

**INQUIRY INTO PROPOSAL FOR A COMPLIANCE
OFFICER FOR THE NSW PARLIAMENT**

Name: NSW Independent Commission Against Corruption

Date Received: 8 February 2021

The Hon. Peter Primrose, MLC
Chair
Legislative Council, Privileges Committee
Parliament House
Macquarie Street
Sydney NSW 2000

By email: privilege@parliament.nsw.gov.au

Our Ref AD21/0002

Dear Mr Primrose,

Inquiry into a proposal for a Compliance Officer for the NSW Parliament

Thank you for your letter dated 14 December 2020 inviting the NSW Independent Commission Against Corruption ("the Commission") to make a submission to the Committee's inquiry into a proposal for a Compliance Officer for the NSW Parliament ("inquiry").

I note that the same proposal was referred to the Legislative Assembly's Standing Committee on Parliamentary Privilege and Ethics on 12 November 2020, which, to date, has not yet substantially progressed to a similar inquiry.


As you will be aware, the Commission is currently investigating alleged conduct of the former NSW Member of Parliament for Wagga Wagga, Mr Daryl Maguire (Operation Keppel) and conducted a public inquiry in September and October 2020. At this stage, the public inquiry has been adjourned and the investigation is not yet complete. It is likely that the Commission's final investigation report will make recommendations and observations about topics that are the subject of the inquiry. Consequently, the Commission may revise its position and observations on aspects of the proposal for a Compliance Officer. I will make sure the Committee is provided with a copy of our investigation report and if requested, provide the Committee with a further submission.

In the meantime, if the Commission can be of further assistance, please contact Mr Lewis Rangott, Executive Director Corruption Prevention on _____ or _____

Thank you for the opportunity to make a submission to this inquiry.

Yours sincerely

The Hon Peter Hall QC
Chief Commissioner

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Submission of the NSW Independent Commission Against Corruption to the Privileges Committee inquiry into the *Proposal for a Compliance Officer for the NSW Parliament*

February 2021

Current inquiry by the Privileges Committee

The Independent Commission Against Corruption (“the Commission”) welcomes the inquiry by the Privileges Committee into a proposal for a Compliance Officer for the NSW Parliament. In principle, the Commission supports the introduction of such a role, subject to the observations and reservations outlined below.

This submission will address several aspects of the proposal, following the numbering system as set out in the terms of reference.

Previous recommendations

As noted in the Chair’s letter of 14 December 2020, the idea presently under examination has been raised previously. In 2013 the Commission recommended the creation of a parliamentary investigator.¹ In that report, the Commission noted that:

The effectiveness of codes of conduct and statutory pecuniary interest regimes is dependent on timely and impartial enforcement mechanisms. No such enforcement mechanism exists in NSW outside of that provided by the Commission’s jurisdiction. This is problematic for allegations of minor breaches given the role of the Commission, as far as practicable, to direct its attention to serious and systemic corrupt conduct. Furthermore, the provisions of s 9 of the ICAC Act require a “substantial” breach of an applicable code of conduct.²

It also noted that “In recent years, there has been support for the creation of an **external third party** to deal with complaints concerning members”, and that:

*The establishment of a parliamentary investigator to examine minor allegations about members would provide a number of benefits. These include the provision of an **impartial** and timely mechanism for resolving minor complaints about the conduct of members. **Public confidence in the institution of parliament might be enhanced if the standards that apply to members are enforced.** The creation of a parliamentary investigator may also provide for a “graded” approach to non-compliance rather than the “all or nothing” response of the current system.*

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¹ NSW ICAC, *Reducing the opportunities and incentives for corruption in the State’s management of coal resources*, October 2013, recommendation 22, p 43.

² Ibid pp 43 – 44.

The Commission supports further consideration of this idea provided there is no change to its jurisdiction or the definition of corrupt conduct in the ICAC Act as a result of any review.³ [Emphasis added]

The report then recommended:

*That the NSW Parliament's Legislative Council Privileges Committee considers the establishment of a parliamentary investigator position in consultation with the Legislative Assembly Privileges and Ethics Committee.*⁴

The key elements of this proposal were that:

- complaints against members be dealt with by an external third party
- that the person be impartial
- that the person fill a lacuna in the ICAC Act limiting the Commission's ability to investigate matters involving minor breaches, both generally and in relation to breaches of applicable codes of conduct
- the exercise of the role should be transparent with a view to enhancing confidence in the institution of parliament, and
- the role not impinge upon the Commission's jurisdiction or the definition of corrupt conduct in the ICAC Act.

The Privileges Committee's subsequent June 2014 report recommended that the Parliament appoint a Commissioner for Standards.⁵

The July 2014 report by the Legislative Assembly's Parliamentary Privilege and Ethics Committee recommended the establishment of an Ethics Commissioner.⁶

The Committee recommends that an office of the Parliament be established by resolution of the House to be called Ethics Commissioner and incorporating the current responsibilities of the Parliamentary Ethics Adviser with the additional responsibilities of:

- *Conducting a mandatory meeting with all members to advise them on the preparation of their primary return;*
- *Providing legal advice to members on complying with their obligations;*
- *Receiving updates to the members' primary returns as required or every six months;*
- *Fielding public inquiries concerning members' compliance;*
- *Receiving complaints confidentially about members' compliance;*
- *Reviewing complaints confidentially;*
- *Making findings of members' compliance or non-compliance; and*

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³ Ibid p 44

⁴ Ibid

⁵ Legislative Council, Privileges Committee, *Recommendations of the ICAC regarding aspects of the Code of Conduct for Members, the interest disclosure regime and a parliamentary investigator*, 2014, recommendation 8, p 62.

⁶ Legislative Assembly, Standing Committee on Parliamentary Privilege and Ethics, *Inquiry into matters arising from the ICAC report entitled 'Reducing the Opportunities and Incentives for Corruption in the State's Management of Coal Resources'*, July 2014, recommendation 4, pp 15 – 16.

- *Using discretion to keep findings confidential or report findings to the House with recommended sanctions for breaches. Sanctions are to include ordering an apology, ordering rectification or reimbursement, recommending the Parliament levy a fine, and referring the matter to an external agency for further investigation such as the Independent Commission Against Corruption or the NSW Police Force.*

These 2014 recommendations have not been implemented by NSW Parliament.

1. Proposed resolution to establish a position of Compliance Officer

- 1.1 The terms of reference propose establishing a Compliance Officer to “expeditiously and confidentially deal with low level, minor misconduct matters so as to protect the institution of Parliament, all members and staff”.
- 1.2 The Commission’s previous recommendation regarding a parliamentary investigator remains pertinent. In principle, the Commission is supportive of the proposal to establish the position of an officer with investigative powers. However, in the Commission’s view, it does not appear that the current proposal adequately addresses all the key elements contained in the Commission’s 2013 proposal, as outlined above.
- 1.3 The proposal to establish the position of a Compliance Officer differs from the previous recommendations made by the Privileges Committee and the Privilege and Ethics Committee. That is, to establish a Commissioner for Standards or Ethics Commissioner. These previously recommended titles suggest a more authoritative role than the establishment of a Compliance Officer. The Commission suggests that the Committee consider an appropriate title to convey the seniority of this proposed position.
- 1.4 Regarding the specific proposal, the independence and impartiality of this officer will be paramount to ensure that it promotes and protects the good repute of the institution of Parliament, its members and staff. A more detailed response is provided below under the subheading for point 4 of the terms of reference.
- 1.5 As noted by the Clerk of the Parliaments and Clerk of the Legislative Council, David Blunt, in his 2013 paper, *A Parliamentary Commissioner for Standards for New South Wales?*, the Commission is effectively the only body which has a role in investigating allegations or complaints about alleged breaches of the NSW’s Code of Conduct for Members.⁷ Establishing a role that encompasses the role of a parliamentary investigator could reduce the need for the Commission to investigate by providing a viable avenue for less serious matters to be addressed.

2. Functions of the position

- 2.1 The terms of reference propose the following functions:

- receive and investigate complaints
- monitoring the Code of Conduct for Members
- educational presentations
- informal advisory services.

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⁷ D Blunt, *A Parliamentary Commissioner for Standards in New South Wales?*, paper to be presented at the 44th Presiding Officers & Clerks’ Conference, Canberra, 1-4 July 2013, NSW Parliament, 2013, p. 5.

- 2.2 The proposal suggests that a Compliance Officer can receive and investigate complaints of "less serious matters falling short of corrupt conduct". As noted above, a key element of the Commission's previous proposals is that the role of a parliamentary investigator does not impinge upon the Commission's jurisdiction or the definition of corrupt conduct pursuant to the *Independent Commission Against Corruption Act 1988* ("ICAC Act").
- 2.3 Although it is contemplated that the Compliance Officer will have some interaction with the Commission, there is no suggestion in the proposal that there be a robust process through which the Commission is apprised of complaints to the Compliance Officer. It is possible that the Commission may already be investigating or have an interest in matters that have also been reported to the Compliance Officer.
- 2.4 In the absence of a robust and sound process to ensure the Commission's jurisdiction is preserved, the Commission does have some reservations about the proposal.
- 2.5 In its dealings with public sector agencies, the Commission "may, before or after investigating a matter (whether or not the investigation is completed, and whether or not the Commission has made any findings), refer the matter for investigation or other action to any person or body considered by the Commission to be appropriate in the circumstances".⁸ This is the case even when the alleged conduct could amount to corrupt conduct. Because corruption can cover a wide range of misconduct, including conduct that is not necessarily criminal in nature, many instances of relatively minor fraud, misuses of information or abuses of office can be satisfactorily investigated by the wrongdoer's own agency. Consequently, the Commission recommends that the remit of the Compliance Officer be extended to *potentially* include matters that could amount to corrupt conduct. However, this suggestion is contingent on establishing satisfactory liaison arrangements with the Commission via a proposed protocol.
- 2.6 In addition, ss 53(3) – (6) of the ICAC Act contemplate a high level of interaction between it and any relevant authority to which such a matter has been referred. Finally, s 54(1) provides that "The Commission may, when referring a matter under this Part, require the relevant authority to submit to the Commission a report or reports in relation to the matter and the action taken by the relevant authority." Section 55 of the ICAC Act contemplates that the Commission may take further action if it is not satisfied that a relevant authority has duly and properly taken action in connection with a matter referred under s 53 of the ICAC Act.
- 2.7 Thus, if the Commission referred a matter to the Compliance Officer it could retain an interest.
- 2.8 There should be an explicit provision in any protocol or Memorandum of Understanding between the Commission and the Compliance Officer by which the Commission can, in appropriate cases, assume the investigation of a complaint.
- 2.9 In addition, it should be noted that often it will be difficult to determine, at the commencement of an investigation, whether the alleged conduct could meet the definition of corrupt conduct. In the Commission's experience, investigations into allegations of minor misconduct can lead to the identification of more serious or systemic misconduct.
- 2.10 The terms of reference seem to indicate that the role of the Compliance Officer will be limited to the conduct of members. The Commission believes the Committee should consider the merits of extending the Compliance Officer's remit to cover staff employed

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⁸ See s 53(1) ICAC Act; see also s 12A ICAC Act.

by the Parliament, including electorate officers and other staff employed by members. There are likely to be occasions when allegations against members and staff intersect and it may be efficient to deal with such matters using a single investigative process. In any case, the Compliance Officer will have specialist investigative skills that can be put to better use with a broader mandate.

- 2.11 Other than making orders for the repayment of misused funds or entitlements, the proposed functions of the Compliance Officer do not include detailed processes relating to enforcement measures concerning “less serious misconduct”. The Commission accepts that it is difficult for the Parliament to devise practical ways to discipline misconduct by its members. Options that are typically used in relation to employees, such as dismissal, demotion or even suspension, are not viable for members. However, because compliance and deterrence depend in part on the presence of effective enforcement mechanisms, the Commission encourages the Committee to put forward realistic options for disciplining any misconduct identified by the Compliance Officer. As noted above, some options were canvassed in 2014 by the Legislative Assembly’s Parliamentary Privilege and Ethics Committee.
- 2.12 In respect to the receipt and investigation of complaints, the Commission notes that clarification is required regarding who can make such complaints, including whether such complaints can be made by members’ staff or members of the public, and whether a complaint needs to comply with any specific formality. By comparison, the UK’s Parliamentary Commissioner for Standards can also receive complaints from a member of the public and outlines a detailed method for making a complaint.⁹ The Commission can and does receive anonymous complaints, which are often a productive source of information.
- 2.13 In respect to the proposed monitoring role of the Code of Conduct for Members, the Constitution (Disclosures by Members) Regulation 1983 (“regulation”) and the members’ entitlement system, the Commission proposes that the Committee also considers the limitations of the existing systems.
- 2.14 For example, the current Code of Conduct for Members requires members to take reasonable steps to avoid, resolve or disclose any conflict of interest, including “in any communication with Ministers, members, public officials, or public office holders” (see clause 7 of the 2020 version of the Code of Conduct for Members). In the absence of a mandatory requirement for a centralised register of members’ conflicts of interest, it is not clear to the Commission how a Compliance Officer could perform the monitoring function of members’ disclosure of their conflicts of interest effectively.
- 2.15 The current system for disclosing interests under the regulation has limitations, which are likely to impair effective monitoring, including that it is still paper based, not real-time, and might only disclose very limited details. The Commission notes that there are a range of outstanding recommendations to strengthen the disclosure regime, which have not yet been implemented by NSW Parliament.¹⁰

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⁹ House of Commons, *The Code of Conduct together with The Guide to the Rules relating to the Conduct of Members*, 17 March 2015, p 44.

¹⁰ Legislative Council, Privileges Committee, *Recommendations of the ICAC regarding aspects of the Code of Conduct for Members, the interest disclosure regime and a parliamentary investigator*, 2014, recommendations 2, 3, 4, 5, 6 and 7. Legislative Assembly, Standing Committee on Parliamentary Privilege and Ethics, *Inquiry into matters arising from the ICAC report entitled ‘Reducing the Opportunities and Incentives for Corruption in the State’s Management of Coal Resources’*, July 2014, recommendations 2 and 6. Legislative Committee, Parliamentary Privileges and Ethics, *Review of the Pecuniary Interests Register*, 21 November 2018,

- 2.16 In respect to the monitoring of the disclosures made under the regulation, the Commission notes that the current pecuniary interest regime essentially relies on self-regulation, apart from the oversight envisaged by s14A (2) of the *Constitution Act 1902* and the role of the Commission. The Commission reiterates the point made previously, namely that compliance and deterrence depend on effective enforcement mechanisms being in place. In the absence of an enforcement mechanism, the proposed monitoring by the Compliance Officer is likely to provide merely administrative oversight (similar to the role performed by the Clerks in regard to the compilation of members' disclosure for the pecuniary interest register) rather than a substantive compliance function. As per comments outlined in para 2.11, above, the Commission proposes that an effective regime requires monitoring and enforcement powers. This may necessitate amendments to the existing regulation.
- 2.17 As mentioned above, in the Commission's view the Compliance Officer could also monitor the Code of Conduct for Members' Staff.
- 2.18 The terms of reference set out a function for the Compliance Officer to assist in the delivery of "Educational presentations". The Commission notes that a comprehensive educational program may entail a number of features beyond presentations. The Commission also notes that the proposal envisages that the Compliance Officer assists rather than replaces the functions of other parliamentary officers with educational roles.

3 Amendment to the Code of Conduct for Members

- 3.1 The Commission agrees with the proposed amendments to the Code of Conduct for Members, relating to workplace safety and harassment.
- 3.2 The Commission foreshadows that its investigation report on Operation Keppel might contain further recommendations regarding amendments to the Code of Conduct for Members. As outlined above, these have not yet been finalised.

4 Terms of Appointment

- 4.1 The independence and impartiality of the Compliance Officer role is essential. As noted by the Commission's 2013 proposal, that is best achieved if the officer is external. However, according to the proposal outlined in the terms of reference it does not appear that the Compliance Officer will be "external" as s/he is to be appointed by the Presiding Officers, making them a parliamentary employee, who can be dismissed by the Chief Executive Officer of the Department of Parliamentary Services with the consent of the President and Speaker. That proposal gives rise to implications about that person's ability to be impartial.
- 4.2 The Commission notes the appointment process of the Australian Capital Territory's Legislative Assembly, which established a Commissioner for Standards in 2014. This Commissioner for Standards is appointed by the Speaker, after consultation with the Chief Minister, the Leader of the Opposition and crossbench members, at the beginning of each Assembly.¹¹ This ensures a level of bipartisan support for the appointment.

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recommendations 1 and 3. Legislative Council, Privileges Committee, *Review of the Members' Code of Conduct*, November 2018, recommendations 2, 3 and 4.

¹¹ [Complaining About a Member of the Legislative Assembly \(act.gov.au\)](https://www.act.gov.au/act/legislation/act/act-act), accessed 4 February 2020.

4.3 As you may be aware, a previous submission from the House of Lord's Commissioner for Standards to the Privileges Committee's 2014 inquiry also includes a relevant recommendation regarding the terms of appointment. It stated:

... the appointment should be conducted in accordance with your rules for other senior non-political appointments. It is important that the investigator is non-party political and seen to be so. In my case, my selection was ratified by the House of Lords as a whole; whilst I am an officer of the House, I am wholly independent and am classified as self-employed. A fixed tenure is desirable. My experience indicates that a part-time role is all that is required.¹²

4.4 The Commission agrees the selected Compliance Officer should be apolitical and be free to perform his or her duties unencumbered of any political interference.

4.5 In the Commission's view, to be able to undertake the proposed functions, any appointee would require both legal and investigative qualifications and a sophisticated understanding of parliamentary conventions. Should the proposal succeed, the Commission recommends that a detailed position description be prepared, which would help shape the likely pool of suitable candidates and assist in determining the suitable term of appointment.

4.6 One further option could be for the selection process to be informed by subject matter experts such as a retired judge or public administration specialist.

5 Complaints investigations

5.1 The Commission notes the constructive discussions contained in the 2014 reports by the Privileges Committee and the Privilege and Ethics Committee when the development of relevant protocols were also considered.

5.2 The Commission recommends that the proposed protocol includes arrangements for liaison between the Compliance Officer, the Presiding Officers, senior staff of the Parliament and the Commission. This could entail a memorandum of understanding or other agreement that addresses:

- prompt reporting of matters to the Commission
- dealing with matters referred by the Commission
- other information sharing, liaison and mutual assistance arrangements that are in the public interest
- cooperation in relation to educational and corruption prevention issues.

5.3 The Commission envisages that it will be closely consulted over the development of this proposed protocol. Also, that the Commission will have an opportunity to provide comment to the Privileges Committee prior to its approval.

5.4 Related to this topic is an issue, which has also been highlighted by Mr Blunt, in his 2013 paper.¹³ He referred to advice from the Crown Solicitor, which appears to indicate that there is currently "a flaw, or at least ambiguity" concerning the duty to report suspected corrupt conduct of members of Parliament and/or staff pursuant to section 11 of the ICAC Act. This is an issue which a protocol or memorandum of understanding could

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¹² Legislative Council, Privileges Committee, *Recommendations of the ICAC regarding aspects of the Code of Conduct for Members, the interest disclosure regime and a parliamentary investigator*, 2014, p 61.

¹³ D Blunt, *A Parliamentary Commissioner for Standards in New South Wales?*, paper to be presented at the 44th Presiding Officers & Clerks' Conference, Canberra, 1-4 July 2013, NSW Parliament, 2013, p. 9.

address. However, the Commission suggests that a better approach might entail designating the Compliance Officer as an official with responsibilities to report reasonably suspected corrupt conduct to the Commission under s 11 of the ICAC Act.

- 5.5 If there is such a gap, the Commission submits that it is essential that it be closed in order to ensure that relevant matters (including pursuant to s 11, Part 5 and s 122 of the ICAC Act) can be appropriately reported to the Commission and/or referred back by the Commission. In line with the comments made under point 1.3, above, the Commission's view is that this reporting and referral role ought to be filled by a person with sufficient seniority and authority, such as a Commissioner.
- 5.6 Section 8(1)(c1) of the *Public Interest Disclosures Act 1994* describes how disclosures about the conduct of members of parliament should be made. Subject to any advice available to the Committee, it may be necessary for the protocol to allow the Compliance Officer to receive and manage public interest disclosures.
- 5.7 Clause 5(a) of the terms of reference outlines that the occupant of the position will, within 3 months of appointment, develop a protocol for discharging the role, including any arrangements for referral between the Compliance Officer and the Commission. The Commission presumes that once the first occupant of the role prepares the necessary protocol, future updates can be arranged by way of minor review. It would not be productive for the protocol to be completely rewritten each time a new Compliance Officer is appointed.
- 5.8 The Commission does not agree with the proposal to limit the reporting of investigative outcomes to matters where the members has not complied with a relevant order or recommendation and where the complaint consents to the making of the report. The Commission's stance on the publication of investigation reports is set out under part 7 below. However, it is noted that a complainant may come under unwarranted pressure to not consent.

6 Powers of the Compliance Officer

- 6.1 The proposed powers in the terms of reference outline the powers to interview members, their staff, and parliamentary officers (who must give "a full, truthful and prompt account") as well as obtaining documents and records.
- 6.2 The Commission notes that both 2014 reports following the previous inquiries related to this topic envisaged that the proposed model would be implemented via a resolution of the House, rather than via legislation.¹⁴ This is important because to be effective, the Compliance Officer's powers will need to be grounded in an appropriate instrument that gives the role legitimacy.
- 6.3 The Commission suggests that an amendment of the Code of Conduct for Members might also be required to ensure that the Compliance Officer has the relevant authority to use these powers. For example, the UK's *Code of Conduct for Members of Parliament* has a separate section titled 'Upholding the Code', which provides the Parliamentary Commissioner for Standards with relevant powers.

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¹⁴ Legislative Council, Privileges Committee, *Recommendations of the ICAC regarding aspects of the Code of Conduct for Members, the interest disclosure regime and a parliamentary investigator*, 2014, p 62. Legislative Assembly, Standing Committee on Parliamentary Privilege and Ethics, *Inquiry into matters arising from the ICAC report entitled 'Reducing the Opportunities and Incentives for Corruption in the State's Management of Coal Resources'*, July 2014, p 15.

6.4 Similarly, the Commission proposes that an amendment of the Code of Conduct for Members' Staff may be required, which sets out the necessary powers of the Compliance Officer.

7 Keeping of records

7.1 The terms of reference state that the records of the Compliance Officer, which presumably includes any completed investigation reports, shall only be made public upon resolution of the House.

7.2 While the Commission agrees that evidence and working documents held by the Compliance Officer should not necessarily become public documents, there is a need for finalised investigation reports to be made public in certain circumstances. The function performed by the Compliance Officer relies on his or her findings having a meaningful deterrent effect and a system that promotes both transparency as well as accountability. By itself, the annual report contemplated by clause 8 of the terms of reference would not, in the Commission's view, provide sufficient transparency. In any case, it is preferable that the decision to publish reports not be based on a political process. Similarly, it is preferable that addressing a member's failure to comply with the authorised powers of the Compliance Officer is not based on a political process.

7.3 The Commission notes that the UK Parliamentary Commissioner for Standards does publish details of substantiated inquiries via a public website.¹⁵

7.4 The Commission also sees a case for publishing the names of members and staff who have not, despite being given reasonable opportunity, completed relevant educational programs. The Commission also recommends that the Compliance Officer have discretion to publish relevant reports that redact or anonymise the names of individuals.

7.5 In the Commission's experience, complainants sometimes publicise the fact that they have made a complaint. This can have a detrimental effect on any investigation and reputation of persons named. This is sometimes referred to as 'weaponising' the complaints process.

7.6 The UK's Parliamentary Commissioner of Standards details a similar situation in her 2019/20 annual report, in which she states:

Another problem is that the confidentiality procedures of the Independent Complaints and Grievance Scheme are open to exploitation by the unscrupulous. I was disappointed on several occasions in the last year to see in the media confidential information about a small number of investigations (presumed or actual). It has been suggested that in some cases complainants - the very people whom the ICGS arrangements were designed to protect - were responsible. Any disclosure is unauthorised and represents a breach of confidence. It is particularly concerning if the information is distorted, since the other parties involved remain under a duty of confidentiality, and cannot respond. I also cannot set the record straight.¹⁶

7.7 The Commission recommends that the proposed protocol address the manner in which complaints can be made, so as to address the risk of 'weaponisation' whilst seeking to find an appropriate balance between confidentiality, transparency, and accountability. For

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¹⁵ See [Allegations Reported to the Standards Committee - UK Parliament](#), accessed 20 January 2021.

¹⁶ Parliamentary Commissioner of Standards, *Annual Report 2019-20*, House of Commons, 15 July 2020, p. 9.

instance, the Commission understands that the conventions of parliamentary privilege give members wide scope to freely raise matters of concern, which could include the conduct of other members.