

CONFIDENTIALITY AND ANONYMITY IN CASES INVOLVING HARASSMENT, BULLYING AND SEXUAL HARASSMENT

Note by the Registrar of Members' Financial Interests

Executive summary

The Report of the Working Group on an Independent Complaints and Grievance Policy, published on 8 February, proposed that there should be total confidentiality about cases involving harassment, bullying and sexual harassment, and almost no disclosure about either the victim or the subject of the complaint –with one major exception: if an allegation is upheld, when details should be given to the political party to which the subject belonged.

The important question before the Committee is how best to balance the public interest in disclosing some information about harassment, bullying and sexual harassment by MPs while protecting sensitive personal information about complainants and victims and about witnesses and the subjects of complaint.

The Committee is invited to consider some modification to the Leader's proposals, as contained in the Working Group's 8 February report and in her 11 June letter to the Chair. These would allow the Commissioner to

- publish the fact that she had rectified or not upheld a case, together with a supporting summary of that case;
- disclose some information in exceptional cases before the case had been concluded: to other agencies, if this was needed in order to protect the interests of vulnerable people; or more generally, if she suspected that someone was a serial harasser or bully.

The Committee may wish to advise against notifying the MP's political party if a n allegation against him or her is upheld.

The Committee may also wish to reconsider the proposal that it should not provide the House with any details about a case if making a formal report which recommends sanctions. (Legal advice on this is awaited.)

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14 June 2018

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Purpose of paper

1. This paper explains the system of confidentiality envisaged by the Working Group on an Independent Complaints and Grievance Policy (ICGP) , as set out in its 8 February Report and the Leader's letter of 11 June. It suggests some modifications, principally to allow the Commissioner to publish on her website outline information about complaints which she rectifies or decides not to uphold. If the Committee agrees, it may wish to make these recommendations to the Leader.
2. The Commissioner was grateful to the Committee for highlighting that decisions so far taken on the ICGP do not supersede the current Code of Conduct practice of posting names of MPs on the PCS website when an investigation has begun. This decision was taken by the whole House in 2010. Any decision to step back from this will be perceived as conducting investigations in secret and a radical departure from a commitment to openness and transparency. The changes considered in this paper therefore relate only to cases involving harassment, bullying and sexual harassment.
3. The real question before the Committee is not whether information about allegations of harassment, bullying and sexual harassment should be published; but how best to balance the public interest in disclosing some information about such cases with the need, which will vary in each case, to protect sensitive personal information about complainants and victims, who may be vulnerable, and about witnesses and the subjects of complaint.

Background

The recommendations of the Cross Party Working Group on an Independent Complaints and Grievance Policy

4. The Working Group's Report of 8 February had the following to say about confidentiality and anonymity:
 - Paragraph 32: "Confidentiality will apply at all stages of the process".
 - Paragraph 36: "...If the resulting decision upholds an allegation of sexual harassment, bullying or harassment, where the perpetrator is known to be a member of a political party, the party will normally be notified of the outcome, unless the complainant specifically requests that this does not happen."
 - Paragraph 58, in relation to sexual harassment: "Complainants will have a right to anonymity, which they may choose to waive. If rectification at any final stage of determination includes any published outcome for the perpetrator,

the complainant should have a choice about whether their own identity is made public.”

- Paragraph 65: “Appropriate and confidential records will also be kept about both reporting levels and the types of issues raised, to inform the development of awareness raising campaigns and wider cultural change initiatives.”

5. In the Leader’s letter of 11 June she says:

“Academic research and evidence taken by the Steering Group show that a lack of confidentiality – or the fear of a loss of confidentiality – deters many people who have experienced bullying, harassment or sexual harassment from coming forward. Where relatively less serious complaints are upheld and are resolved with a penalty imposed by the Commissioner, I envisage that the details of the investigation will not be published without the victim’s consent and that the identity of the victim will not be revealed without their consent.

“In more serious cases, because of the importance of confidentiality, no information would be published which could identify the complainant, including the original investigation memorandum from the Commissioner. In that case, I envisage that the Committee’s report would simply state that a complaint of a certain nature had been upheld against a certain MP and that based on the investigation and the Commissioner’s papers, it is recommended that that certain MP should be, for example, suspended for six months.”

Current arrangements for Code of Conduct investigations by the Commissioner and consideration by the Committee

6. The Standards and Privileges Committee’s Sixth Report of 2010-12, published on 2 November 2010,¹ sets out the information to be disclosed during and after investigations by the Parliamentary Commissioner for Standards. Under these arrangements the Commissioner discloses very little until the inquiry is complete. When she opens an investigation she announces on her webpages the name of the MP under inquiry (but not the name of the complainant), and the broad area being investigated. She asks all those involved (complainant, witnesses, MP) to keep the correspondence confidential. She makes no further announcements until the inquiry finishes.
7. When the Commissioner determines a case, she publishes online her correspondence and her resolution letter. If she submits a formal memorandum to the Committee for Standards, which she does in serious cases, the Committee will publish its own report alongside that memorandum and the evidence the Commissioner considered.
8. These arrangements are based on a mix of principle and pragmatism. Between 2003 and 2010 the Commissioner’s staff had not proactively announced the names of MPs being investigated. But if anyone – journalist or anyone else -

¹ <https://publications.parliament.uk/pa/cm201011/cmselect/cmstnprv/577/57702.htm>

asked about a specific MP, the office did confirm whether or not that particular MP was under investigation. Once investigations were completed, if the Commissioner sent a formal memorandum to the Committee, the office would confirm this. The memorandum would be published as an appendix to the Committee's report. If the Commissioner did not uphold the allegation, or rectified it (resolved it informally), he did not publish any information at all about the case.

9. By 2010 this policy had become unworkable. It had given rise to a competitive guessing game by journalists as they tried to work out who was under inquiry. The policy did not prevent the media from publishing information about those suspected or known to be under investigation, or about others involved; and when this happened. The effect of the policy was to leave the field open to complainants, political opponents, campaigners and occasionally the MPs complained about. They controlled the information available. Since the Commissioner was restricted in his contacts with the media, it was very difficult for him to counter this.
10. The greater openness described in paragraphs 6 and 7 above is not perfect. Complainants and others still sometimes publish details of their complaint against an MP before or during an investigation, or even before the Commissioner receives the complaint, despite verbal rebukes. But it delivered accountability, in accordance with the Nolan principles of public life. It enabled the Commissioner and Committee to put authoritative information in the public domain and to exercise some control over what is published. For the first time it enabled the Commissioner to publish details of decisions in cases resolved through rectification (previously criticised as "secret deals") and the supporting evidence.

Changes needed in respect of cases involving bullying, harassment and sexual harassment

11. The Commissioner considers that it is important to publish at least a summary of each case she has concluded so that it can be shown that justice has been done and that MPs are accountable. However, the wider public interest will need to be balanced against the need to protect some or all of the individuals involved:
 - *Complainants/victims* It is agreed that the identity of complainants and victims should generally be protected, to avoid further suffering and to avoid deterring others from coming forward. The Commissioner is fully committed to protecting the identity of the complainant during investigations under the ICGP as is proposed.
 - *Those who are the subject of complaints.* The Commissioner also accepts that confidentiality for the subject of any complaint of sexual harassment is an important issue to be resolved. Given the highly sensitive nature of sexual harassment allegations, the subject of these complaints will not wish to be identified. We have seen, in recent times, the tragic consequences that such allegations can have on politicians and we must be mindful of that.
 - *Others* Depending on the circumstances, in some cases it may be necessary to protect the identity of third parties and/or whistleblowers.

12. Where harassment, bullying or sexual harassment is alleged, the Commissioner envisages that the information published should be in the form of a carefully written summary, instead of the fuller evidence which she normally publishes in other cases.

The Working Group's proposals

13. The solution envisaged by the Leader and the Working Group is that the Commissioner and Committee will disclose no information at all about allegations of bullying, harassment or sexual harassment, whether investigated or not, except in the following limited circumstances:

- If a complaint is resolved through the rectification process. Some or all of the details might be published in some circumstances if the “deal” required it. For example the subject of the complaint might be required to publish an apology. However, if this involved disclosing the complainant’s identity he/she would need to agree to this.
- At the conclusion of the most serious cases, if the Committee submits a report to the whole House. It is envisaged that very little information would be disclosed. The Committee would recommend a sanction to the House. The Leader’s letter envisages that the Committee’s report would say only that the Commissioner had found that a named MP had – for example - sexually harassed someone. The House would then be asked to vote (without debate) on a sanction, which could include either suspension or expulsion. *NB We have asked for legal advice on whether these arrangements satisfy the demands of natural justice.*
- At the conclusion of these and other cases, if an allegation against a member of a political party is upheld. The Commissioner or Committee would be expected to tell the MP’s political party (unless the complainant asked for this not to happen). And the Commissioner and the Committee would be expected to pass information about cases to a monitoring organisation.

The Commissioner's proposals

14. The Commissioner has a slightly different take. Experience has shown it has not always been possible to achieve confidentiality. For example, the complainant (or sometimes the subject of the complaint or a third party) may pass information to the media with the aim of pursuing their dispute in public. And, while most of the Commissioner’s other investigations are conducted mainly by correspondence, cases involving harassment, bullying and sexual harassment are more likely to require witness testimony. Each contact with a witness increases the possibility of the complaint and the investigation becoming more widely known.

15. Once a case has been determined, it is even more likely to leak. For example, if an allegation is not to be upheld, the MP concerned might well think it in his or her interest to make this known. If the MP knows that he or she will be disciplined, they might choose to make the matter public in the Chamber in order

to win support. If they are ingenious and the Chair is sympathetic or not alert, they could use parliamentary privilege to do so without risk of legal challenge, but they could do so even without privilege. The complainant would have the choice of letting it lie, or suing for defamation, which would expose them to precisely the court process they had sought to avoid, without normal legal protections.

16. Under the proposed procedures, the Commissioner will not be conducting investigations; that will be for the independent investigators. It will therefore not be possible for her to publish on her website the list of those MPs who are being investigated.
17. The Commissioner also agrees that she should generally give out no information at all about cases of harassment, bullying or sexual harassment (on her website or in response to media enquiries) until an outcome is reached. This would be analogous to the treatment of an employee whose employer is investigating disciplinary charges against him or her. However, once a case has been concluded, she believes that there should be a carefully managed procedure for publication of information. She suggests that
 - If the Commissioner has rectified (resolved) an allegation against an MP, she should publish on her webpages simply that an allegation under the ICGP against Member x has been resolved, supported by a brief summary of the facts. However, the Commissioner would be able to publish details identifying the complainant if he/she agreed. (NB The Working Group has proposed that if the investigator, complainant and the subject of the complaint agreed a resolution before the case came to the Commissioner, this too could be published. But it would not come within the Commissioner's remit.)
 - If the Commissioner found that the allegation was not substantiated, she would normally publish this with a brief summary of the facts.
 - If the Commissioner submitted a formal memorandum to the Committee, she would not publish any information about this; nor would her office disclose this fact if asked. The memorandum would be redacted, for example to remove names, if considered necessary in that case, before submission to the Committee. The Committee would later publish its own Report to the House. Subject to legal advice, a summary of Commissioner's finding might be attached (rather than the full evidence, which is published in other types of case).
18. Whatever arrangements are agreed, it would be helpful if the written procedures specifically provided for the Commissioner, exceptionally, to disclose some information before a case was concluded if there was evidence suggesting that someone was a serial harasser or bully. Publishing the fact of a harassment, bullying or sexual harassment allegation against a prominent individual can be helpful, as the Jimmy Savile and Harvey Weinstein cases have shown, because if others have also suffered but did not feel able to make a complaint themselves, this can encourage them to come forward. We must also remind ourselves that, again in recent times, only when high profile names have been entered into the public domain have others come forward. Former celebrities have been charged,

sentenced and imprisoned for many years as a result of their victims coming forward. If the Committee is uneasy with this proposal, the procedures might provide for the Commissioner to seek authorisation from the Committee to identify individuals in the public interest. The test would be parallel to that used in criminal justice proceedings.

19. In other circumstances the Commissioner or others might need to make a disclosure to another agency in order to protect vulnerable adults or children. The procedures would need to provide for this too.
20. We suggest that it would not be right to share unpublished information with political parties, as was envisaged in the Working Group's original report.

Recommendation

21. If the Committee agrees, it may wish to recommend to the Leader that it would be helpful if the Working Group's original proposals were modified in the following ways:
 - a. To allow the Commissioner to publish the fact that an allegation against an MP had been rectified, with a brief summary of supporting information. The complainant would not be identified unless he or she agreed.
 - b. To allow the Commissioner to publish the fact that an allegation against an MP had not been upheld, with a brief summary of supporting information. The complainant would not be identified unless he or she agreed.
 - c. To remove the requirement to share with political parties information about cases concluded.
 - d. To provide for the Commissioner to disclose some information before a case had been concluded, in exceptional cases only, if there was evidence suggesting that someone was a serial harasser or bully. (If a safeguard is needed, she might be required to approach the Committee about this.)
 - e. To provide for the Commissioner or others to make disclosures at any stage to another agency in order to protect others, particularly vulnerable adults or children.
22. Subject to the legal advice which is awaited, the Committee might also wish to recommend that if it published a report to the House on such a case, a summary of Commissioner's findings might be attached instead of the full evidence (which is published in other types of case).