

Scottish Parliamentary Standards (Sexual Harassment and Complaints Process) Bill

Explanatory Notes

Introduction

1. As required under Rule 9.3.2A of the Parliament's Standing Orders, these Explanatory Notes are published to accompany the Scottish Parliamentary Standards (Sexual Harassment and Complaints Process) Bill, introduced in the Scottish Parliament on 13 November 2020. They have been prepared by Scottish Parliament officials on behalf of the Standards, Procedures and Public Appointments Committee, whose convener (Bill Kidd MSP) introduced the Bill.
2. The following other accompanying documents are published separately:
 - statements on legislative competence by the Presiding Officer and the member who introduced the Bill (SP Bill 85–LC);
 - a Financial Memorandum (SP Bill 85–FM);
 - a Policy Memorandum (SP Bill 85–PM).
3. The Explanatory Notes are intended to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by the Parliament. The Notes should be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a section, or a part of a section, does not seem to require any explanation or comment, none is given.

The Bill

4. The Bill makes three distinct changes to the Scottish Parliamentary Standards Commissioner Act 2002 (“the 2002 Act”). These are set out in

sections 1-3 of the Bill, while sections 4 and 5 deal with commencement and the Bill's short title.

Background

5. The Parliament's original standing orders (made under the 1998 Act) provided for the creation of a Code of Conduct for MSPs, and the first version of the Code was approved by the Parliament on 24 February 2000 and came into force the same day. Also in 2000, the Parliament's Standards Committee published a report¹ recommending the creation of an independent commissioner to investigate complaints made about the conduct of MSPs and alleged breaches of the Members' Interests Order² or the Code. A further report in 2001 formally proposed the establishment of the Commissioner's office through a Committee Bill.³ That Bill became the 2002 Act.

6. The 2002 Act provided for the appointment of a person as the Scottish Parliamentary Standards Commissioner, now known as the Commissioner for Ethical Standards in Public Life in Scotland.⁴ It also gives the Commissioner the power to call for witnesses and documents, protection from actions for defamation, and a duty to report annually to the Parliament.

7. Under section 3 of the 2002 Act, where a complaint is made about the conduct of an MSP, the Commissioner is to investigate whether the

¹ Standards Committee, 4th Report, 2000 (Session 1), Models of Investigation of Complaints, SP Paper 186.

² The Scotland Act 1998 (Transitory and Transitional Provisions) (Members' Interests) Order 1999 (S.I. 1999/1350). This order made provision for the registration, declaration etc. of MSPs' interests until it was superseded by the Interests of Members of the Scottish Parliament Act 2006.

³ Standards Committee, 2nd Report, 2001 (Session 1), Proposal for a Standards Commissioner Committee Bill, SP Paper 312.

⁴ The Scottish Parliamentary Commissions and Commissioners etc. Act 2010 created a new Commission for Ethical Standards in Public Life in Scotland, consisting of two Commissioners, and transferred the functions of the Scottish Parliamentary Standards Commissioner to one of them (the Public Standards Commissioner for Scotland). The Public Services Reform (Commissioner for Ethical Standards in Public Life in Scotland etc.) Order 2013 (S.S.I. 2013/197) then created the office of Commissioner for Ethical Standards in Public Life in Scotland, transferred to it the functions of the Public Standards Commissioner for Scotland and dissolved the Commission for Ethical Standards in Public Life in Scotland.

member has committed the conduct complained about and has, in doing so, breached a “relevant provision”, and then to report the outcome of that investigation to the Parliament. A “relevant provision” is defined to mean any provision of the Parliament’s standing orders, the Code of Conduct, the Members’ Interests Order or any ASP made in pursuance of section 39 of the 1998 Act⁵ – but only if the provision in question was in force at the time the conduct complained about was alleged to have taken place (“the relevant time”). Since the Members’ Interests Order was replaced by the Interests of Members of the Scottish Parliament Act 2006, a “relevant provision” has come to mean any provision, in force at the relevant time, of the standing orders, the Code or the 2006 Act.

8. Section 5 of the 2002 Act requires the Commissioner to conduct a two-stage investigation into any complaint – a first stage to establish whether the complaint is admissible and then, if it is, a second stage to further investigate it and report to the Parliament on whether a breach of a relevant provision occurred. (This two-stage process, which is the focus of the 2002 Act, is itself part of a wider four-stage process – the third stage being consideration of the Commissioner’s report by the SPPA Committee and a recommendation to the Parliament on what sanctions, if any to impose; and the fourth being consideration by the Parliament of the SPPA Committee’s recommendation and a final decision on sanctions.)

9. Under section 6 of the 2002 Act, there are three main admissibility tests for complaints, the second of which is that the complaint meets all of the “specified requirements” listed in paragraphs (a) to (e) of subsection (5). Paragraph (b) includes a requirement that the complaint be signed by the complainer; paragraph (e) is that the complaint “was made within one year from the date when the complainer could reasonably have become aware of the conduct complained about” (the one-year time limit). Under section 7(4), if the Commissioner finds (at the first stage of investigation) that a complaint is inadmissible for failing to satisfy the “specified requirements”, the Commissioner must report this to the Parliament, which must then (under section 7(7)) direct the Commissioner either to dismiss the complaint as inadmissible or to treat the complaint as if it had met all of the specified requirements. Accordingly, the Parliament (in practice, the SPPA Committee) has the power to direct the Commissioner to investigate

⁵ Section 3, subsections (3) and (4).

a complaint even if (for example) it isn't signed or doesn't comply with the one-year time limit.

10. Under section 11 of the 2002 Act, a complaint can be withdrawn (at any time after being made but before a report of an investigation is made to the Parliament) by notice in writing to the Commissioner which is signed by the complainer.

Commentary on sections

Section 1 – Complaints about past sexual harassment

11. Section 1 of the Bill amends section 3 of the 2002 Act so as to enable the Commissioner to investigate complaints alleging past sexual harassment by an MSP (that is, someone who was an MSP at the time of the conduct complained about⁶) of a member of that MSP's own staff.

12. The main provision by which it does this is section 1(2)(b), which inserts a new subsection (4A) into section 3 of the 2002 Act. Under that new subsection, two paragraphs of the 7 January 2020 version of the Code of Conduct – in so far as they relate to sexual harassment by a member of the Parliament of their own staff – must be treated as if they had always been part of the Code.

13. Section 1(2)(a) of the Bill extends the definition of “relevant provision” (in section 3(3) of the 2002 Act) so it not only covers provisions that were in force at the relevant time but also those treated (under new subsection (4A)) as having been in force at the relevant time.

14. The effect is to allow the Commissioner to investigate a breach of a “relevant provision” of the Code (about the sexual harassment by an MSP of their own staff) in respect of conduct alleged to have taken place prior to 7 January 2020.

15. Prior to 7 January 2020, the courtesy and respect provisions of the Code applied to the treatment of other MSPs, parliamentary staff (including contractors) and the staff of other MSPs. There was no explicit provision relative to an MSP's treatment of their own staff. Without section 1, therefore, a complaint that an MSP sexually harassed a member of the

⁶ Section 20 of the 2002 Act defines “member of the Parliament” to include former MSPs (and Law Officers) as well as current ones.

MSP's own staff in the period before 7 January 2020 could be dismissed by the Commissioner as inadmissible, on the grounds that the conduct complained about did not breach a "relevant provision".

16. The two paragraphs of the Code (7 January 2020 version) referred to in section 1 of the Bill read as follows (extract from Section 7: MSPs' general conduct):

"Treatment of others

5. Members must treat the following individuals with courtesy and respect:

- other MSPs;
- parliamentary staff (including contractors providing services to the Parliament);
- their own staff and the staff of other MSPs.

6. Members must not behave in a manner towards these individuals that involves bullying, harassment (including sexual harassment) or any other inappropriate behaviour."

Section 2 – Removal of default time limit

17. Section 2 of the Bill amends section 6 of the 2002 Act so as to remove the one-year time limit (explained in paragraph 9 above). As a result, the fact that a complaint is made more than a year after the complainer could reasonably have become aware of the conduct complained about would no longer be a reason for the Commissioner to find the complaint inadmissible at the first stage of the investigation (on the grounds that it fails to meet the "specified requirements"). Accordingly, the Commissioner will be able to investigate such a complaint (at the second stage) without first reporting to the Parliament and being directed to treat the complaint as if it satisfied the specified requirements.

Section 3 – Removal of requirement for signature

18. Section 3(2) of the Bill amends section 6 of the 2002 Act so as to remove the requirement for a complaint to be signed, thus facilitating the making and receipt of complaints by electronic means. It will remain necessary for a complaint to be made by an individual person and to state (amongst other things) that person's name and address.

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19. Section 3(3) of the Bill removes the requirement for the withdrawal of a complaint (under section 11 of the 2002 Act) to be signed by the complainer, thus facilitating withdrawal by electronic means. It will remain a requirement for notice of withdrawal to be made in writing.

Section 4 – Commencement

20. Subsection (3) makes clear that the modifications made to the 2002 Act by section 1 do not apply to any complaint received by the Commissioner before the commencement of that section (which is, by virtue of subsection (2), 6 months after Royal Assent), even if the complaint is ongoing at the point of commencement.

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