Standards, Procedures and Public Appointments Committee

All MSPs
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10 June 2019

Dear Member,

Consultation of MSPs on draft changes proposed to the Code of Conduct for MSPs

The report of the Joint Working Group on sexual harassment and sexist behaviour was referred to the Standards, Procedures and Public Appointments Committee by the SPCB.

Since January this year, the Committee has considered the recommendations made by the Joint Working Group (JWG) and has agreed to propose changes to the Code of Conduct for MSPs to give effect to these recommendations. These are set out in the Annexe to this letter.

The Committee is seeking the views of MSPs on the proposed changes and MSPs are invited to respond by Friday 13 September 2019 by sending a written submission to the Committee by email to sppa.committee@parliament.scot. If you have any queries about the changes proposed to the Code of Conduct, please contact the clerks to the Committee using the contact details above.
I look forward to receiving and considering your written responses.

Yours sincerely,

Bill Kidd MSP
Convener
Standards, Procedures and Public Appointments Committee
Annexe – Consultation on Code of Conduct changes to give effect to the recommendations of the Joint Working Group on Sexual Harassment and Sexist Behaviour

1. This document sets out the recommendations made by the Joint Working Group (JWG) and includes proposals on how changes can be made to the Code of Conduct to give effect to these recommendations.

2. This consultation seeks the views of MSPs on the changes to the Code of Conduct proposed by the Standards, Procedures and Public Appointments Committee, which are all set out in track changes in boxes in the consultation document below.

3. In addition, background information is also provided on the changes that the Committee has agreed should be made to the Guidance on the Code of Conduct, the Scottish Parliamentary Standards Commissioner Act 2002 (the 2002 Act) and the Directions to the Commissioner. Final versions of the changes to the Guidance and the Directions will be agreed by the Committee after the summer recess following this consultation. There will be a separate consultation of MSPs on the proposed amendments to the 2002 Act at a later date.

Changes to the Code of Conduct

Treatment of others and excluded complaints

4. The JWG wanted to ensure that parliamentary staff, other members’ staff and members own staff could make a complaint to the Commissioner for Ethical Standards. It specifically recommended that section 9 of the Code be revised to reflect the new sexual harassment policy and allow complaints to be made directly to the Commissioner by parliamentary staff and the staff of other members:

“As the Code is currently written, it does not take account of the variety of informal options that will be open to people under our policy and instead prescribes a particular route a complaint should take. Additionally, a complaint could only be referred to the SPPA committee once these additional steps have been taken and the decision is for the SPCB rather than the complainant themselves.

“Therefore, we believe that section 9 in relation to ‘Excluded Complaints’ needs to be rewritten to reflect the new policy and to allow complainants to take a formal complaint directly to the Commissioner without having gone through any other processes.”

Members are invited to provide their views on the following proposed change to the Code of Conduct
The Committee proposes to take out section 9.6.d of the Code of Conduct from the paragraph on Excluded Complaints to allow parliamentary staff and other members’ staff to make complaints directly to the Commissioner:

9.6(d) Complaints about a member’s treatment of the Parliament’s staff: these are to be made to the Parliament’s Human Resources Office which will investigate the complaint. Complaints about a member’s treatment of the staff of another member: these are to be made to the member’s Business Manager who will investigate. In some cases a joint investigation by the Human Resources Office and Business Managers may be appropriate. In all cases, opportunities for conciliation will be pursued in the first instance. If a complaint cannot be resolved, it will be reported to the SPCB who may refer the complaint to the Standards, Procedures and Public Appointments Committee.

5. The Committee also agreed that members’ own staff should be able to make a complaint directly to the Commissioner as recommended by the JWG, requiring a reference to these individuals to be included in the Treatment of Others section of the Code.

6. The JWG suggested that the Committee might wish to consider revising the standard in the Code to refer to bullying and inappropriate behaviour. The Joint Working Group stated that:

“when we review our procedures for dealing with bullying and other inappropriate conduct, it is likely that we will follow the same procedures as we are proposing for sexual harassment. Therefore, the SPPA committee might want to think about having a class of complaint that encompasses this broader range of misconduct.”

7. In light of the JWG’s recommendation, the Committee decided to clarify that the requirement placed on members to treat others with courtesy and respect included bullying, harassment (including sexual harassment) or any other inappropriate behaviour.

Members are invited to provide their views on the following proposed changes to the Code of Conduct

To allow members’ own staff to make complaints directly to the Commissioner and to clarify that the requirement on members to treat others with courtesy and respect included bullying, harassment (including sexual
harassment) or any other inappropriate behaviour, the Committee proposes the following changes to the Code of Conduct:

**Treatment of others**

7.5. Members must treat other MSPs with 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.

7.6. In addition, Members must treat parliamentary staff (which includes contractors providing services to the Parliament) together with the staff of MSPs with courtesy and respect. Complaints from staff of bullying or harassment, including any allegation of sexual harassment, or any other inappropriate behaviour on the part of members will be taken seriously and investigated. Members must not behave in a manner towards these individuals that involves bullying, harassment (including sexual harassment) or any other inappropriate behaviour.

**Complaints about a MSP’s member of staff**

8. Sections 7.17 and 7.18 of the Code of Conduct currently place a responsibility on members in relation to their own staff, with section 7.18 holding members responsible for the behaviour of their staff.

9. The JWG indicated that it did not consider that a formal complaint should be taken against a member where the complaint relates to inappropriate behaviour by their staff. It stated:

   “... neither do we think that a formal complaint of sexual harassment should be taken against a Member if it is their member of staff who is alleged to have behaved inappropriately. This is primarily because we want everyone to take responsibility for their own behaviour and while, in a ‘normal’ employment situation a manager should ensure staff are behaving appropriately, if a member of staff sexually harassed another member of staff it is they who would be disciplined and not their manager (unless the manager had been negligent in their duty in which case, a manager might be disciplined separately).”

10. The Committee agreed that members should not be held responsible for the behaviour of their own staff in relation to inappropriate behaviour and instead considered that members should take reasonable steps to ensure that their staff are fully aware of, understand and abide by the policies, rules and
requirements that apply to the conduct of personnel on the SPCB’s premises. In addition, the Committee agreed that members should be responsible for taking appropriate action, including disciplinary action, in cases where their staff had behaved inappropriately.

**Members are invited to provide their views on the following proposed changes to the Code of Conduct**

In order that a formal complaint cannot be taken against a member if their member of staff is alleged to have behaved inappropriately, the Committee proposes the following changes to the Code of Conduct:

**Members’ responsibilities**

**Complaints about a MSP’s member of staff**

7.17. Members are answerable for the behaviour of their staff in the course of carrying out their duties as employees within the Parliamentary complex and in their dealings with other members, other members’ staff, and Parliamentary staff.

7.17 Members are responsible for ensuring that their staff are fully aware of and understand the policies, rules and requirements that apply to the conduct of personnel on the SPCB’s premises.

7.18 Members must take reasonable steps to ensure that their staff are fully aware of, understand and abide by the policies, rules and requirements that apply to the conduct of personnel on the SPCB’s premises.

7.19 If a member becomes aware that a member of their staff has not abided by any policies adopted by the SPCB, that member is responsible for taking appropriate action, including disciplinary action, in relation to their member of staff.

7.20 On occasion, MSPs’ staff will handle confidential information. MSPs must ensure that their staff or any other persons accessing or handling confidential documents or information listed in paragraphs 12 – 15 on their behalf comply with the confidentiality rules. MSPs will be held responsible for any breach by these parties.

7.19. MSPs will be held responsible for any breach by these parties. Members will be held responsible for the behaviour of their staff within the Parliamentary complex and in their dealings with other members, other members’ staff, and Parliamentary staff.
Confidentiality

11. The JWG discussed the importance of confidentiality in the complaints process. It stated in its report—

“It is absolutely vital that there is confidentiality at the heart of any process we develop … both for the complainant and the respondent. Investigations must be allowed to progress without the glare of publicity.”

12. When the Committee discussed this recommendation, it agreed that the Guidance on the Code of Conduct should be updated and strengthened to emphasise the importance of confidentiality. As noted above, these changes to the Guidance will be brought back to the Committee after the summer recess.

13. In addition, the Committee agreed to make changes to the Directions to the Commissioner to require:

- the Commissioner to redact information which identified an alleged victim as far as possible and place a duty on the Commissioner not to include information which reveals the identity of any person (unless, in the view of the Commissioner there is a good reason for including this information).
- that the Commissioner “shall not comment” in response to any inquiries as to whether a complaint concerning a member has been received.

14. The Committee also agreed that the non-disclosure requirements set out in the Code should be extended to require members not to disclose the identity of an individual who was the subject of a complaint against a member in relation to that member’s behaviour. The Guidance to the Code would clarify that this requirement was focused on the disclosure of the identity of the individual and would not stop the member from referring to the complaint after the Committee’s report had been published.

Members are invited to provide their views on the following proposed change to the Code of Conduct

The Committee proposes that the Code should be revised to require Members to protect the identity of an alleged, including after Stage 3 of the complaints process as set out below.

9.1 Members must not disclose, communicate or discuss any complaint or intention to make a complaint, to or with members of the press or other media prior to the lodging of the complaint or during Stages 1, 2 and 3 of the procedure for dealing with complaints (this procedure is set out in the guidance on the Code of Conduct (the Code)). Stage 3 is completed when the Standards, Procedures and Public Appointments Committee has made a report to the Parliament. If the complaint is about a member’s treatment of another individual under paragraphs 7.5 and 7.6, members must not disclose
the identity of that individual, at any time, where it has been kept confidential in the Committee’s report.

**Opportunity to make representations during the complaints process**

15. The JWG recommended that where a person makes a complaint about sexual harassment they should have new rights to make representations during the complaints process.

16. The Committee recognised that sexual harassment always involves more than one person, and the parties concerned may have different accounts of an alleged incident and the process of considering a complaint will therefore normally involve weighing up these different accounts of an incident to establish what occurred.

17. At present, only the Member being complained about has the right to comment on the contents of the Commissioner’s draft report including its factual accuracy. In addition, only the Member complained about has the opportunity to make representation to the SPPA Committee. The Committee agreed that in the interests of fairness, where the complaint was about a Member’s treatment of an individual, the alleged victim should have opportunities to make representations at appropriate stages during the complaints process. It was considered that this would improve the complaints process, giving the alleged victim a voice at appropriate times. As the Commissioner and the Committee would both have the relevant information at their disposal in order to establish the facts of the complaint, this would enhance the overall credibility of the complaints process.

18. The Committee agreed the alleged victim should be given the opportunity to comment on the Commissioner’s draft report and the findings in fact. This would require a new provision in the 2002 Act after section 9(3). This amendment to the 2002 Act will be taken forward as part of the Committee Bill and consulted upon as part of that process.

19. The JWG recommended that the alleged victim or victims should also be invited to make representations to the Committee on the Commissioner’s report. The Committee agreed that there should be a change to the Guidance on the Code to allow for representations to be made to the Committee in writing in certain circumstances, for example if the latter decided to conduct its own investigation into a complaint. The proposed changes to the Guidance will be brought back to the Committee after the summer recess.

**The procedure for considering older complaints**

20. The JWG recognised that it can take time for people to come forward with complaints of a sensitive nature. Because of this, and in the interests of removing barriers to people considering whether to make a complaint, it
recommended that “there should be no time limit applied to complaints of sexual harassment.”

21. The JWG also stated—

“We appreciate that not setting a time limit also means that complaints can be taken against former members. We believe that complaints should be able to be made against former members (and the same goes for former members of staff) and the Code of Conduct currently allows for this.”

22. There is currently no time limit on making complaints to the Commissioner about MSPs’ conduct, nor is there any restriction on a complaint being made against a former member. However, there is a “one-year provision” in the 2002 Act which requires the Commissioner to seek a direction from the Committee to take forward investigations into complaints made one year from when the complainer could reasonably have become aware of the conduct.

23. The Committee agreed that this one-year provision should be removed for all types of complaints to avoid a situation whereby there were different procedures for different types of complaint under the Code. This would involve amendments to Section 6 of the 2002 Act and the Committee will consider this further as part of the Committee Bill and consult MSPs on this proposal.

24. The agreement by the Committee to remove section 9.6.d of the Code of Conduct will allow parliamentary staff and other member’s staff to make complaints of a historic nature directly to the Commissioner. The Committee also agreed that work should be imitated 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 and other inappropriate behaviour (including harassment on the grounds of other protected characteristics or bullying). As with the other provisions in the Committee Bill, there will be a separate consultation on these provisions as part of the Committee Bill process.