

LEGAL ADVICE ON STANDING ORDER 4 (FINANCIAL AND OTHER INTERESTS OF MEMBERS) AND FREEMASONRY.

1. The Committee on Standards of Conduct has decided to resubmit to the National Assembly sitting in plenary its proposals to amend Standing Orders to require Members to register their membership of Freemasons and other organisations with a closed membership. In the light of that decision the Committee has asked for legal advice on the following matters:
 - a) the criminal law in relation to current requirements
 - b) the persons or bodies who could take legal action and whether any actions would need to be against the Assembly as a corporate body or could they be against individual members.
 - c) the likelihood of a successful legal action.
 - d) the possible consequences in financial terms for the Assembly of defending any such action.
2. In order to address the above matters it is necessary to be aware of the relevant legal framework. This is set out below.

THE LEGAL FRAMEWORK

The Government of Wales Act 1998 and Standing Orders.

3. Section 72 of the Government of Wales Act 1998 (“GOWA”) is headed “integrity” and deals with the provisions that may be included in Standing Orders regulating the conduct of Assembly Members. Section 72(1) provides that the Standing Orders must include provision for Assembly Members’ registrable interests (as defined in the Standing Orders) to be entered into a register and for that register to be published. It is a criminal offence to take part in Assembly proceedings without having complied with a Standing Order made in pursuance of section 72(1): see section 72(6) of GOWA.
4. There are further provisions empowering the making of Standing Orders requiring Assembly Members to declare an interest before taking part in proceedings relating to that matter and for preventing a person from participating in proceedings where he or she has a registrable interest in any matter to which the proceedings relate: see section 72 (2) and (3) of GOWA. Non compliance is a criminal offence: section 72(6) of GOWA.
5. Section 72 (7) of GOWA provides in effect that a person who is guilty of a criminal offence under section 72 is liable on summary conviction to a fine not exceeding £5000.
6. Standing Order 4 is headed “Financial and other Interests of Members”. It provides, amongst other things, for the registration of financial and other interests. Standing Order 4.1 provides for the Presiding Officer “to maintain and publish” a register of interests. Standing Order 4.2 provides that the interests set out in the Annex to

Standing Order 4 are to be registered. The first nine interests are essentially matters which could give rise to financial benefit for the Assembly Member or his or her family. The tenth category is paid or unpaid membership or chairmanship by the Member of any body funded in whole or in part by the Assembly. The eleventh registrable interest is “Membership of Freemasons”.

The Human Rights Act 1998

7. By s 2 of The Human Rights Act 1998 (“the HRA”), a United Kingdom court determining a question which has arisen in connection with a Convention right must “take into account”, inter alia, any relevant judgement of the European Court of Human Rights. This is a weaker obligation than the duty to “apply” Strasbourg jurisprudence. However, the widely accepted view is that relevant Strasbourg case-law which is properly applicable to circumstances within the United Kingdom should set the minimum standard for protection. If a court fails to follow a clearly relevant judgement of the Court, a disgruntled applicant retains the option of taking the case on to Strasbourg after exhausting domestic remedies.
8. The Assembly has no power to do any act which is incompatible with any of the rights of the European Convention on Human Rights – see section 107 (1) of GOWA. Only a person who is a victim for the purposes of Article 34 of the Convention may bring proceedings in a court to establish that an Assembly act is incompatible – see section 107 (2) of GOWA.
9. Schedule 8 to GOWA makes provision for the bringing of legal proceedings in relation to “devolution issues”. Such issues are defined as including, amongst other things, “a question whether a failure to act by the Assembly is incompatible with any of the Convention rights”.
10. The relevant Articles of the European Convention on Human Rights i.e. Articles 8,10,11 and 14 are set out in the Annex.

Relevant decisions of the European Court of Human Rights

11. The Court issued two decisions on 2 August 2001 relating to the membership of the Freemasons :

Grande Oriente d’Italia de Palazzo Giustiniani v. Italy (case no. 35972/97)

12. This case concerns a piece of Italian secondary (regional) legislation about public appointments made by the Regional Government and its agencies. The legislation provides that any nomination for such a public appointment must include a declaration that the candidate is not a member of a masonic lodge. The applicant, which is a form of Grand Lodge, alleged a breach of various Articles of the Convention.
13. The European Court of Human Rights (“the Court”) considered the complaints brought under Articles 11, 13 and 14. It found a violation of Article 11, the right

to freedom of assembly and association, on the grounds that the provision was not “necessary in a democratic society”. It did not consider it necessary to consider the claims brought under the other Articles.

N.F.v Italy (case no. 37119/97)

14. This concerns a judge who, for a short while, was an active member of the freemasons. He was given a disciplinary sanction by the body regulating the conduct of the judiciary, on the basis that his past membership of the freemasons constituted conduct unbecoming to a judge. He complained that this sanction amounted to a breach of Articles 8,9,10 and 11 taken alone and in conjunction with Article 14. He also alleged a breach of Article 8 (the right to respect one’s private life, etc.) on the basis that, as a result of the disciplinary case, the Italian press had published the fact that he had been a member of the freemasons.
15. The Court held that the disciplinary sanction amounted to a violation of the applicant’s Article 11 rights, on the basis that, on the facts of the case, it was not a sanction “prescribed by law”. It was held that it was not necessary to consider whether the disciplinary sanction also constituted a violation of any other Convention right.
16. The Court went on to rule that there had been no interference with (and thus no violation of) the applicant’s Article 8 rights by virtue of the fact that his masonic involvement had been published in the press.

THE ISSUES

A) The criminal Law in relation to current requirements.

17. Please see paragraphs 3 to 6 above. At present it is a requirement that an Assembly Member who is also a Member of the Freemasons should register that interest in the register. If he or she does not do so then he or she could, in the circumstances set out in 72 of the GOWA, be committing a criminal offence. The penalty for such an offence would be a fine not exceeding £5000.

B) The persons or bodies who could take legal action and whether any actions would need to be against the Assembly as a corporate body or could they be against individual Members.

18. Only a victim for the purposes of Article 34 of the European Convention of Human Rights can bring an action - see paragraph 8 above. It is clear from the Grande Oriente case (see paras 12 and 13 above) that a masonic organisation could, in principle, qualify as a victim, on the basis that the requirement that persons could not both be freemasons and hold particular public offices could cause a loss of members to the organisation and a loss of prestige. It is likely that a Welsh masonic organisation would, therefore, be entitled to claim it was affected by the Standing Order and be able to challenge it.

19. An individual who was directly affected might also bring an action. An Assembly Member who was (or was not) a freemason would also be entitled to challenge the requirement. It is less clear though whether any other member of the public could bring such a challenge.
20. I consider that any challenge would be brought against the Assembly and not against individuals. Any challenge would be on the basis that the Assembly as a corporate body has carried out an act which is incompatible with any of the Convention rights.

C.) The likelihood of a successful legal action

21. In order to deal with this issue it is necessary to consider each of the relevant Articles of the European Convention of Human Rights, i.e. Articles 11 (freedom of assembly and association), 8 (right to respect for private and family life), 10 (freedom of expression) and 14 (prohibition of discrimination)

Article 11 (freedom of assembly and association)

22. I consider that a masonic organisation and some individuals would be entitled to bring a challenge against the requirement in Standing Order 4. As presently drafted I think that on balance the courts would find that the requirement did not violate Article 11. It probably constitutes an interference with the freedom of assembly and association granted by article 11 (1) but that infringement could be justified because the criteria for justification set out in Article 11 (2) have been satisfied i.e. the restriction is prescribed by law and is necessary and proportionate to meet a legitimate interest, namely public confidence in the working of the Assembly. There must, however, be a real risk that a court would take a different view. The judgement in the Grande Oriente case has increased the risks of a finding of violation to such an extent that the prospects of success on either side are finely balanced.

Article 8 (right to respect for family and private life)

23. The issue here is whether there would be an infringement because the registration requirement relates to the disclosure of information about a person's private affairs or the publication of that information. I consider that in the event of a challenge by an individual Assembly Member there is a reasonable prospect that a court would find that there was an interference with Article 8 (1) but that such interference would be justified because the criteria set out in Article 8 (2) had been satisfied i.e. that it pursues a legitimate aim, it ensures public confidence in the working of the Assembly and that it is necessary and proportionate. As with Article 11, though, there is a real risk that a court would take a contrary view.

Article 10 (freedom of expression)

- 24 My views here are the same as for Article 8. If a challenge brought by an individual under Article 8 were to fail it is likely that a challenge under Article 10 would fail also.

Article 14 (prohibition of discrimination)

- 25 I consider that there is a higher risk of a successful challenge (whether by an individual or organisation) on the basis of this Article, which protects against discrimination, read in conjunction with Articles 8, 10 or 11, as appropriate. There are arguments for saying that on available evidence the registration requirement under Standing Order 4 amounts to discrimination in that similar organisations are being treated differently from Freemasons. The issue is finely balanced though.
- 26 The real risk of challenge by a masonic organisation or an individual would be minimised by putting freemasonry on the same footing as similar organisations. Extending the list of organisations covered by the registration requirement would allow the organisations added in, and certain of their members, to challenge the requirement. Nevertheless, it is considered that the risks of a successful challenge from any party would be reduced.

Summary

- 27 There is a reasonable prospect that the Assembly could successfully defend a challenge brought against it if the present requirement under Standing Order 4 remained. However, there is a real and significant risk that it could not, particularly as regards Article 14 of the European Convention on Human Rights, and that risk has increased as a result of the judgement in the Grande Oriente case. The issue is finely balanced.

D.) The possible consequences in financial terms for the Assembly of defending any action.

- 28 If the Assembly were to lose any challenge then of course the question of damages arises. It is rather unclear as to how the European Court of Human Rights awards damages. Any award is based on “just satisfaction” – see Article 41 of the Convention. Often the Court awards nothing for both non pecuniary loss (injury to feeling etc) and for pecuniary loss. A recent Court of Appeal case relating to immigration, namely, *Ala Anufrijeva and Another v London Borough of Southwark* (2003) EWCA Civ 1406, makes it very difficult for applicants to be awarded damages in human rights cases. It is quite possible, or even probable, therefore, that an applicant such as a masonic lodge, might, if successful, be awarded costs but no damages. It should be noted that in the Grande Oriente case only a sum for costs was awarded whereas in the NF case a sum for damage and a greater sum for costs and expenses were awarded.

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Annex

Relevant extracts from the European Convention on Human Rights (set out in Schedule 1 to the Human Rights Act 1998)

Article 8

Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of rights or freedoms of others.

Article 10

Freedom of expression

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive or impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent states from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are described by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation of rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Article 11

Freedom of assembly and association

1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join Trade Unions for the protection of his interests.
2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

Article 14

Prohibition of discrimination

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language,

religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.