



OFFICIAL REPORT
AITHISG OIFIGEIL

Standards, Procedures and Public Appointments Committee

Thursday 20 December 2018

Session 5



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Thursday 20 December 2018

CONTENTS

	Col.
DECISIONS ON TAKING BUSINESS IN PRIVATE	1
SEXUAL HARASSMENT AND SEXIST BEHAVIOUR.....	2

STANDARDS, PROCEDURES AND PUBLIC APPOINTMENTS COMMITTEE
24th Meeting 2018, Session 5

CONVENER

*Bill Kidd (Glasgow Anniesland) (SNP)

DEPUTY CONVENER

*Mark Ruskell (Mid Scotland and Fife) (Green)

COMMITTEE MEMBERS

*Jamie Halcro Johnston (Highlands and Islands) (Con)

*Tom Mason (North East Scotland) (Con)

*Gil Paterson (Clydebank and Milngavie) (SNP)

*Elaine Smith (Central Scotland) (Lab)

*Maureen Watt (Aberdeen South and North Kincardine) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Susan Duffy (Scottish Parliament)

Vicky McSherry (Scottish Parliament)

CLERK TO THE COMMITTEE

Katy Orr

LOCATION

The James Clerk Maxwell Room (CR4)

Scottish Parliament

Standards, Procedures and Public Appointments Committee

Thursday 20 December 2018

[The Convener opened the meeting at 10:00]

Decisions on Taking Business in Private

The Convener (Bill Kidd): Thank you for attending the meeting. It is a good turnout, and we have guests today. I welcome everyone to the 24th meeting in 2018 of the Standards, Procedures and Public Appointments Committee. Agenda item 1 is decisions on taking business in private. Does the committee agree to take item 4, which is consideration of the evidence heard under agenda item 3, in private?

Members *indicated agreement.*

The Convener: Does the committee agree that its consideration at future meetings of the draft report on draft changes to the code of conduct and its approach to the report from the joint working group on sexual harassment and sexist behaviour should be taken in private?

Members *indicated agreement.*

Sexual Harassment and Sexist Behaviour

10:01

The Convener: We move to the substantive items on the agenda. The next item is evidence from the joint working group on sexual harassment and sexist behaviour. We are joined by Susan Duffy, group head of committees and outreach, and Vicky McSherry, culture of respect team leader, both from the Scottish Parliament. Thank you for coming along. I invite Susan Duffy to make a short opening statement.

Susan Duffy (Scottish Parliament): Thank you for inviting us to the committee this morning.

I will give a quick reprise of how we have got to this point. The Scottish Parliamentary Corporate Body set up the joint working group on sexual harassment in January 2018 to consider and agree any actions that needed to be taken in the light of the survey on sexual harassment. I had the privilege of chairing the group. Other members of the group were Vicky McSherry; David McGill, who is one of the three assistant chief executives of the Parliament; three members of the Scottish Parliament—Michelle Ballantyne, Rhoda Grant and Rona Mackay—Gillian Mackay and Cheryl Kreuger, who are MSP staff; and Emma Ritch from Engender.

It might be useful to give a quick reminder of the headline survey results. Although 78 per cent of respondents had not experienced any sexual harassment or sexist behaviour, 30 per cent of women had experienced such behaviour. The survey also told us that people were not reporting issues and that those who experienced such behaviour were the least likely to have confidence in our reporting procedures.

The results of the survey plus comments and the focus groups that we subsequently set up have shaped the recommendations that the group is now putting forward. We also took into account the recommendations made by the committee in the report that was published in June.

What have we done? When we published the results of the survey, we set out the broad strands of work we wanted to take forward. They were: a programme of education and awareness raising; an improved reporting procedure and policies; an additional measure to support people who have experienced sexual harassment; and mechanisms to monitor and review what has been put in place.

On awareness raising, the culture of respect workshops, which everyone was asked to attend, began at the end of October. I hope that all members of the committee have either already

been to a workshop or are due to attend one. So far, about 700 people have attended those workshops, and we have set up more sessions in the new year.

The report that the group published on Thursday 13 December sets out our recommendations to improve procedures and, crucially, to provide an independent support service for everyone. We have also set out in that report how we intend to approach monitoring and reviewing in the future.

The group issued a statement in June, setting out what zero tolerance means in the Parliament. Our recommendations are designed to deliver on the principles in that statement. Those principles are: taking complaints seriously and dealing with them promptly and sensitively; having transparent, easily understood policies and processes; being consistent, fair and proportionate; and ensuring that there are consequences for inappropriate behaviour.

Another guiding principle was the need to replicate the principles of effective employment policies as far as possible, even though we have a number of different employment relationships in the Parliament—particularly in respect of members, who are not employees.

All those principles underpin the recommendations that we are making on how complaints against members should be handled. Given that we currently have a system that is set up under statute, it is inevitable that procedures will be different for complaints against members, but we want to ensure that the same principles as apply to complaints against anyone else also apply to complaints against members.

In summary, the main changes that we suggest to the way in which complaints against members are dealt with are the removal of the current one-year time limit that is in the code of conduct and under statute; the complainant being given a copy of the report by the Commissioner for Ethical Standards in Public Life in Scotland and the opportunity to comment in the same way as a member currently can; and all complaints against members going through the same procedure, which is not the case at the moment. In the report, we also ask the more fundamental question about whether complaints against members should be dealt with in an entirely different way.

We are very happy to answer questions on any of that.

The Convener: Thanks very much. You have given a good outline of what is in the report, which was published just last week. Do you have any idea of the next steps that will be taken to implement the recommendations? What timescales are involved?

Vicky McSherry (Scottish Parliament): We have started a period of consultation, which will run until 31 January. Once all the responses are back, we will analyse them and the joint working group will then consider them in February. The intention is to report back our findings to the corporate body at the beginning of March.

In the meantime, so that we have something that is ready to go once we have final approval from the corporate body in March, we are working on getting the independent support service up and running, with the intention that we will be able to implement the new policy and processes later in March.

The Convener: That is useful, because people get concerned that things will go into the long grass. That shows that the process is moving on reasonably quickly.

Will the consultation add anything to our current processes? I know that the consultation is quite wide ranging, but is there anything that people will see as making a big difference?

Susan Duffy: We started off the process by asking for the views of everyone who works in, and for, the Parliament, so we thought that it was only right, before we finalise the policy, to go back out to everybody and check that we have captured everything.

We have deliberately made the consultation relatively focused, because it is about only the policy, not the changes to the code of conduct, which are—quite properly—in the domain of this committee. We are asking people, for example, whether anything should be added to what we have set out in how people deal with something informally and whether anything that we have not thought about should be considered in how we deal with complaints formally. We give people an opportunity to say whether there is anything that they feel has not been captured in the overall policy. We want to check in with people to ensure that what we are doing is going along the right lines.

The Convener: That is really useful. Mark Ruskell has questions on the use of the ethical standards commissioner and how he or she will be involved in the process.

Mark Ruskell (Mid Scotland and Fife) (Green): My questions are about the possible advantages or disadvantages of moving away from our current procedures, under which such complaints eventually come to this committee and we consider sanctions, where appropriate. You obviously want us to reflect on your report and on how a change might be brought to bear. What was the working group's thinking on the advantages? Might we also need to consider some downsides?

Susan Duffy: One of the overall advantages of not having complaints dealt with in this committee setting is that the process would be exactly the same for all complaints, regardless of whom the complaint is being made against. We took into account the fact that we already have a code of conduct and tried to make suggestions about how the current code could be changed. The committee will obviously have to look at that, but we do not want to knock the code of conduct out of shape.

A disadvantage of not taking complaints through the current process is that a non-statutory investigation would not have the powers that the commissioner has under statute to compel witnesses to appear and to compel the production of documents. Another thing—it may be an advantage or a disadvantage; I do not know—is the key question: if we took the commissioner and this committee out of the process, who would apply a parliamentary sanction?

The joint working group's purpose was to look at how we could make our current procedures fit with the overall policy, but the group felt that it was properly for this committee to decide whether the system was right, going forward. I am happy to expand on some of the thinking around that.

Mark Ruskell: The report by Dame Laura Cox at Westminster recommended something similar. Did that report feed into your thinking at all?

Susan Duffy: I read Laura Cox's report with interest. She looked at a couple of different proposals. One proposal was to set up an Independent Parliamentary Standards Authority—IPSA—type of organisation, which would look at complaints independently. The second proposal, which Laura Cox seemed to favour in her report, was to give the standards commissioner at Westminster the power to impose sanctions. We have the results of our survey, but I think that the situation here is different from the situation at Westminster. There are particular problems there.

Mark Ruskell: What do you mean?

Susan Duffy: Harassment is all to do with power imbalances. The results of our survey show that people here have experienced sexual harassment and sexist behaviour. However, from our experience and from talking to colleagues at Westminster, we believe that we do not have such a deferential—if I can use that word—culture as there is at Westminster.

Mark Ruskell: So, you want us to look specifically at issues around the code of conduct and who might apply sanctions if we were to depart from the current process. One option would be to look at the powers of the commissioner and whether it would be appropriate for the commissioner to apply them.

Susan Duffy: Yes.

Mark Ruskell: Is there anything else that you think we should look at?

Susan Duffy: There are a number of issues. It is not that the system is broken or that there have been any issues with it, but, when we looked at the matter, we were thinking about it from the point of view of the complainant and how confident somebody would be in bringing a complaint forward in a political sphere.

For example, it is obvious that the complainant's identity should not be made known in any report on any investigation, but, when a report is published, even though the person's name is not in it, they know that it is about them. We considered whether there could be situations in which we would not publish a report, but, because of the system that we have, we did not think that we could ask Parliament to take a decision on imposing sanctions against a member without knowing the basis for doing that. That would not happen in a normal employment situation; therefore, we recognised that the report would have to be published. We then asked ourselves whether that would put somebody off.

There are also issues relating to having some sort of system of appeal and representation. Again, we looked at that from the perspective of the complainant and how they would feel about interacting with this committee. Even though that would take place in private, it could be a daunting process.

The Convener: We will move on to the thorny issue of time limits on complaints. Elaine Smith has questions on that.

Elaine Smith (Central Scotland) (Lab): I first want to go back a step to the previous line of questioning and to what Susan Duffy said about Westminster. Is it just a power and deference issue, or is it more than that? There is a male-dominated macho culture at Westminster, which this Parliament perhaps does not have to the same extent because there is a critical mass of women here. Does that make a difference?

10:15

Susan Duffy: The report makes it clear that a lot of the issues come from structural inequalities and it talks about the work that this Parliament is doing to alleviate the structural inequalities. You are absolutely right that such inequalities have an impact on the overall atmosphere in an organisation. The Parliament has done and continues to do a lot to consider the structural inequalities and ensure that gender balance is taken into account and women are represented in key decision-making bodies. As you can see, we

have two women in senior positions in the Parliament who have been involved in the issue.

Elaine Smith: Obviously, no one is being complacent about that, and work will continue.

Susan Duffy: Absolutely—there is lots more to do.

Elaine Smith: We had a brief discussion with the commissioner about the time limits for complaints. Under the current arrangements, the commissioner is obliged to seek a direction from the committee to investigate complaints that are made more than one year from the date when the complainer could reasonably have become aware of the conduct complained about. That does not mean that there is a limit as such, because the committee might give that direction if asked. Will you say a bit more about why you propose that no time limit should be applied to complaints about sexual harassment?

Susan Duffy: On the first point, it is good that the committee can apply a direction, but one reason for proposing a blanket approach of having no time limit for this type of complaint is so that we do not put the committee in the invidious position of having to take decisions on a case-by-case basis.

We know that it is always better if people raise complaints as soon as possible after something has happened and when everything is fresh in people's minds but, particularly with this type of complaint, it can be very difficult for people to do that. They might feel powerless to do something because the person is in a position of authority or power over them. They might be frightened to come forward and frightened that they will not be believed, and the overall culture might not help. There have been instances in which women have come forward when they have felt more confident or, because things have changed, that they might be believed and will not be blamed for something. Alternatively, they might see that the person is going to do another job and they might want to highlight the issue. It can be extremely difficult for people to pluck up the courage to bring forward such complaints. Because we are trying to put in place a system in which it is easier for people to come forward and people will feel more confident, we thought that it would seem contradictory to have a time limit.

We considered whether we should get rid of the one-year limit and have another limit, but we decided against that, because we thought that any time period would be arbitrary. We recognise that any investigation will need to take into account how far back the allegations go, whether the behaviour was a one-off or continued over a period, how serious it is and how much people can remember about what happened. That would all

be taken into account in the investigation into whether there is a case to answer.

Elaine Smith: I think that we will come on to what the sanctions might be, particularly with ex-members, for example.

It might not be entirely clear whether a complaint relates to sexual harassment before it has been looked into. Would there be situations in which it could be difficult to determine that on initial inspection? How would that affect the time limits?

Susan Duffy: That was also something that we grappled with. We took the decision when we started that we would focus on sexual harassment specifically, rather than bullying and harassment more generally, because, as we have just spoken about, the issues of structural inequality and power imbalance play out very strongly in relation to sexual harassment and sexist behaviour and there are particular interventions that we need to look at for those.

We also recognise that, when we have reviewed them, our revised procedures on harassment and bullying more generally are probably going to look similar to what is proposed for sexual harassment. That is why the report invited the committee to consider whether, if there were to be a separate class of complaint, it should be made slightly wider than sexual harassment and should relate to the treatment of others, in order to future proof the code of conduct for the time when we revise our procedures on harassment and bullying more generally.

To answer Elaine Smith's question, that is a long way of saying that, if it were done in that way, there would be less likelihood of something falling between two stools. The last thing that we want is for a complaint not to be taken forward because we are not sure whether it is about sexual harassment or bullying.

Elaine Smith: I know that we will come on to talk about ex-members. Susan Duffy mentioned the culture of respect workshops. Ex-members will not have had the opportunity to attend. In some ways, the culture of the Parliament will change, no matter whether it has been better or worse than other places. The sexual harassment policy in the annex to the report refers to things such as invasion of personal space. How will grey areas be dealt with? The kind of thing that I am thinking of is that whereas, a number of years ago, an ex-member may have thought it appropriate to give everyone they came across a cuddle, now we might not consider that entirely appropriate, depending on who it is and the circumstances, if we have been on the workshop and thought about it. How would that kind of thing be dealt with, given

that the culture may have been very different five or 10 years ago?

Susan Duffy: Unlike Westminster's, our code of conduct has mentioned sexual harassment specifically from the beginning. It did not describe what it was in detail, but there are definitions under the law. From the beginning, the Parliament has had a culture of treating people with respect. We are now trying to put a bit more detail into the definitions. I would argue that a lot of what we are talking about now was also unacceptable five years ago, even though it is only now that we are so specifying.

In Elaine Smith's example, context is everything. It goes back to power imbalance. I might give Vicky a cuddle when we leave the committee room. That is fine—isn't it? [*Laughter.*]

Vicky McSherry: Yes, that is fine.

Susan Duffy: If I were to do that with a member of my staff when I am in a position of authority over them, that would be different.

Elaine Smith: That is interesting, particularly on the issue of ex-members, which we will probably come on to later.

Gil Paterson (Clydebank and Milngavie) (SNP): I have a couple of questions later, but this is a point that has not been raised yet.

There may be an investigation under the party systems, and the person may be cleared. Because what is being proposed here involves no time limit, no matter the outcome of the party investigation, somewhere down the line the complainer may complain through this process. What would happen?

Vicky McSherry: Are you asking about a complaint that has been dealt with previously?

Gil Paterson: Yes, by the party system, specifically.

Vicky McSherry: If we want people to raise their concerns through the new policy, we need to give them the opportunity to do that. A different process will be followed and the matter will go to the independent investigator. Then it will go back to the party, the employer or whoever is making the complaint. Because it is a different process and we have been more explicit about the behaviour that is expected of people, the behaviour will have to be tested against the standards that are set out in the new policy.

Gil Paterson: The JWG said:

"it may be considered appropriate for complaints of sexual harassment to be treated as a separate class of complaint."

We are interested in the reasons for that. I am concerned about the suggestion, because when

we heard from the commissioner at the committee's most recent meeting, we talked about differential treatment. What is proposed is a differential approach in two areas: the time limit for making a complaint; and the category of complaint. Sexual harassment might be a separate category, which is not what we have currently.

I think that one or two members of this committee might have difficulty with that. The commissioner was concerned about the difficulties in law that a differential approach to complaints could cause—I will not read out what he said. For instance, if there is a time limit for complaining about verbal abuse or a physical attack, a person might not come forward within the year, perhaps for the same reasons that we have been talking about in relation to sexual harassment—indeed, the same person might have experienced that. That, to me—and, I think, to the commissioner—looks unfair, because we would be treating one form of inappropriate behaviour differently from another, which might be equally serious for the individual. How can we square that circle?

Susan Duffy: I agree with your final point about a separate category. That is why we asked whether, if a separate category were to be created, it should cover something broader, such as the treatment of others—it would be about someone's behaviour, whether we are talking about sexual harassment or bullying.

You asked why we suggested that you might want to consider creating a separate category. I suppose that we are really just putting the question back to you about whether the changes that the group proposed—which we think need to be made, to ensure that the same principles apply to complaints against members in relation to their behaviour—should apply across the board to other complaints that you deal with under the code of conduct. That is obviously a decision for the committee.

That is why we thought that, in considering whether to apply what we propose across the board, you might think that such an approach would not be appropriate for all the types of complaint that you have to deal with, such as complaints to do with members' interests or breaches of confidentiality. We therefore thought that one option would be to create a separate category, because we are talking about complaints about people's behaviour, which are a different type of complaint.

Gil Paterson: I can understand that. There is clearly a difference. However, the impact on the individual can be very similar.

Did the joint working group take evidence specifically on the impact of the proposed

approach in that regard? I am not saying that what has been raised does not have to be dealt with; these are very serious issues, but there are other very serious issues that we in this Parliament need to deal with, too. The issue is whether you separate them. Was there any discussion or investigation of what the impact would be if the committee did not make the suggested changes to other elements of the code of conduct in a holistic fashion, with regard to all inappropriate actions?

10:30

Susan Duffy: We looked at the code of conduct and at complaints about bullying and harassment generally—in this case, we are talking about sexual harassment. We are trying to put the complainant at the centre of the process, but there are elements of the code of conduct that jump out at you because they do not put the complainant at the centre of the process or they do not afford them the same rights as the respondent. For example, currently, a member who is complained about is given a copy of the commissioner's report, but the person who complains is not, nor do they have the ability to make representations.

The other issue with the way that the code is written at the moment is that our policy says that people can try to resolve an issue informally. We would encourage people to do that where appropriate, but sometimes it is not appropriate to do that—the person might not feel comfortable doing it or the matter might be too serious. We are saying clearly that people do not have to have gone through all the informal processes before they take a formal complaint. The way that section 9 of the code of conduct, on excluded complaints, is written suggests that people would have to go through lots of informal procedures before they could have a formal complaint taken to the commissioner. That relates to complaints from SPCB staff or members' staff. It also suggests that the decision whether to refer a complaint formally to the commissioner and the committee would be taken by the SPCB rather than by the complainant.

That was our thinking behind why we said that we thought that the code of conduct had to change. As I said, that relates to complaints about somebody's behaviour. It relates to issues of natural justice and the complainant feeling that their voice needs to be heard. It is for the committee to decide whether it thinks that that is appropriate for other types of complaint that you deal with—I am talking about a breach of the Interests of Members of the Scottish Parliament Act 2006, for example, rather than complaints about somebody's behaviour.

Maureen Watt (Aberdeen South and North Kincardine) (SNP): Elaine Smith talked about

former members and asked what might happen in those circumstances. What are the challenges in establishing findings and conclusions in historical cases?

Susan Duffy: Some of the disadvantages are that memories can fade over time, there might be confusion about dates and facts, and some documents might not be available any more. There are potential difficulties in that regard.

What also plays into that is how serious something was and whether it was a one-off or a recurring issue. People are more likely to be able to recall more serious, recurring behaviour than a one-off sexist comment that was made, say, 10 years ago.

Maureen Watt: What, then, is the merit in carrying out investigations into former members? What could usefully be done with the outputs of such an investigation?

Susan Duffy: A consequence of there being no time limit on making a complaint means that the policy would also apply to, for example, a former member of staff.

We recognise that the issue of sanctions comes up. The person would no longer be an MSP, so parliamentary sanctions could not be applied. For an ex-member of staff, we could not undertake any disciplinary proceedings, because they would no longer work here.

There are a couple of reasons for our approach. It could—particularly for somebody who has been thinking about making a complaint for a long time—provide closure or the opportunity to be heard. It would also be a way for the organisation to learn lessons. Although we appreciate that there could be no disciplinary sanction, we could learn lessons and the person affected could be given closure, because they would feel that their complaint had been listened to and investigated.

Maureen Watt: When a person complains, at what stage is the person who is complained against informed? That is especially important if the matter is played out in front of the press and in the public domain. How soon is—for want of a better word—the accused informed? How is that done?

Vicky McSherry: In our new process, which will involve the use of independent investigators, the individual will be told as soon as the complaint is received. That is the process for staff.

Susan Duffy: In relation to members, as far as I am aware, when the commissioner receives a complaint, they will contact the person against whom the complaint has been made. Subsequently, they will be invited to come in to be told about the allegations against them and to respond to them.

Maureen Watt: What training does anybody involved in the process have to enable them to distinguish between real and vexatious complaints?

Vicky McSherry: For our new process, we will appoint an independent investigator to investigate complaints against staff. We will go through a full procurement process. We will be looking for experienced and qualified people who are used to doing such investigations. They will be brought up to speed with our processes and the behaviour standards that we expect. Predominantly, those people will come from a human resources or legal background and it will be the role that they do all the time.

I do not know about the commissioner—I assume that there is training for the commissioner and his staff.

Susan Duffy: The commissioner's staff are trained in investigation. The report makes it clear that, recognising the nature of the complaints, investigators should also have the skills to be inquisitorial without being adversarial and to deal with things appropriately and sensitively. We would obviously specify that in the contract for tender.

In relation to the commissioner, the report says that they would need to satisfy themselves that their staff had the skills and abilities to investigate the complaints on that basis. As well as having the skills of investigators, they will need to have the skill to deal with such complaints sensitively and appropriately.

The Convener: We move on to the issue of anonymity, which is an important part of the report.

Tom Mason (North East Scotland) (Con): It is difficult to maintain anonymity most the time. What is the balance between telling the respondent that there is a problem and not identifying the complainer? How soon should the respondent be told? It is a difficult balance but, at some stage, that has to happen, otherwise natural justice will not take place.

Susan Duffy: You are right; it is a difficult balance. One of the reasons why we talk about the issue in the report is because the feedback that we got from the survey was that people's worries about anonymity and confidentiality were a barrier to reporting. We wanted to be up-front about what people could expect.

Particularly when we are talking about a power imbalance, we completely appreciate that a person who is making a complaint might not want the person they are complaining about to know about it. However, you made the point about natural justice. In any such case, anybody who is accused of anything has to have the opportunity to

respond. With such complaints, that means knowing the full details, which will probably mean knowing the identity of the person who has made the complaint. I stress that that does not mean that the identity of that person should not be kept confidential. It must be kept confidential to those who have a legitimate right to know.

There might be occasions when we deal with issues informally. Let us say that a member of my staff comes to me and says that someone has behaved in a sexist manner towards them, but they do not want to do anything about it. I might have heard that from somebody else, and if I am dealing with the incident informally, I might, as a manager, be able to go and speak to the person without having to say who had made the complaint. There could be circumstances in which we deal with things informally and do not have to make the complainer's identity known to the person who is being complained about.

A formal complaint takes us into very different territory. As we say in our report, and in order to manage people's expectations, the only circumstances in which the respondent would not be told the identity of the person who made a formal complaint would be an extreme situation in which, for example, there was concern about an individual's safety.

It is a difficult balance. We want to get rid of as many barriers as possible, but we also need to make sure that the process is robust and fair to both parties.

Tom Mason: If a complaint is dealt with informally in the first place but then leads to a series of complaints—perhaps two different people or multiple persons complain about the same person—how do you log that, keeping it logical and within the same domain rather than logging individual complaints?

Vicky McSherry: As Susan Duffy said, if someone has made a formal complaint—

Tom Mason: That is the easy part.

Vicky McSherry: Well, not necessarily. If a complaint goes down that route, it cannot be done anonymously. If a formal investigation is to take place, the person who is responding to the complaint needs to know who has complained. They need to have the details to be able to respond and, as Susan Duffy said, the details include the name of the complainer.

Correct me if I am wrong, but I think that you are talking about someone who has not made a formal complaint but who has maybe logged the situation in some way. When the support service is set up, people will be able to contact it anonymously just to speak to somebody, so they do not have to give their name. They might just want to talk to

somebody, log the situation somewhere and perhaps come back to it in the future. They might log it at that point but not want to give their name. If the case proceeds to a formal complaint, we would expect people to put their name to it.

Tom Mason: You say “log” but how can that be done effectively? We are dealing with the whole domain, but complaints and comments might be made to different managers in different places.

Susan Duffy: Logging will be done through the independent support service. I appreciate that it is difficult to collect data across the piece if people are just having chats with their manager. We are looking at being able to log complaints centrally through the independent support service, which will be available to everybody. We are encouraging people to contact that service, regardless of whether they want to make a complaint or whether they just want to talk something through with somebody.

Tom Mason: Will the respondent know that that log is being kept? Will they have access to it? If— heaven forbid—there were dozens of complaints against me, would I be entitled to know about them?

10:45

Susan Duffy: The log records that people have phoned up with an issue with somebody but, at that stage, it does not record formal complaint. If a formal complaint was made, we would tell the respondent.

We know that a barrier to people coming forward is that they do not want to be the person who puts their head above the parapet, so we will explore with our independent support service how, if a number of people log concerns about the same person—and action cannot be taken on the back of that—those operating the system could have a confidential and secure way to tell the people who complained that they were not alone in making such complaints, which would allow them to think about taking further action. That is complicated, because we would have to put in place a lot of safeguards, and it raises the issue of fairness.

Such an approach is relatively new; it has been trialled by a few universities in the States. The Equality and Human Rights Commission mentioned it in a recent report, and the Ministry of Justice is looking at something like it. The system is complicated, because it involves issues of fairness and data protection. We do not have the answers at this point, but we want to explore it further.

Elaine Smith: You mentioned data protection, which I can see being an issue. If information is

kept on someone with their name against it, that person should surely be allowed to ask to see that information.

Susan Duffy: Yes.

Vicky McSherry: Yes—that is one thing that we need to investigate. I understand that the software encrypts the information, so it does not record a complaint against an individual’s name—the information is all coded in some way. That is all a bit technical and I will not pretend that I know what it means. We need to look at the issue further, but data protection is a big factor.

Susan Duffy: We have taken advice and, if we can have a system that encrypts information and uses a code rather than a person’s name, that should help with data protection. We will not put in place anything that would go against natural justice or data protection and the general data protection regulation.

Tom Mason: Problems could arise with disclosure. If the respondent wanted a disclosure document, would that be one of the places in which such concerns were confirmed or otherwise?

Susan Duffy: We will have to look at all such questions in the round. We have consulted our legal team and will continue to do so. You are right that people can request disclosure of records that are held about them, so we will have to look at such issues. As I said, one reason why we are looking at the system that I referred to is that, instead of making a person’s name obvious to others, it would encrypt the information.

At this stage, we do not have a final solution. The issue is difficult, for all the reasons that you mentioned.

The Convener: We will move on to access to, and the opportunity to comment on, the commissioner’s report.

Jamie Halcro Johnston (Highlands and Islands) (Con): On the previous point, I recognise that the information could be encrypted, but will you confirm that it could not be the subject of a freedom of information request?

Susan Duffy: We will check. We would not want the information to be subject to FOI requests, and we would have to make sure that that would not undermine what we are doing.

Jamie Halcro Johnston: Of course. As mentioned, this is about access to, and the opportunity to comment on, the draft report. When the commissioner gave evidence to us recently, he expressed a preference for comments from the complainant to be made at the stage of findings in fact, not at the stage of the draft report, which would include findings in fact and conclusions.

Can you comment on that and provide more detail on the approach that you recommend?

Susan Duffy: As I said at the beginning, we tried to apply the overarching principle that we would approach things similarly, regardless of whom the complaint is against.

The starting point is to think about what would happen in an employment situation. If there was an investigation in an employment situation, the respondent, the complainant and any witnesses would be given the opportunity to review the witness statements to check that they were factually correct. Crucially, if—once the investigator has come to a conclusion and the information is given to the decision-making body—the decision is made not to uphold the complaint, the person who made the complaint would have the opportunity to appeal that decision.

That was our starting point, so that is where I probably differ slightly from the commissioner because I think that if there is just the opportunity for someone to comment on findings in fact, but not on the conclusions, we would miss out that appeal process. It is absolutely right that people should be given the opportunity to clarify that something is factually correct, but, for example, if the commissioner then concludes that sexual harassment has not taken place but the complainant thinks that that conclusion is wrong, we think that they should be able to make representations on that conclusion.

Although we have tried to make the process fully analogous with a normal grievance procedure, we know that we cannot, because for it to be fully analogous with grievance procedure, the complainant would be able not only to make a written representation but to appear in front of the committee in some sort of appeal hearing. There are two reasons why that cannot happen. First, the committee was never set up to act in that way, and secondly, it can be quite testing for a person to have to do that. Therefore, we suggest in the report that the complainant should be able to make a written representation.

If, at that stage, we say that there is no case to answer, there is nowhere else for the complainant to go and it is important for them to have the opportunity to appeal that. The person against whom the complaint is made has the opportunity to appeal later on. In an employment situation, if action is then taken against them, they have the opportunity to appeal against that and to appeal against any sanction, as does an MSP. However, we think that it is critical for natural justice that a complainant has the opportunity to appeal against a conclusion as to whether there had been a breach of the code.

Jamie Halcro Johnston: Are the procedures or processes altered if both parties take issue with either the contents of each other's statements or the report itself?

Susan Duffy: With such complaints, it will always be the case that people will interpret differently what others have said. We were talking earlier about the skills of investigators. Investigators need to be skilled because, particularly with these types of complaints, they need to weigh up differing interpretations of what has happened and come to a conclusion. The standard of proof is the balance of probabilities. These types of complaints are rarely easy to investigate and there is rarely an easy answer.

Vicky McSherry: I do not want to put words into the commissioner's mouth, but I think that he indicated that it would be very difficult to be sitting there with all the different evidence. That is always going to be the case in these types of situations. As Susan Duffy said, 99 per cent of the time it comes down to one person's word against the word of another. The role of the investigator is to sit there and look at one person's view and then the other person's view. There will not necessarily be lots of other witnesses or lots of other evidence; it will come down to making a decision based on looking at those views.

It does not sit well with me that the respondent would be given more opportunity for input than the complainant. That does not feel right.

The Convener: Maureen Watt wants to come at the issue from another angle.

Maureen Watt: As you know, the committee has been conducting work to tighten the confidentiality provisions. Do you foresee that the complainant having access to the commissioner's report before the committee had completed its deliberations might present risks as regards the confidentiality of the process?

Susan Duffy: At the moment, if a member who has been complained about breaches confidentiality, a complaint can be made and the committee can take action against them. I appreciate that the committee would not be able to take action if a complainant were to breach confidentiality. If a member of our staff were to breach confidentiality, that would potentially be a disciplinary offence.

If two people have access to a report, as opposed to one person, that means that there is potentially twice the risk of something being leaked. However, the balance is that the complainant must be given a copy of the report, for the sake of natural justice. We make it clear that confidentiality must be respected. As the report says, we work in an organisation that is not like other organisations, in that things are subject

to media scrutiny. Confidentiality is always important, and it is vital in this case. I know that the committee takes that very seriously.

The Convener: We will move on to excluded complaints. The joint working group report recommends that complaints against a member about the treatment of any member of staff in Parliament should no longer be excluded from the commissioner's remit. What would be the effect—including the advantages—of no longer excluding complaints against a member about the treatment of parliamentary staff or the staff of other MSPs?

Susan Duffy: The code of conduct is written in such a way that, when a complaint is made by a member of SPCB staff or a member's member of staff, that will be looked at by the relevant business manager or by the human resources office.

In a sense, the issue is covered by our policy of looking at things on an informal basis. Someone who comes to us might want a situation to be dealt with informally—they might want to deal with it themselves or to talk to the person's line manager—but they might also want to talk to HR and, if the situation involved a member, somebody from HR or me, as a manager, would go and have a word with the relevant business manager.

The code does not reflect what the situation is with the policy. The crucial thing for me is that the code is currently written in such a way that, for complaints to be dealt with by the commissioner, all those informal processes would have to have been gone through before a formal complaint could be taken. In addition, it is the SPCB that would refer on any complaint. That takes control away from the complainant and goes against the overarching policy, whereby we are saying that it is not necessary to have gone through all the informal processes: if people want to make a formal complaint, that is their choice.

The Convener: That makes sense to me.

You have held up remarkably well. I will move on to the final area of questioning, which is on the treatment of visitors to the Parliament. Did the joint working group give any consideration to recommending that members should be held to a standard of behaviour in relation to people whom they encounter in the context of their parliamentary duties? How should that be treated under the code?

11:00

Susan Duffy: When the joint working group was looking at that, we wanted to make sure that we were clear about the standards of behaviour that should apply to everybody who works in or for the Parliament, and which would apply regardless of

whom people interact with. When we were looking at that, we probably thought that the code already covers members' treatment of witnesses. However, looking at the code now, I think that it possibly does not, but I do not see any reason why.

For example, on the non-MSP side of things, if a person who comes here believes that they have been treated badly by a member of staff, there is already a complaints procedure through which they can raise a complaint against that member of staff. If somebody came to me and said that a member of my staff had been sexually harassing somebody, I would probably go through the procedures that we are talking about now to investigate and take a decision on it.

If we are looking to apply the same principles, I see no reason why the code of conduct should not make clear the standard of behaviour that is expected of a member in their treatment of a visitor to the Parliament, and that a visitor may make a complaint under the code if they feel that they have been treated inappropriately.

The Convener: That seems to be reasonable.

Jamie Halcro Johnston: At the beginning, you talked about the culture of respect workshops that are taking place and you said that more than 700 people have attended. I attended a workshop yesterday. How are you monitoring the feedback from people who have attended the workshops, and how will you analyse and monitor the workshops' impact?

Vicky McSherry: Everyone fills in an evaluation sheet when they are at the workshop, so we are taking feedback from that and collating it. Once the workshops have finished, we will analyse it. We have had feedback as we have been going along, so we made minor changes to the workshops after the first few sessions and, to an extent, we have continued to do that.

We said that the training is just the first step and it is about changing the culture. Longer term, we need to look at the impact of the training and see what changes have taken place. We have a wee bit more work to do in the joint working group on the measures that we will put in place and how we measure the change. For example, once the policy has been in place for a while, we could come back to the parliamentary community and ask similar questions to see whether there has been any change.

One of the measures that will definitely be put in place, which we do not have just now, is the collation of data by the independent support service. It will collate stats on the number of complaints and contacts that it gets, which will give us data that we do not currently have. There

are plans to measure the change, difficult though that might be.

Jamie Halcro Johnston: On the evaluation of the workshops, a maximum of 15 people attend so the feedback is only semi-anonymous, if that is possible. I hope that you see what I mean—those attending are one of a small group of people and where they sit in the Parliament structure is recorded. How confident are you that the feedback is entirely honest, accurate and constructive? Will people feel confident enough to highlight concerns about whether the workshop was relevant, or what additional things they might like to have seen? I do not know whether I am revealing anything, but the feedback response was simply circling a number from one to five. It was not an opportunity, which we could have provided, to say this or that was good, or this needs to be done better.

Vicky McSherry: To be fair, when people have been completing the sheets, they have been writing quite a lot of comments at the bottom, where there is a free text space. There has been quite a lot of constructive feedback.

It has come through quite strongly that people have appreciated the fact that groups have been mixed and that there have not been groups just for MSPs or staff, which has been really useful for groups to start a conversation and to share and hear different views. That is some of the feedback that we have had.

We need to look at what we do next and whether any further training is required. Once the workshops are done and out of the way, there will be an exercise to look at all the feedback. We might even have to go back to people again for further feedback, and we might have another couple of focus groups specifically on the training to ask what the next steps that we could take should be.

Jamie Halcro Johnston: The diversity of the people, their backgrounds and their roles were really important. Thank you.

Elaine Smith: I want to ask about the conclusion, but before I do that I would like to explore something further. All workplaces have office politics and power dynamics, but this is an unusual workplace. People who look at what goes on in the chamber might sometimes think that there is not much of a culture of respect at all. That can just be the cut and thrust of political debate.

Another aspect is reputational damage, which is important to anyone, but is particularly important to members because it could mean the end of their political career. For people in a different working environment it might mean training, and they might still keep their job, but depending on the situation it would be very difficult for members to recover from

reputational damage. If vexatious complaints are made, how will they be dealt with?

Susan Duffy: The policy is very clear that the making of any vexatious or malicious complaints will be taken very seriously. We expect such complaints to be rare but we are very clear, as we are with any of our other policies, whether or not they involve a grievance, that the making of such complaints will be taken very seriously. If someone is found to have made a vexatious or malicious complaint, they will be disciplined and dealt with.

To return to your point on reputational damage, confidentiality is important for the complainant and the respondent because, if someone has made a vexatious complaint, there is no case to answer. If that has been kept confidential, it is less likely that someone's reputation will suffer, because the matter has not made it into the public domain. That is why it is very important that any investigatory process is done in confidence, and can go ahead without the glare of publicity.

Elaine Smith: Paragraph 141 in the conclusion of the report recognises that there will be

“some tricky issues for the SPPA committee to consider”

and that we will need time to do that. It talks about the potential

“need to make legislative change as well as changes to the Code of Conduct.”

Therefore, it suggests that we

“may wish to consider, in the intervening period, whether transitional arrangements need to be put in place.”

Can you elaborate on those transitional arrangements?

Susan Duffy: To return to the one-year time limit, the committee can currently issue a direction to the commissioner. Changing that is likely to require legislative change. For example, the committee can make a direction on an individual basis, but does it want to follow the conclusions of the joint working group, and say that, as a matter of policy, a direction would be issued to the commissioner to look at any complaint that is made that is over a year old? Those are the kinds of issues that I am talking about.

Some things, such as a change to the code of conduct, would take much less time. The committee would have to inquire into that, and produce a report, which would be for Parliament to agree on. For issues on which legislative change is needed, that would obviously take a lot longer.

The committee might look at whether it can do things through directions, or through changes to the code, which can help in the intervening period, until such time as legislation can be changed.

Elaine Smith: Before we put a transitional arrangement in place, we would first need to make a decision and set the legislative change process in train, because we would have to have agreed with the report. Is there anything else that you think should be transitional while the committee is deliberating?

Susan Duffy: We always appreciated that, at the point in time when a policy was put in place, we might not be able to change the code of conduct in terms of complaints against members. Ultimately, we would like to be able to have this policy and everything else in place. As we said at the beginning, we hope to have the policy finalised by March. I do not know whether the committee will have been able to take decisions on whether the code of conduct should be changed by that point; if there is going to be legislative change, that would definitely not happen within that timescale. If the committee agrees with the recommendations of the joint working group and knows that legislative change will be needed, it would be for the committee to decide whether there is something that it could do in the intervening period to send out a signal that says, "We have this policy. We know that changes will have to be made down the line, but this is what we want to do going forward."

The Convener: I thank Susan Duffy and Vicky McSherry. That was an intense amount of work, which you covered extremely well. The session was useful to the committee, and I hope that the committee's questions have been useful to the joint working group, too. I wish you all the best with progress on that, and for Christmas and new year.

11:10

Meeting continued in private until 11:30.

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