

# Scottish Parliamentary Standards (Sexual Harassment and Complaints Process) Bill

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## Policy Memorandum

### Introduction

1. As permitted under Rule 9.3.3A of the Parliament's Standing Orders, this Policy Memorandum is published to accompany the Scottish Parliamentary Standards (Sexual Harassment and Complaints Process) Bill introduced in the Scottish Parliament on 13 November 2020. It has 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);
- Explanatory Notes (SP Bill 85–EN).

### Policy objectives of the Bill

#### Summary

3. The Committee's aim in introducing this Bill is to ensure that the highest standards of conduct among MSPs are upheld, particularly with respect to sexual harassment. The Committee believes that it is in the parliamentary and wider public interest to allow anyone who might have been sexually harassed by a serving or former member to complain about that, whenever the alleged harassment occurred, and for all such complaints to be investigated.

4. The Bill is based on the results of the Parliament's survey on sexual harassment, the Committee's own inquiry and the report of the Parliament's

Joint Working Group (JWG) on Sexual Harassment and Sexist Behaviour.<sup>1</sup> Against this backdrop, the Committee considers it necessary to bring the sexual harassment of members' own staff (by the employing MSP) within the remit of the Commissioner for Ethical Standards in Public Life in Scotland ("the Commissioner"). The Committee is clear that such conduct brings the Parliament into disrepute and should be capable of investigation by the Commissioner, regardless of when that conduct occurred. An independent investigation mechanism is vital to the proper investigation of complaints and the Parliament's processes for holding members to account for their conduct.

5. In deciding to make provision on past cases, regard has also been had to the fact that incidents of alleged sexual harassment by a person's employer are not always reported at the time they occur. This, as revealed during the Committee's inquiry, can happen for a number of reasons, including an imbalance of power and concern about impact on career prospects.

6. The Bill places MSPs' staff on the same footing as other staff working at the Parliament by bringing complaints about historic sexual harassment by their employing MSPs under the investigatory remit of the Commissioner. The Bill also alters the admissibility criteria in relation to all complaints about historic misconduct and it removes the requirement for a signature on complaints and on complaint withdrawals.

## Complaints about historic sexual harassment

### Background

7. The Code of Conduct, since its introduction in February 2002, has contained provisions requiring MSPs to treat other MSPs, Parliamentary staff (including staff employed by contractors providing services to the Parliament, e.g. catering and postal services) and the staff of other MSPs, with courtesy and respect. Conduct by MSPs towards their own staff was not (until recently) covered by the Code, and it was mainly regulated by employment law.

8. The Scottish Parliament's work to address sexual harassment was prompted by reports in the media about alleged sexual harassment and misconduct at the Scottish Parliament and elsewhere. In December 2017,

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<sup>1</sup> Citations for all three documents can be found in footnotes 2-4 below.

This document relates to the Scottish Parliamentary Standards (Sexual Harassment and Complaints Process) Bill (SP Bill 85) as introduced in the Scottish Parliament on 13 November 2020

the Standards, Procedures and Public Appointments Committee (the Committee) began an inquiry entitled “Sexual Harassment and Inappropriate Conduct” into the Parliament’s processes and procedures for dealing with sexual misconduct. The inquiry addressed the barriers which people subject to sexual misconduct face when considering whether to bring a complaint and recommended a single route of complaint for all affected. The Committee’s findings were set out in its report, published in June 2018<sup>2</sup>.

9. While the Committee’s inquiry was under way, the Scottish Parliamentary Corporate Body (SPCB) launched a sexual harassment helpline and issued a survey to all staff and Members in order to establish baseline information on staff and MSP experiences and their attitude to reporting sexual harassment. The results of the survey were published in February 2018.<sup>3</sup>

10. A Joint Working Group (JWG) was established in February 2018 to progress the work arising from the results of the staff survey and comprised senior Parliament officials, representatives from each political party and an external expert. The JWG took into account the Committee’s inquiry report as part of its work. The JWG’s own report<sup>4</sup> was published in December 2018. It recommended (amongst other things) the “removal of the current one-year time limit for making a complaint” and that formal complaints in relation to MSPs’ treatment of their own staff should be dealt with under the Code of Conduct.<sup>5</sup>

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<sup>2</sup> Available at: <https://sp-bpr-en-prod-cdnep.azureedge.net/published/SPPA/2018/6/5/Sexual-harassment-and-inappropriate-conduct-1/SPPAS052018R04.pdf>

<sup>3</sup> Available on the Scottish Parliament website at: [http://www.parliament.scot/StaffAndManagementResources/10130\\_Sexual\\_Harassment\\_Sexist\\_Behaviour\\_Survey\\_-\\_Final\\_Report\\_260218.pdf](http://www.parliament.scot/StaffAndManagementResources/10130_Sexual_Harassment_Sexist_Behaviour_Survey_-_Final_Report_260218.pdf)

<sup>4</sup> Report of the Joint Working Group on Sexual Harassment. Available at: [https://www.parliament.scot/TrainingAndDevelopment/Joint\\_Working\\_Group\\_Final\\_Harassment\\_Report\\_December\\_2018\\_2.pdf](https://www.parliament.scot/TrainingAndDevelopment/Joint_Working_Group_Final_Harassment_Report_December_2018_2.pdf)

<sup>5</sup> Report of the Joint Working Group on Sexual Harassment, paragraphs 71 and 103. Available at: [https://www.parliament.scot/TrainingAndDevelopment/Joint\\_Working\\_Group\\_Final\\_Harassment\\_Report\\_December\\_2018\\_2.pdf](https://www.parliament.scot/TrainingAndDevelopment/Joint_Working_Group_Final_Harassment_Report_December_2018_2.pdf)

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11. Following a consultation on its recommendations, the SPCB referred the JWG's report to the Committee.

12. The Committee considered the recommendations of the JWG's report in the first half of 2019 before consulting MSPs on proposed revisions to the Code of Conduct for MSPs to implement those recommendations. Details of the Committee's consultation are set out on the Committee's webpage.<sup>6</sup> The consultation referenced the Committee's view "that work should be initiated on preparing amendments to the 2002 Act with a view to allowing members' own staff to make complaints about historic behaviour which involved sexual harassment". The final changes proposed by the Committee to the Code were agreed by the Parliament on 10 December 2019<sup>7</sup> and came into effect on 7 January 2020.

13. The January 2020 revisions to the Code meant that complaints under the Code about a MSP's treatment of a member of the Parliament's staff or an MSP's treatment of a member of staff of another member could now be made directly to the Commissioner. (MSP conduct in respect of these groups had been covered by the Code on a longstanding basis, although the complaints route was not to the Commissioner directly.) Additionally, MSPs' own staff were now explicitly included in order to give effect to the recommendation of the Joint Working Group that such complaints should be dealt with under the Code. As the JWG noted, the effect is "that the Parliament will be able to hold Members to account for their behaviour towards their own staff in the same way as their behaviour towards anyone else."

14. While the changes to the Code place the parties who experience misconduct by an MSP on an equal footing, it does not address complaints about historical misconduct towards one group – MSPs' own staff. This is because it is only possible, under the Scottish Parliamentary Standards Commissioner Act 2002 (the 2002 Act), for the Commissioner to carry out

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<sup>6</sup> Available at:

<https://www.parliament.scot/parliamentarybusiness/CurrentCommittees/111615.aspx>

<sup>7</sup> Official Report, Meeting of the Parliament, 10 December 2019 (cols 69 and 70), available at:

<http://www.parliament.scot/parliamentarybusiness/report.aspx?r=12422&i=112258&c=224522&s=>

investigations in relation to a “relevant provision”.<sup>8</sup> MSPs’ conduct towards their own staff was not covered by the Code historically, and there is therefore no “relevant provision” for the purposes of investigations under the 2002 Act. The Code of Conduct for MSPs, in its first edition, explicitly excluded conduct by an MSP towards his or her own staff stating that the employment relationship took precedence, although this reference was later removed. Therefore, there is a need for primary legislation to address the lack of a “relevant provision” in relation to historic misconduct.

## **The Bill**

15. The Bill amends the 2002 Act to allow the Commissioner to investigate complaints about past instances of alleged sexual harassment by MSPs towards their own staff. This is achieved by adjusting what is treated as a relevant provision for the purposes of the Commissioner’s investigations under the 2002 Act. The expansion of what is to be deemed a relevant provision will only apply to complaints of sexual harassment and not to other forms of misconduct. This change means that complaints about MSPs’ treatment of their own staff, if they relate to sexual harassment, will henceforth be treated as though they had always been covered by the Code of Conduct.

## **Removal of default time limit**

16. Another of the JWG’s recommendations was that “there should be no time limit applied to complaints of sexual harassment”. The Committee’s own inquiry had identified various barriers to bringing complaints and that it can take time for people to do so. In order to address this and to deliver the JWG’s recommendation, a change to the admissibility criteria set out in the 2002 Act is required. These criteria normally require a complaint to be made “within one year from the date when the complainer could reasonably have become aware of the conduct complained about”. If the Commissioner considers that this one-year requirement has not been met, but that the complaint is otherwise admissible, she is obliged under the Act to seek a direction from the Committee either to dismiss the complaint or treat it as admissible. The Committee views this requirement as a deterrent to anyone considering bringing a complaint about historic misconduct.

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<sup>8</sup> Under section 3(3) of the 2002 Act, a “relevant provision” is any provision in force at the time of the alleged misconduct in: the Parliament’s Standing Orders; the Code of Conduct; the Scotland Act 1998 (Transitory and Transitional Provisions) (Members’ Interests) Order 1999; or made by or under an Act of the Scottish Parliament in pursuance of section 39 (members’ interests) of the Scotland Act.

Accordingly, the Bill removes this step. This will apply to any alleged breach of the Code of Conduct – not just those involving sexual harassment or a Member’s treatment of his or her own staff – in order to ensure a uniform approach.

## **Requirement for signature**

17. Finally, in considering whether any other amendments to the Act were necessary, the Committee noted that the 2002 Act requires complaints to the Commissioner, together with notices of the withdrawal of such complaints, to be signed. This had previously been highlighted by the (former) Commissioner as a constraint to the online process of submitting a complaint on the Commissioner’s website.<sup>9</sup> In practice, the Commissioner interprets this requirement as including electronic identifiers.

18. The Committee is satisfied that the online processes used by the Commissioner for Ethical Standards in Public Life provide safeguards to ensure that the identity of a complainant is fully established and that only the complainant would be able to withdraw a complaint. In addition, removing the requirement for a signature would better reflect modern working practices, facilitating the submission of complaints by electronic means. Accordingly, the Bill removes the requirements for signatures in sections 6 and 11 of the 2002 Act.

## **Alternative Approaches**

### **Complaints about historic sexual harassment**

19. Consideration was given to whether historic complaints about MSPs’ conduct towards their own staff could be brought within the remit of the Commissioner through adjustments to the Code of Conduct or by means of the Parliament giving a Direction to the Commissioner (under section 4 of the 2002 Act). However, since the 2002 Act limits the Commissioner to investigating breaches of “relevant provisions” in force at the time when the conduct allegedly took place, it was not possible to achieve the Committee’s objective without amending the Act.

20. Consideration was also given to whether all types of historic misconduct by MSPs towards their own staff should be brought within the Commissioner’s investigative remit. The Committee agreed to limit the

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<sup>9</sup> Available at: <https://www.ethicalstandards.org.uk/>

change to sexual harassment, as a targeted response to the Joint Work Group's recommendations, which had attracted cross-party endorsement. Furthermore, in seeking to deal with past behaviours, the Committee has taken into account that sexual harassment (on the part of MSPs towards their staff) has never been lawful or acceptable

### **Removal of time limit**

21. The Committee considered the alternative approach of removing the one-year provision in relation to complaints about sexual harassment only. The Committee decided to remove it for all complaints for simplicity and to create a uniform process for all complaints. This admissibility step does not represent an absolute cut-off as it stands – it is already possible for older complaints to be investigated. This provision will remove the perceived barrier which the current drafting represents.

### **Requirement for signature**

22. An alternative approach here would have been to leave things as they are, with the Commissioner continuing to interpret this requirement as including electronic identifiers. On its own, this would not have justified bringing forward a Bill but it made sense to make this change as the Bill was being brought forward to address the more substantial policy areas.

### **Consultation**

23. As set out above, this Bill is part of a suite of work which the Parliament has undertaken to address sexual harassment within the institution. Details of the evidence gathered by the Committee as part of its initial inquiry into sexual harassment and inappropriate conduct are set out in its report<sup>10</sup>. The Committee heard from a range of stakeholders including women's groups, political parties, academics and trades unions. Among the Committee's recommendations was "a central, stand-alone sexual harassment policy which applies to all campus users regardless of employment status". This Bill forms part of the measures designed to address this recommendation.

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<sup>10</sup> Standards, Procedures and Public Appointments Committee, 4<sup>th</sup> Report, 2018 (Session 5), Sexual harassment and inappropriate conduct (SP Paper 340), available at: <https://sp-bpr-en-prod-cdnep.azureedge.net/published/SPPA/2018/6/5/Sexual-harassment-and-inappropriate-conduct-1/SPPAS052018R04.pdf>

24. The SPCB's survey of staff and Members provided baseline information about the experiences of staff and MSPs and their attitude to reporting sexual harassment. The JWG's report<sup>11</sup> was published in December 2018. MSPs were consulted after it was published and no responses were generated.

25. The Committee considered the recommendations of the JWG's report in the first half of 2019 then launched a three-month consultation of MSPs on proposed revisions to the Code. The Committee considered the responses from MSPs, as well as from some MSP staff, and revised its proposals in light of their feedback.

26. Details of the Committee's consultation are set out on the Committee's webpage<sup>12</sup> and the results of the consultation are explored within the Committee's report on Code of Conduct revisions.<sup>13</sup> The consultation covered: the Role of the SPPA Committee in the complaints process; anonymity and confidentiality; excluded complaints and treatment of members' own staff; MSPs' responsibility for the conduct of their own staff; the right of a complainant to make representations to the committee when it is considering a complaint; and the procedure for considering older complaints. It referenced the Committee's view "that work should be initiated on preparing amendments to the 2002 Act with a view to allowing members' own staff to make complaints about historic behaviour which involved sexual harassment".

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<sup>11</sup> Available at:

[https://www.parliament.scot/TrainingAndDevelopment/Joint\\_Working\\_Group\\_Final\\_Harassment\\_Report\\_December\\_2018\\_2.pdf](https://www.parliament.scot/TrainingAndDevelopment/Joint_Working_Group_Final_Harassment_Report_December_2018_2.pdf)

<sup>12</sup> Available at:

<https://www.parliament.scot/parliamentarybusiness/CurrentCommittees/111615.aspx>

<sup>13</sup> Standards, Procedures and Public Appointments Committee, 16<sup>th</sup> Report, 2019 (Session 5), Code of Conduct for MSPs – proposed revisions to implement the recommendations contained in the Joint Working Group's Report on Sexual Harassment and Sexist Behaviour (SP Paper 637), available at: <https://sp-bpr-en-prod-cdnepe.azureedge.net/published/SPPA/2019/12/3/Code-of-Conduct-for-MSPs---proposed-revisions-to-implement-the-recommendations-contained-in-the-Joint-Working-Group-s-Report-on-Sexual-Harassment-and-Sexist-Behaviour/SPPAS052019R16.pdf>

## Effects on Equal Opportunities, Human Rights, Island Communities, Local Government, Sustainable Development Etc.

### **Equal Opportunities**

27. The Bill does not discriminate on the basis of maternity and pregnancy, marriage and civil partnership, gender reassignment, race, disability, religion and belief, sex or sexual orientation. The Bill is likely to benefit women in particular, since they are more likely than men to be the subject of sexual harassment. (Analysis of the staff survey revealed that 30% of women and 6% of men reported experiencing sexual harassment or sexist behaviour.) The Bill will contribute to providing redress for inequalities in the workplace, promoting a culture of respect and helping to correct imbalances of power.

### **Human Rights**

28. The Parliament is committed to a zero tolerance approach on sexual harassment, whenever it occurs or has occurred in the Parliament. As the Parliament's Sexual Harassment Policy (21 March 2019) states,

“Every person has the right to work in an environment that promotes respect, fairness, equality, and dignity and enables them to make their best contribution. Sexist behaviour and sexual harassment do not belong in the Parliament and we are committing to creating the shared understanding of appropriate behaviours, culture, and accountability mechanisms that will eradicate them.”

29. The Bill is one of a package of measures that will seek to give life to this zero tolerance approach. It is vitally important that allegations of sexual harassment occurring in the past can be investigated by the Commissioner and, where it is found to have occurred, that the Parliament can take appropriate action to hold MSPs to account and learn lessons as an institution to strengthen protections from sexual harassment in the future.

30. The Bill makes provision in relation to past cases that were not formerly covered by the Code of Conduct. The provision on past cases in section 1 of the Bill, is a focussed measure dealing with one sub-category of potential complaints cases, i.e. complaints involving alleged sexual harassment by an MSP (or former MSP) towards their own staff. It will put

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this staff group on the same footing, with regard to Commissioner investigation of sexual harassment complaints, as other staff groups in the Parliament which have always been covered by the Code. This amendment of the 2002 Act strikes a proportionate balance between the rights of individual MSPs and the wider public interest in the Parliament holding its elected members to account where sexual harassment has occurred. As is noted elsewhere in this Memorandum, sexual harassment by an MSP employer of their employees has never been acceptable or lawful conduct in the lifetime of the Scottish Parliament.

### **Island Communities**

31. The Bill will have no differential impact on island communities.

### **Local Government**

32. The Bill will not have any impact on local authorities.

### **Sustainable Development**

33. The Bill is part of a suite of measures designed to ensure that the highest standards of conduct among MSPs are upheld, particularly with respect to sexual harassment.

34. There are various principles in the UK Shared Framework for Sustainable Development adopted by the Scottish Executive in 2005 which are of relevance to the Bill, primarily “Ensuring a Strong, Healthy and Just Society – meeting the diverse needs of all people in existing and future communities, promoting well-being, social cohesion and creating equal opportunity for all”.

35. The Bill addresses these principles by discouraging abusive, demeaning behaviour and ensuring that individuals can be heard in respect of historic harassment and are able to access the parliamentary complaints process in respect of past sexual harassment. The Bill also promotes equity by placing MSPs’ own staff on an equal footing with other groups of staff already covered by the Code of Conduct and go some way to mitigating redressing power imbalances between MSPs and their staff. The Bill’s provisions could also increase social capital since they are designed to increase trust and positive working relationships between MSPs and their staff.

36. It can be argued that the Bill will help to achieve a more sustainable economy. Individuals who are subject to sexual harassment may choose to leave their job to avoid further abusive situations or be forced to take time off from work due to distress suffered with this loss of working days having a detrimental effect on their income. The Parliament's staff survey revealed that 1 in 5 women are affected by harassment / sexism, which can result in people leaving their jobs or experiencing a 'chilling' effect on their careers. The Bill is part of a package of measures which seek to protect people, which includes making their livelihoods secure and decent.

37. The Bill addresses the principle of promoting good governance by helping to simplify a cluttered and confusing complaints landscape. The Joint Working Group's processes were participatory and inclusive.

38. The UN Sustainable Development Goals contain a number of goals and targets which are of relevance to the Bill:

- Goal 5: Achieve gender equality and empower all women and girls
  - Goal 5.1: End all forms of discrimination against all women and girls everywhere
  - Goal 5.2: Eliminate all forms of violence against all women and girls in the public and private spheres, including trafficking and sexual and other types of exploitation.

39. Also relevant to this Bill is:

- Goal 8: Promote sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all.

40. The Bill contributes to the delivery of these Goals by providing a route to an independent investigation by the Commissioner on an issue which is more likely to be experienced by women. Furthermore, its provisions encourage a workplace environment in which such behaviours are not tolerated and are therefore less likely to occur in the first place.

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