intention for meetings held during and as part of the investigatory process to be held in public. These form a routine part of the Compliance Officer's information-gathering in order to make his findings on the matter at hand.

33. Under the 2010 Act, the Compliance Officer is required to provide the MP with the opportunity to make representations before the Compliance Officer makes his provisional findings on the matter under investigation. The Compliance Officer may offer the MP the opportunity to make these representations in person, or may decide that it is appropriate for them to be made in person even though the MP has not requested this. Where representations are made in person, these shall be by way of a hearing that shall generally be heard in public.

34. IPSA has provided the Compliance Officer with the discretion to decide to hold the hearing in private, if he considers it appropriate to do so.

35. Neither IPSA nor the Compliance Officer can control the way in which the media reports an investigation. Unless it appears to the Compliance Officer inappropriate to do so, the Compliance Officer shall publish the name of an MP under investigation at the point at which that investigation becomes substantive. When a hearing is held in public, the media may attend. While IPSA accepts this may result in negative media stories about the MP concerned, it takes the view that the need for transparency is paramount. The Compliance Officer's findings shall routinely be published, including where the Compliance Officer finds that IPSA was at fault.

36. IPSA does not agree that recourse to the First-tier Tribunal satisfies article 6(1) of the ECHR. Appeal to the First-tier Tribunal is only open to the MP in three specific circumstances during an investigation:

    a. in respect of a decision to issue a repayment direction;

    b. in respect of a decision to refuse an extension on a repayment direction; and

    c. in respect of a penalty notice being issued.

37. IPSA has provided guidance to the Compliance Officer on the basis that article 6(1) applies to the whole investigation.

Accompaniment to Meetings and Hearings

38. Several responses from MPs stated that an MP under investigation should be entitled to legal representation at hearings, and that this should not be at the discretion of the Compliance Officer. The 1922 Committee, for example, commented that:

> *There is an automatic right in law for a person to take representation with them to a disciplinary/conduct hearing... Given the quasi-legal nature of these hearings and the role of the Compliance Officer, it is probable that Members will choose to have representation and on occasion professional legal support.*

39. In addition to an MP bringing representation, Hugh Bayley MP comments on the situation where an MP wishes to bring a witness to a meeting or hearing.

> *I question whether the Compliance Officer, who has the responsibility to come to a judgement based on the evidence that he/she hears is the right person to decide whether it is* appropriate *for the MP to call or examine witnesses. Surely that decision should be taken by the 'accused', the MP.*

IPSA's position

40. The provisions in the guidance were never intended to prevent an MP from bringing legal representation to a meeting or a hearing, but were designed to cover the attendance of witnesses. For the avoidance of doubt, we believe that MPs should have the right to be accompanied or represented by a legal professional at hearings.

41. IPSA is persuaded that the Compliance Officer should not have the authority to refuse a witness that the MP chooses to bring to a meeting or hearing. It should be for the MP to decide whether a particular witness can provide relevant information to the Compliance Officer. However, the Compliance Officer may decline to hear a witness if it is clear that the information the witness provides is not relevant to the issue under investigation.

The Compliance Officer's Findings

42. One response, from the Taxpayers' Alliance, raised the concern that an MP may accept a provisional finding of the Compliance Officer, in order to conclude the investigation prematurely.

> *It is imperative therefore that the Compliance Officer is confident that no further investigation should take place when the provisional finding is presented, or before an MP is allowed to accept those provisional findings. If further investigation is recommended it should take place regardless of whether the MP accepts the initial amount of repayment.*

43. One response commented on the provisions relating to the publication of the Compliance Officer's findings. Mr Hugh Bayley MP wrote:

> *MPs' expenses claims and the decisions on them are published. It is therefore consistent to publish the Compliance Officer's final decisions.*

44. Less clear cut in the responses were the views on publishing other elements of the investigation, including the Compliance Officer's provisional findings and transcripts of hearings. The 1922 Committee, for example, commented that there was no need to hold hearings in public if the transcripts were to be published. Mr Joe Igerton commented

that there was no requirement to publish anything relating to the hearings, as if the matter went to the First-tier Tribunal that would be held in public. Overall, the comments in relation to publishing details of the investigation raised concerns that it may lead to the perception that the MP has committed some wrong, even if the Compliance Officer finds that ISPA is at fault.

IPSA's position

45. It is for the Compliance Officer, not IPSA, to determine when he is satisfied an investigation is complete and the findings – provisional or otherwise – are finalised.

46. Transparency is one of IPSA's core values. IPSA has seen little evidence to counter its view that the Compliance Officer should routinely publish as comprehensive an account of investigations as possible. The guidance recognises that there may be circumstances where the Compliance Officer should decide to defer publication. This may include circumstances where he suspects a criminal office has occurred, and the matter has been referred to the police.

Recovery of Overpayments

47. Two respondents commented on the provision for the Compliance Officer to require an MP to pay interest on any amount the Compliance Officer finds he has been overpaid. One respondent, the 1922 Committee, commented that in the guidance:

> *IPSA makes clear that it will recover all interest on monies paid.*

48. Hugh Bayley MP accepted the principle that interest may be paid, but argued that the proposed rate of 4% above the base rate was too high. Instead, a commercially available rate should be applied.

IPSA's position

49. IPSA does not expect the Compliance Officer to charge interest every time an MP is found to have been overpaid. The guidance sets out the factors which IPSA expects the Compliance Officer to take into account when deciding whether to charge interest.

50. Where the Compliance Officer does charge interest, IPSA considers it should be at his discretion to determine the rate applied. In doing so, the Compliance Officer should take account of the rates that are commercially available, as well as the rates of interest charged by the courts and other regulatory bodies.

Costs and Penalties

51. The majority of respondents who commented on the Compliance Officer's powers to require costs to be paid or to impose penalties supported the principle. There were, however, differing views on how they are exercised in practice. There was also some, limited, confusion of the two.

52. A small number of respondents questioned whether the Compliance Officer should charge an MP costs if he finds that IPSA is at fault in his investigation. The 1922 Committee, for example, said that this was "*unacceptable*" while Anne McKechin argued that the MP should be entitled to costs if IPSA was found to be at fault.

53. The amount of costs charged also raised comment from Mr Joe Igerton. He commented that the costs charged should not exceed the amount claimed and overpaid, or £1000, whichever was the higher. Otherwise, the costs could ruin MPs who have been guilty of only "*minor carelessness"* in their expenses claims.

54. The issue of penalties caused more, and varied comments. Several members of the public were of the opinion that a penalty limited to £1000 may be insufficient. Mr Peter Hooper, for example, took the view that:

> *A maximum penalty of £1000 is totally inadequate when dealing with transgressors who may have claimed very substantial sums of public money – in any event fixed penalties are unlikely to keep pace with inflation and/or the growth in MPs' salaries.*

55. Mr Joe Igerton called for more caution, arguing that when penalties are applied the Compliance Officer should be mindful that:

> *In between fraud and honest errors lies recklessness and repeated carelessness... Although the legislation is hugely complex, there is nothing much wrong with the idea of MPs who muck up their expenses claims and get too much paying a modest penalty. But there is, I would suggest, a great deal wrong with MPs being humiliated for minor carelessness.*

<u>IPSA's position</u>

56. The 2010 Act provides the Compliance officer with the power to require an MP to contribute to the costs of the investigation. IPSA takes the view that he should not do so

routinely, and has provided guidance to the Compliance Officer on the factors he should take into account when determining what those costs should be.

57. There is no provision in the 2010 Act for IPSA to pay costs either to the MP or to the Consolidated Fund, in the event that IPSA is found to be at fault following an investigation.

58. IPSA is required by the 2010 Act to provide the Compliance Officer with a scheme for the calculation of these costs. As these must be a reasonable proportion of the costs themselves, they are related to the costs rather than the size of the overpayment. The scheme can be found [here].

59. Penalties can only be issued by the Compliance Officer in certain circumstances, and are limited by the 2010 Act to a maximum of £1000. IPSA has provided the Compliance Officer with guidance regarding how to determine the size of the penalty, up to this maximum.

Conclusions

60. IPSA has today published the *Guidance on the Investigations Procedures for the Compliance Officer*, which includes guidance on the recovery of overpayments, costs and penalties.

61. No responses were received in the consultation on the contents of joint statements between IPSA, the Compliance Officer and the Parliamentary Commissioner for Standards, Director of Public Prosecutions and the Metropolitan Police Commissioner. These will be finalised in due course.