



Commissioner for Ethical Standards in Public Life in Scotland

CONDUCT of MEMBERS of the SCOTTISH PARLIAMENT

Report by

the Commissioner for Ethical Standards in Public Life in Scotland

on

complaint no. MSP/2007/16-17/18

Complainer:- Mr Stuart McMillan MSP

**Respondents:- Ms Rachael Hamilton MSP
Mr Jackson Carlaw MSP**

6 June 2017

Commissioner for Ethical Standards in Public Life in Scotland

Thistle House, 91 Haymarket Terrace, Edinburgh EH12 5HE

T: 0300 011 0550 E: investigations@ethicalstandards.org.uk W: <http://www.ethicalstandards.org.uk>

CONTENTS

1.0	Introduction
2.0	Complaint
3.0	Joint Response
4.0	Admissibility of the complaint and subsequent proceedings
5.0	Investigation and Findings
6.0	Conclusion
7.0	The Code
Appendix 1	The Complaint
Appendix 2	The Joint Response
Appendix 3	Correspondence – Admissibility of Complaint

CONDUCT of MEMBERS of the SCOTTISH PARLIAMENT

Report on complaint no. MSP/2007/16-17/18 to the Scottish Parliament

Complainer: - Mr Stuart McMillan, MSP

Respondents: - Ms Rachael Hamilton MSP and Mr Jackson Carlaw MSP

1.0 Introduction

- 1.1 The Code of Conduct for Members of the Scottish Parliament ("the Code") has been approved by the Scottish Parliament under its Standing Orders to provide a set of principles and standards for its Members.
- 1.2 Other relevant provisions relating to the conduct of MSPs include: the Scotland Act 1998 - "the 1998 Act"; The Scotland Act 2012 - "the 2012 Act"; The Interests of Members of the Scottish Parliament Act 2006, ("the 2006 Act"); and The Interests of Members of the Scottish Parliament (Amendment) Act 2016.
- 1.3 For the purpose of considering this complaint, the relevant provisions are paragraphs 7.4.2, 7.4.4, and 7.4.7 in Volume 2 of the Code. Reference has also been made to Volume 3 at paragraph 7.8. The relevant edition of the Code is edition 6 which was approved by the Parliament on 8 June 2016. Excerpts from the Code are replicated at the end of this Report.
- 1.4 The investigation of the complaint has been undertaken in terms of the Scottish Parliamentary Standards Commissioner Act 2002 ("the 2002 Act") and the Directions by the Standards Procedures and Public Appointments Committee dated 1 March 2012.
- 1.5 This Report falls to be submitted to the Parliament in terms of section 9 of the 2002 Act.

2.0 Complaint

- 2.1 The complainer ("the complainer") is Mr Stuart McMillan MSP and his complaint is about Ms Rachael Hamilton MSP ("the first respondent") and Mr Jackson Carlaw MSP ("the second respondent").
- 2.2 Ms Hamilton was an MSP for South Scotland Region from her election on 5 May 2016 until 2 May 2017 as a member of the Scottish Conservative and Unionist Party. Mr Carlaw is MSP for Eastwood and is a member of the Scottish Conservative and Unionist Party. He was first elected on 3 May 2007, and was re-elected in 2011 and in 2016. The first respondent was, and the second respondent is, a member of the Culture, Tourism, Europe and External Relations Committee ("the Committee") of the Parliament.
- 2.3 The complaint alleges that the respondents sought political advantage by making public comments on the Committee's 3rd Report of Session 5 entitled "EU Migration and EU Citizens' Rights" prior to its formal publication on 6 February 2017, having failed to register any dissent during the meeting when the Report was approved. It is alleged that this amounted to a breach of the Code's Confidentiality Requirements as set out in Volume 2 at Section 7 - paragraphs 7.4.2, 7.4.4 and 7.4.7 as well as Volume 3 at paragraph 7.8. [The Code provides that reports, although

approved by a committee (and no longer in draft form), should be kept confidential until formal publication, except where the Committee has agreed to prior publication and has waived confidentiality.

- 2.4 The complaint was made by letter dated 10 February 2017. This is attached as **Appendix 1**.

3.0 Response

- 3.1 The respondents submitted a joint response setting out their position by letter dated 7 March 2017. This is attached as **Appendix 2**. The respondents refuted the allegation that they had breached the Code and stated that they had made comments on the report in response to an enquiry from the Scottish Conservative and Unionist Party Press Office during the weekend prior to publication. They denied having passed copies of the report to anyone and they had understood that their comments would not be made public until the embargo was lifted the next day.

4.0 Admissibility of the complaint and subsequent proceedings

- 4.1 The complaint was clearly stated as was the joint response.
- 4.2 Stage 1 of the investigation of a complaint requires an assessment of admissibility. In assessing admissibility, the key tests are whether the complaint is relevant, whether the complaint meets the requirements for form, content and execution and whether the complaint warrants further investigation if it appears after an initial investigation that the evidence is sufficient to suggest that the conduct complained about may have taken place.
- 4.3 I determined that the complaint was admissible and notified the respondents and the Clerk to the Committee on 14 March 2017 to that effect and confirmed that I was proceeding with my investigation. Copies of my letters are set out in **Appendix 3**.
- 4.4 I invited the respondents to attend for separate interviews, which they did on 18 April 2017. At the interviews, both respondents provided me with confirmation and clarification of their actions and the basis on which they had proceeded in this matter.

5.0 Investigations and Findings

Investigation

- 5.1 At interview, both respondents confirmed that they did not distribute the report. The respondents also pointed out that, in line with normal practice, the final report, having been agreed for publication, was widely circulated to media organisations – subject to a publication embargo.
- 5.2 The respondents stated that a major media organisation who were in receipt of the embargoed report had contacted the Scottish Conservative and Unionist Party Press Office and invited that office to supply a comment. The press office then made contact with the respondents, separately, during the weekend before publication. The respondents agreed to supply comments to the press office. The second respondent

specifically recalled his understanding that his comments would not be published before the lifting of the embargo.

- 5.3 The first respondent outlined her general knowledge of confidentiality and embargo. She confirmed her awareness from the Committee meeting that the report was embargoed until Sunday night. She confirmed that she had been contacted by her party's press office, which she stated was responsible for dealing with the media. She was asked if both she and the second respondent agreed with the report's conclusions. Her position was that, whilst she generally agreed with the report, she did not agree with sections of report's conclusions and had marked her copy of the report accordingly when reading it. Because of her inexperience as an MSP, she had not realised that, in the circumstances of majority approval, she could have asked the Committee to note her dissent at that point. She explained that she did not have any means of making a statement directly to the media and did not know how her comment would be used by the press office. The first respondent stated that she was not trying to pre-empt matters, as she knew the embargo applied to everyone.
- 5.4 The second respondent explained that he was clear about his individual responsibility of confidentiality. Although he had not been at the committee meeting at which the report was agreed, he knew that the report was to be published, and that it was to be treated as confidential prior to publication. His position was that the approved report varied from the previous draft report he had seen and he would not have agreed with a certain clause - which dealt with the need for a bespoke Scottish immigration arrangement - as it was not in line with his previous stance. The second respondent had been contacted by the press office. However, he knew that no public statement could be made in advance of publication of the report. His comments to the press office were made on that basis.
- 5.5 The second respondent explained that he had not had the opportunity to speak to the first respondent until the following week. In any event, he did not have the full detail of the final report to be published on the Monday - nor indeed the technology at hand to comment directly to the press. He emphasised his awareness of his responsibility and duty to parliamentary colleagues.

Findings

- 5.6 Having completed the investigation in this case and considered the respondents' representations, I have found that the material facts are:-
- (i) The first and second respondents are as specified in Paragraph 2.2 of this report.
 - (ii) The complaint is as set out in paragraph 2.3 of this report.
 - (iii) When contacted by the Scottish Conservative and Unionist Party Press Office, both respondents offered comments on the report in question during the weekend immediately prior to the publication of the report on Monday, 6 February 2017.
 - (iv) The first respondent was not clear what the party Press Office would do with her comments on the report, but had no intention of making any public comment in advance of publication of the report.

- (v) The second respondent gave his comments on the proposed report on the clear understanding that they would not be made public in advance of publication of the report.
- (vi) Copies of the report had been distributed to the media under embargo in advance of publication in accordance with the committee's normal practice.
- (vii) No copies of the report were distributed by the respondents in advance of its publication.
- (viii) The absence of any dissent during the Committee's consideration of the final report was attributable to the first respondent being unaware of the option to ask for her dissent to be recorded and the second respondent's absence from the meeting on 26 January 2017.
- (ix) Paragraphs 7.4.2 and 7.4.7 (which are set out in section 7 of this report) apply to the consideration of obligations on the making of public comments prior to the publication of Committee reports.
- (x) Paragraph 7.4.4 of the Code (which is set out in section 7 of this report) applies to off the record briefings to the media on the general contents or line of draft reports and other confidential material and information.
- (xi) Volume 3 of the Code represents guidance to members and cannot constitute any obligation for regulation. Paragraph 7.8 therefore is not relevant to assessment of this complaint.
- (xii) In this instance there is no evidence that the respondents gave an off the record briefing to the media about a draft committee report or provided supporting confidential material or information. I refer to my prior findings (in paragraphs 5(iv) and 5(v) in this report. It is the case that the respondents gave comments on a final report approved for publication (but which was embargoed). Their comments were made to the party press office on the understanding, or in the expectation, that these too were embargoed for public comment until the publication of the report.

6.0 Conclusion

- 6.1 I have concluded on the information available to me that: (a) the first respondent, Ms Rachael Hamilton MSP, and (b) the second respondent, Mr Jackson Carlaw MSP, did not breach any of paragraphs 7.4.2, 7.4.4 or 7.4.7 of Volume 2 of the Code by distributing copies of the 3rd Report of Session 5 approved by the Committee or by making public comments in advance of its publication.

Bill Thomson
Commissioner

6 June 2017

7.0 The Code

Volume 7.4 Confidentiality Requirements

7.4.1 It is the intention of the Parliament that its proceedings and printed material be open to the general public. This should be the basis on which members work, but there may be times when members will be required to treat discussions, documents or other information relating to the Parliament in a confidential manner, as described in paragraph 7.4.2 below.

7.4.2 All drafts of committee reports, and committee reports which, although agreed by a committee and no longer in draft, have not yet been published, should be kept confidential, unless the committee decides otherwise. In addition the following should be treated as confidential:

- briefing provided to members by Parliamentary staff for particular members' information only;
- documents produced during a private session of a committee;
- evidence submitted to a committee sitting in private from a witness which it has been agreed can be treated as confidential;
- any other documents or information which the committee has agreed should be treated as confidential; and
- minutes of private discussions.

7.4.3 Given the potential damage that the unauthorised disclosure of confidential committee material can do to the standing and integrity of a committee it is essential that all members respect these rules. This means that, unless the Parliament or the relevant committee has agreed otherwise, such documents should not be circulated, shown, or transmitted in any other way to members of the public (including those in Cross-Party Groups), media or to any member of any organisation outwith the Parliament, including the Scottish Government, nor to other MSPs who are not members of the committee or committees for whom the material was intended.

7.4.4 It is unacceptable for members to provide the media with off the record briefings on the general contents or line of draft committee reports or other confidential material or information. Disclosures of this kind can also seriously undermine and devalue the work of committees.

7.4.5 It is also unacceptable, unless the Parliament or the relevant committee has agreed otherwise, to disclose any information to which a member has privileged access, for example, derived from a confidential document or details of discussions or votes taken in private session, either orally or in writing.

7.4.6 In the case of other documents and information members are requested to exercise their judgement as to what should or should not be made available to outside bodies or individuals. In cases of doubt members should seek the advice of the relevant clerk.

7.4.7 Where a committee member wishes to express dissent from a committee report, the member should only make this public once the committee report has been published in order to avoid disclosing the conclusions of a draft report.

Volume 3 Confidentiality Requirements

7.8 Certain information may be agreed as confidential by committees or subcommittees. This is not through any desire to withhold information from the public. Rather, there are a number of difficulties which could arise through the unauthorised disclosure of confidential material:

- public discussion of draft reports might give preliminary views a status they do not warrant and lead to recommendations or findings not adopted by the committee being prematurely attributed to it;
- early release of information about a committee report could also result in unfair party political advantage;
- it may be difficult for members to freely deliberate on the content of a draft report;
- it may be difficult to get witnesses to give evidence in confidence if members are shown to be incapable of treating their proceedings in confidence;
- it could lead to a loss of mutual trust between members and a breakdown of confidence in the operation of the committee.



The Scottish Parliament
Pàrlamaid na h-Alba

APPENDIX 1
MSP/2007/16-17/18
Stuart McMillan MSP

Greenock and Inverclyde
Constituency Office
26 Grey Place
Greenock
PA15 1YF

Tel. 01475 720 930
Stuart.McMillan.MSP@Parliament.scot
WWW.Stuart-McMillan.net

The Commissioner for Ethical Standards
in Public Life in Scotland
Thistle House
91 Haymarket Terrace
Edinburgh
EH12 5HE

Our Ref: SM/ML100217

Date: 10 February 2017

17 FEB 2017

OFFICE OF PSCS

Dear Mr. Thompson,

Complaint regarding a Breach of the Code of Conduct for Members of the Scottish Parliament

Breach: Volume 2, S.7.4 of the MSP's Code of Conduct (Confidentiality)

MSPs: Rachael Hamilton MSP; Jackson Carlaw MSP

I wish to bring to your attention a number of actions taken by the above MSPs relating to the business of the Culture, Tourism, Europe and External Relations Committee (the Committee) which I believe to be in breach of the Code of Conduct for Members of the Scottish Parliament ('The Code').

As you may know, the Committee published its 3rd Report of Session 5 on 6th February 2017, titled 'EU Migration and EU Citizens' Rights'. For background, this report was based on months of evidence taken by the Committee and extensive discussion amongst Committee members. The report highlighted current uncertainty for EU nationals living in Scotland and put forward the view that a bespoke immigration solution must be explored by the Scottish Government to account for the country's demographic needs.

It is clear that, prior to the Report's publication on the 6th February, the Code's confidentiality requirements set out in Volume 2, Section 7 would have applied. S.7.4.2 reads 'committee reports which, although agreed by a committee and no longer in draft, have not yet been published, should be kept confidential'. I should make clear at this point that no agreement was made between Members to waive the presumption of confidentiality (as is possible under S.7.4.2: 'unless the committee decides otherwise').

At the Committee's 3rd Meeting of 2017 on Thursday 26th January, you will see that the first agenda item was the discussion of the Report in private. At this meeting, Committee members of all parties agreed to the findings of the Report which reflected months of collective evidence taking. At no point during this meeting did any member express their wish to dissent from the report's findings. However, it later became clear that Rachael Hamilton MSP and Jackson Carlaw MSP had proceeded to set out the Report's conclusions and issued a press release

with a copy of the report attached on the Sunday before publication, fabricating that 'Committee members were divided' during discussion of the issue, as can be seen in STV's coverage of the Report. As Joan McAlpine MSP, Committee Convenor, explained to Parliament on the 7th February, 'having agreed to the report, the two Scottish Conservative members of our committee issued a party press release distancing themselves from its conclusions. They could have dissented in committee, but they chose not to'.

As I have made clear above, this material should have been treated as confidential under S.7.4.2. It is impossible to tell how many people were given sensitive information about the Report's findings in breach of the confidentiality requirement. The probability is that, as well as members of the press to whom the lines were issued, the Report's conclusions were seen by press officers who worked with the MSPs to agree their line, other Conservative MSPs, and Conservative colleagues in Westminster (as the contents of the Report pertained to a reserved competence which would have been of extreme interest to them).

I believe that by issuing press lines which amounted to a dissenting view on the Committee Report prior to its publication and doing so by disclosing the Report's conclusions, Rachael Hamilton MSP and Jackson Carlaw MSP are in breach of Section 7.4.4 and Section 7.4.7 which reads as follows:

'7.4.4 It is unacceptable for members to provide the media with off the record briefings on the general contents or line of draft committee reports or other confidential material or information. Disclosures of this kind can also seriously undermine and devalue the work of committees.'

'7.4.7 Where a committee member wishes to express dissent from a committee report, the member should only make this public once the committee report has been published in order to avoid disclosing the conclusions of a draft report.'

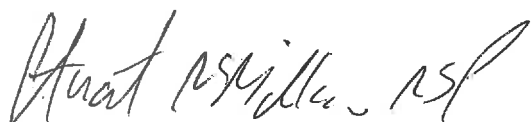
Though Section 7.4.7 refers to a 'draft report', it seems clear from the wording of the section – 'in order to avoid disclosing the conclusions' – and the wording in Section 7.4.2 (which assimilates a draft report and a report 'which, although agreed by a committee and no longer in draft, have not yet been published') that prior to the 6th February publication the Report can be considered under S.7.4.7.

The actions of the Scottish Conservative MSPs are clearly in-keeping with the outcomes of Breach that the Code predicts. According to Section 7.8, unauthorised disclosure of confidential material can result in, *inter alia*, 'unfair party political advantage'; 'loss of mutual trust between members and a breakdown of confidence in the operation of the committee'; and 'difficult[y] for members to freely deliberate on the content of a draft report'. I believe that the first 'difficulty' on this list was the desired effect of the course of action taken by these Members and that the second and third 'difficulty' describes the present circumstances of the Committee. The fact that this set of facts matches so clearly with the possible negative outcomes of unauthorised disclosures laid out by the Code's drafters is further evidence of political malpractice outwith the rules of the Code of Conduct.

It seems clear that these Members gained a political advantage by issuing statements about the Report's conclusions and their dissent from them. This blindsided other Members because this view had not been made clear in discussion. I believe that by following this course of action, the Members were in clear breach of the Code's provisions on confidentiality and that their conduct has therefore fallen short of the high standards expected by the Parliament and enforced by your office.

I look forward to your advice.

Yours faithfully,

A handwritten signature in black ink, appearing to read 'Stuart McMillan MSP'. The signature is fluid and cursive, with the letters 'M' and 'S' being particularly prominent.

Stuart McMillan MSP



The Scottish Parliament
Pàrlamaid na h-Alba

APPENDIX 2
MSP/2007/16-17/18

Jackson Carlaw MSP
Member for Eastwood

Bill Thomson
Commissioner for Ethical Standards in Public Life in Scotland
Thistle House
91 Haymarket Terrace
Edinburgh
EH12 5HE

Your ref: MSP/2007/16-17/18/B/DW

7 March 2017

Dear Mr Thomson

09 MAR 2017

OFFICE OF PSCS

**Public Standards
Code of Conduct for Members of the Scottish Parliament
Complaint by Mr Stuart McMillan MSP**

Thank you for your letter of February 28th 2017 and the copy of the detailed complaint made by the above MSP in respect of both Rachael Hamilton MSP and me.

May I take this opportunity to reject, on behalf of us both, the allegations made by Mr McMillan.

I note that the substance of Mr McMillan's argument rests on the allegation that either Ms Hamilton or I broke the confidentiality of the committee by sharing a draft copy of this report and that we briefed Conservative Party officials on its contents. Therefore, in the first instance, can I make clear that at no time did Rachael Hamilton or I distribute a draft copy of the report to colleagues.

The final report, having been agreed by the committee, was then widely circulated to media organisations and others by the committee clerks, subject to a publication embargo and in the normal way. Subsequently, a major media organisation, who were in receipt of an embargoed copy of the final report, contacted the Scottish Conservative and Unionist Press Office and invited them to supply a comment.

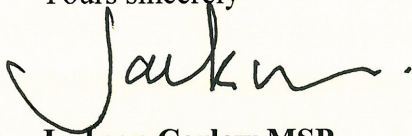
Only then did the Party Press Office endeavour to contact Rachael Hamilton and I to seek any comment. Mindful of the duty of confidentiality, we agreed to do so subject to any such comment also being embargoed until after the publication of the report itself and in accordance with Section 7.4.7 of 'The Code'.

I might add that these facts could have been established without difficulty had the MSP discussed the matter with either Rachael Hamilton or myself.

Having served in the Scottish Parliament for some ten years, I am acutely aware of my responsibilities and my duty to colleagues.

I trust that the forgoing will assist you as you consider the admissibility of the complaint.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Jackson', followed by a horizontal flourish and a period.

Jackson Carlaw MSP



APPENDIX 3
MSP/2007/16-17/18

Commissioner for Ethical Standards in Public Life in Scotland

CONFIDENTIAL

Ms Rachael Hamilton MSP

Reference: MSP/2007/16-17/18/A/DW

██████████
The Scottish Parliament
Edinburgh
EH99 1SP

14 March 2017

Dear Ms Hamilton

Public Standards
Code of Conduct for Members of the Scottish Parliament
Complaint against Rachael Hamilton MSP & Jackson Carlaw MSP
by Stuart McMillan MSP

I refer to your correspondence regarding the complaint about you from Stuart McMillan MSP.

Having considered the terms of the complaint, I have concluded that - for the purposes of the Scottish Parliamentary Standards Commissioner Act 2002 - the complaint is admissible and, therefore I intend to continue consideration of the matter.

I am writing to the Clerk of the Standards, Procedures and Public Appointments Committee to confirm this interim conclusion.

I wish to progress the investigation expeditiously and will write to you again as soon as possible regarding progress.

If you have any queries, please contact the office by telephone 0300 011 0550 or email investigations@ethicalstandards.org.uk

I should also be grateful if you would treat this matter on a confidential basis.

Yours sincerely

B. McKinney
P/P

Bill Thomson
Commissioner



Commissioner for Ethical Standards in Public Life in Scotland

CONFIDENTIAL

Mr Jackson Carlaw MSP

Reference: MSP/2007/16-17/18/B/DW

██████████
The Scottish Parliament
Edinburgh
EH99 1SP

14 March 2017

Dear Mr Carlaw

Public Standards
Code of Conduct for Members of the Scottish Parliament
Complaint against Rachael Hamilton MSP & Jackson Carlaw MSP
by Stuart McMillan MSP

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E.7. 16-06-11