

Independent Expert Panel

The Conduct of Ms Patricia Gibson MP

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pursuant to House of Commons Standing Order No. 150A

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The Independent Expert Panel

The Independent Expert Panel was established by the House of Commons on 23 June 2020. The Panel hears any appeals from decisions by the Parliamentary Commissioner for Standards in complaints against a MP or former MP under the Independent Complaints and Grievance Scheme (ICGS); and considers referrals from the Commissioner to determine sanctions in such cases. These are cases involving an allegation of a breach of the Bullying and Harassment Policy for UK Parliament, or the Sexual Misconduct Policy for UK Parliament.

Current membership

Mrs Lisa Ball
Monica Daley
Mrs Johanna Higgins
Sir Stephen Irwin (Chair)
Professor Clare McGlynn
Miss Dale Simon
Sir Peter Thornton
Dr Matthew Vickers

Powers

The Panel's powers are set out in House of Commons Standing Orders Nos 150A to 150D. These are available on the internet via www.parliament.uk.

Publication

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Report by the Chair of the Panel

- 1.1 The Independent Expert Panel (the Panel) was established by the House of Commons on 23 June 2020. The Panel hears any appeals from decisions by the Parliamentary Commissioner for Standards (the Commissioner) on complaints against a MP, or former MP, under the Independent Complaints and Grievance Scheme (ICGS); and considers referrals from the Commissioner to determine sanctions where she has upheld a complaint in serious cases. These are cases involving an allegation of a breach of the Bullying and Harassment Policy for UK Parliament, or the Sexual Misconduct Policy for UK Parliament.¹
- 1.2 The Panel is guided by the principles of natural justice, fairness for all parties, transparency and proportionality. We understand the seriousness of, and the harm caused by, bullying, harassment and sexual misconduct. We are rigorously independent, impartial and objective, acting without any political input or influence.
- 1.3 This is a report of the decision of the Panel on an appeal following a referral by the Commissioner of a complaint under the Sexual Misconduct Policy that she had upheld against the respondent, Patricia Gibson, the Member for North Ayrshire and Arran.
- 1.4 The complainant, a member of party group staff in Westminster, made two allegations under the Sexual Misconduct Policy. One was subsequently assessed under the Bullying and Harassment Policy with the agreement of the parties.
- 1.5 Following an investigation by an independent investigator, the Commissioner agreed with her recommendation that that a single allegation under the Sexual Misconduct Policy should be upheld. This was that Ms Gibson had subjected the complainant to unwelcome physical contact of a sexual nature in January 2020 in the Stranger's Bar in the Houses of Parliament when she was drunk, in the context of repeatedly propositioning him in the bar and subsequently. The Commissioner also agreed with the investigator's recommendation that the second allegation that had been assessed under the

¹ See, UK Parliament, [Independent Complaints and Grievance Scheme](#), for more detail on the ICGS and copies of the relevant policies.

Bullying and Harassment Policy should not be upheld.

- 1.6 The Commissioner referred the case to the Panel to determine sanction in a memorandum dated 28 March 2022. The respondent appealed the Commissioner's decision to uphold the complaint, and to refer it to the Panel, on 29 April 2022. The complainant did not appeal the decision not to uphold the second allegation.
- 1.7 I appointed the following sub-panel to consider the respondent's appeal and the Commissioner's referral:
- Mrs Lisa Ball
 - Ms Monica Daley (chair)
 - Professor Clare McGlynn
- 1.8 For the reasons set out in its decision of 16 June 2022, section 2 of this report, the sub-panel upheld Ms Gibson's appeal, and set aside the Commissioner's decision to uphold the complaint. It did not therefore need to consider the referral to determine sanction.
- 1.9 The Panel has specified the grounds under which an appeal can be brought.² The sub-panel upheld the respondent's appeal on the ground that; "The investigation was materially flawed in a way that affected the decision of the Commissioner." The sub-panel agreed with the respondent that the investigation was materially flawed in three respects:
- The investigator applied the wrong test in determining what constitutes conduct of a sexual nature in the Sexual Misconduct Policy. She failed to consider all the circumstances, including the complainant's perspective, to decide whether it was reasonable to conclude that the conduct was sexual in nature.
 - Procedural unfairness had arisen because of the substantial changes that the investigator made to the draft Formal Assessment Report after the Factual Accuracy Check. These followed representations from the respondent that the investigator had not made a factual finding in her

² Independent Expert Panel, *Appeals, referrals and sanctions: Guidance for the parties* version 2, October 2021, paragraph 21.

draft report that the conduct complained of was conduct of a sexual nature. These changes exceeded what was permitted by the Sexual Misconduct Policy.

- The investigator's treatment of evidence of the respondent's personal circumstances and whether it might be relevant to whether the alleged behaviour was likely to have occurred or not was inconsistent and procedurally unfair.

1.10 The sub-panel concluded that in her memorandum to the Panel setting out her reasoning behind her decision to accept the investigator's recommendation to uphold the allegation, the Commissioner had not identified these material flaws with the investigation, or addressed them. They therefore concluded that the appeal should be upheld.

1.11 Neither the Commissioner nor the sub-panel found that the complaint was vexatious or made in bad faith.

1.12 In their decision the sub-panel stressed the importance of all the parties involved in an ICGS complaint, including complainants, fulfilling their commitments to maintaining confidentiality:

The confidentiality of the ICGS process plays a vital role in enabling complainants to come forward, safe in the knowledge that their complaint will be investigated without attendant publicity and that they will be protected with anonymity. A breach of confidentiality also erodes the trust of all the parliamentary staff and MPs who are subject to the Behaviour Code, and the Independent Complaints and Grievance scheme. The sub-panel consider that knowingly breaching confidentiality may hamper the ability of the investigator, the Commissioner, and the Independent Expert Panel to deal with cases. Breaches of confidentiality, therefore, risk the integrity of the ICGS scheme and its decision-making processes [...]

1.13 The Panel's policy is generally not to publish reports relating to appeals that have been upheld in favour of respondents, where the confidentiality of the process has been respected throughout. However, as the sub-panel sets out, there has been significant media reporting relating to this case, as well as substantial comment on social media. These have resulted in Ms Gibson receiving pronounced negative media attention; online abuse and

harassment, including sexual threats; and physical damage to her constituency office. It is therefore appropriate that the decision that the complaint against her has not been upheld, and the reasons why, should be published.

- 1.14 I therefore make this report to the House pursuant to Standing Order 150A. All other information about this case, including the investigator's report, the Commissioner's memorandum, and the identity of the complainant and any witnesses, remains confidential. There must be no action to victimise or retaliate against the complainant, respondent, or any witness as a result of this complaint or report.

Sir Stephen Irwin
23 June 2022

Appeal against the decision of the Commissioner

Decision of the sub-panel on appeal against the decision of the Commissioner

16 June 2022

Mrs Lisa Ball; Ms Monica Daley (chair); Professor Clare McGlynn

Background

- 2.1 The complainant is a member of a political group's staff based in the Palace of Westminster. He has been employed by the group since 2016. The respondent has been the Member of Parliament for North Ayrshire and Arran since 7 May 2015.
- 2.2 The complainant initially contacted the Independent Complaints and Grievance Scheme (ICGS) helpline on 3 May 2021 to make an allegation of sexual misconduct against the respondent. Following an initial assessment of the complaint, the Parliamentary Commissioner for Standards (the Commissioner) authorised a full investigation on 23 July 2021. She upheld the complaint and referred it to the Independent Expert Panel (The Panel) to determine sanction on 28 March 2022. The respondent submitted an appeal against the Commissioner's decision to uphold the complaint on 29 April 2022. This is the sub-panel's decision on that appeal.

The complaint

- 2.3 The complainant made two allegations against the respondent. The Commissioner upheld Allegation 1 for the reasons set out below, but not the second. The complainant has not appealed the Commissioner's decision on Allegation 2, and it is therefore not referred to in this decision.
- 2.4 Allegation 1 was:

That [the respondent] subjected [the complainant] to unwelcome physical contact of a sexual nature on 8 January 2020 in the Stranger's Bar in the Houses of Parliament when she was drunk, i.e., she stroked his arm and back (over his clothing) and asked him to "come home and shag me". She repeatedly propositioned him in this way in the Stranger's

Bar that night and later she tried to pull him into a taxi with her at the end of the night at Carriage Gates, again asking him to go home with her.

- 2.5 The respondent denied, and continues to deny, the allegation. Her evidence was (in essence) that she was intoxicated, and therefore unable confidently to recall her exact words and actions. The respondent asserted, however, that she would not have stroked the complainant in the manner alleged and would never have used the word “shag”, nor would she have propositioned the complainant.

The Sexual Misconduct policy and procedure

- 2.6 The Sexual Misconduct Policy for UK Parliament (the Policy) defines sexual misconduct at paragraph 2.3 as:

[...] a range of behaviours including sexual assault, sexual harassment, stalking, voyeurism, and any other conduct of a sexual nature that is non-consensual or has the purpose or effect of threatening, intimidating, undermining, humiliating, or coercing a person. Any of these behaviours that will be treated as a potential breach under this policy, encompassing behaviours that may or may not also be defined as sexual harassment or sexual offences in the context of civil or criminal courts. However, using the language of sexual misconduct makes it clear that the policy for Parliament is separate from and additional to any legal process.

- 2.7 It also provides a non-exhaustive list of “behaviours” that “may constitute sexual misconduct if they occur inappropriately or without explicit and freely given consent.” [paragraph 2.4]. These include:

2.5 Verbal — sexual remarks including those about appearance or clothing, jokes, catcalls, questions about sexual life, raising sexual topics, verbal advances, etc.

[...]

Repeatedly propositioning someone, in person or by telephone.

[...]

2.7 Physical—suggestive looks and gestures, staring, leering, threatening behaviour, brushing past someone, pinching, touching,

groping, promises/threats related to career prospects in return for sexual favours, etc.

Uncalled-for physical contact, deliberate brushing past.

Unwelcome and inappropriate touching, hugging, or kissing.

Groping, grabbing, kissing, or fondling without consent.

[...]

- 2.8 The Sexual Misconduct Procedure for UK Parliament (the Procedure) provides, at paragraph 4.1, that in making decisions under the Sexual Misconduct Policy “the standard of proof will be on the balance of probabilities (i.e., that the incident complained of is more likely than not to have occurred).”

The Commissioner’s decision

- 2.9 The independent investigator appointed by the ICGS recommended that Allegation 1 should be upheld. The Commissioner agreed with that recommendation. Further detail on the investigation and the Commissioner’s reasoning is set out in the analysis of the respondent’s appeal below.
- 2.10 In summary, the Commissioner concluded that: “On the balance of probabilities, relying on the complainant’s evidence, and the corroborating evidence of [two witnesses], I am satisfied that [the respondent] did touch the complainant repeatedly over an extended period.” And that the respondent’s “touching of the complainant did involve a form of contact that could be reasonably described as “stroking””.
- 2.11 Although none of the witnesses heard the respondent ask the complainant to “come home and shag me”, the Commissioner concluded that she was “satisfied that the [respondent] did proposition the complainant in the way described in the bar and that her later comments at the taxi were a continuation of that conduct.” This was based on a witness account of the complainant’s reaction in the bar to something said by the respondent to the complainant. There was also witness evidence of the respondent later asking the complainant to go home with her as the respondent was being helped into a taxi. The complainant also complained the following day to

another witness that he had been propositioned by the respondent.

2.12 The Commissioner decided that due to the inconsistencies in the evidence, and the lack of a detailed account, there was insufficient evidence to conclude that the respondent had tried to pull the complainant into the taxi; as the two witnesses accompanying the complainant and the respondent were clear that it did not happen, although their evidence as to what did occur was conflicting.

2.13 The Commissioner concluded that the respondent's actions amounted to sexual misconduct as defined in the Policy. In doing so she applied the following test:

a. *Was there conduct of a sexual nature?*

b. *Was that conduct non-consensual? Or did the conduct have the purpose or effect of threatening, intimidating, undermining, humiliating, or coercing the complainant?*

For a finding of sexual misconduct to be safely made, I must be satisfied that on the balance of probabilities the answer to the first question is "yes" and that the answer to one of the two limbs of the second question is also "yes".

2.14 She concluded that:

I am satisfied that [the respondent] propositioned the complainant on more than one occasion and that this was conduct of a sexual nature. In light of the propositioning, I am also satisfied that the touching which occurred in the bar was also of a sexual nature. The complainant's evidence is clear that all this conduct was unwanted. On this basis, I agree with the investigator that this allegation should be upheld and that the conduct complained of amounts to a breach of Parliament's Sexual Misconduct Policy.

The respondent's appeal

2.15 The respondent appealed the Commissioner's decision to uphold Allegation 1 on the grounds that:

- The investigation was materially flawed in a way that affected the

decision of the Commissioner; and

- The process followed by the Commissioner was procedurally flawed or her decision was unreasonable.

2.16 In her appeal the respondent raised the following issues:

- a. There was no opportunity for R [the respondent] to make representations on the conclusions reached in the [Formal Assessment Report (FAR)] before a decision was made. Comments on the factual accuracy of the draft Formal Assessment Report were invited - before parties see the statements and other evidence. They were told expressly that comments on the conclusions would not be taken into account. The draft FAR and final FAR therefore contained an outcome that was communicated to the parties before there was an opportunity to make full representations on the evidence and the "recommendations" to the final decision maker. The distinction between the role of the Independent Investigator and the PCS [the Commissioner] is also blurred and unsatisfactory. Looking at the matter from an employment law perspective, the situation would be akin to an employer deciding that misconduct had been committed without a hearing - and then inviting the employee to appeal. This is a breach of the principles of natural justice.*
- b. The approach has resulted in substantive unfairness in this case. Representations were made on behalf of R dealing with the fact that in the draft FAR the conduct had not been found to be sexual (and thus classified as sexual harassment under the UK Parliament's Sexual Misconduct Policy ("the Policy")). This resulted in the re-interpretation of evidence and changes in the final FAR to correct this flaw. This renders the decision of the PCS unreasonable.*
- c. The conclusion in the FAR, accepted by the PCS that R's conduct was of a sexual nature is fundamentally flawed – and the Independent Investigator's understanding of the concept of sexual harassment affected her findings and is likely to have impacted on questions asked of the witnesses.*
- d. The PCS failed to take into account relevant circumstances*

surrounding the alleged conduct or give them sufficient weight in light of the seriousness of both the allegations and their consequences for R's career and well-being. This amounts to a failure to adhere to the terms of the Policy.

- e. The PCS reprimands C for his breaches of confidentiality and engagement with the media, but concludes that an outcome should be provided because of the media interest caused by C. This is unreasonable.*
- f. The treatment of oral testimony during the investigation was not sufficiently rigorous given the serious and sensitive nature of the allegations – and the potential impact of the finding on R's career and well-being. The assessment of witness credibility in the FAR is limited – and includes a failure to take into account pertinent personal information shared by R.*

- 2.17 On the 16 May 2022, the sub-panel met to decide whether the appeal brought by the respondent came within one or more of the grounds for appeal set out in paragraph 21 of the Panel's Guidance.¹
- 2.18 The sub-panel was satisfied that the appeal raised issues on the following grounds "(a) The investigation was materially flawed in a way that affected the decision of the Commissioner" and "(b) The process followed by the Commissioner was procedurally flawed or her decision was unreasonable".
- 2.19 As a result of the respondent's representations in her appeal, the sub-panel requested a copy of the independent investigator's "Factual Accuracy Check Addendum" to her "Formal Assessment Report" which had not been provided to the parties or the sub-panel. This recorded the submissions made by both the complainant and respondent on the investigator's draft report during the Factual Accuracy Check, and the investigator's response to them.
- 2.20 On 23 May 2022, and subsequently, the sub-panel met to consider the grounds of appeal and to decide whether to uphold the respondent's appeal

¹ Independent Expert Panel, *Appeals, referrals and sanctions: Guidance for the parties*, version 2, October 2021.

or dismiss it.

- 2.21 The sub-panel met on 10 June 2022 to finalise its decision, subject to drafting and review.
- 2.22 The sub-panel's understanding of the issues raised by the respondent in her appeal can be summarised as follows-:
- a. The role of the investigator and that of the Commissioner was blurred. The investigator had exceeded her role, and had gone beyond investigating by making factual findings, and by deciding which aspects of the complaint should be upheld, had usurped the Commissioner's role as decision maker.
 - b. The investigator applied the wrong test in determining what constitutes conduct of a sexual nature in the Parliamentary policy, and had failed to consider whether, viewed objectively, the conduct of the respondent amounted to conduct of a sexual nature.
 - c. Procedural unfairness had arisen because of substantial changes that had been made to the draft Formal Assessment Report following the Factual Accuracy Check. The respondent in her response to the Factual Accuracy Check alleged that in the draft Report's conclusion, the investigator had failed to make a factual finding that the conduct complained of was conduct of a sexual nature. In her appeal the respondent complained that the investigator had purported to correct this in the final report.
 - d. The investigator had given insufficient weight to evidence of the respondent's personal circumstances, although in the draft report the investigator had stated that the personal circumstances might be relevant to whether the alleged behaviour was likely to have occurred or not.
 - e. The Commissioner's approach, in identifying that the complainant had breached confidentiality, without taking this into account in her decision, was unreasonable.

Distinction between role of investigator and Commissioner is blurred and unsatisfactory.

2.23 The sub-panel considered whether the investigator had usurped the Commissioner's role as decision maker by making recommendations on whether the allegations should be upheld. The Sexual Misconduct Procedure states at paragraphs 6.5 and 6.6 that:

6.5. The outcome of a formal assessment is a written report recording details of the complaint, the evidence that has been gathered to enable the Investigator to assess whether there has been sexual misconduct by the respondent, the Investigator's analysis of that evidence and the recommendation to uphold or not uphold the complaint.

6.6. If the complaint is upheld, the assessment will be sent to the relevant decision-making body, identifying the Investigator's recommendation and the reasons for that assessment.

2.24 The sub-panel also referred to the Commissioner's memorandum in which she states at paragraph 29. "Having carefully reviewed the investigator's report, and the evidence collected during the investigation, I agree with the investigator's recommendations." The Commissioner then proceeds to examine in detail the evidence presented in this case and to set out her assessment of each of the allegations. Following this detailed consideration, she reaches her own conclusions as to whether or not there was a breach of the Policy.

2.25 The investigator and the Commissioner's roles are clearly set out within the Procedure. The sub-panel finds that there was no evidence before it upon which it could be satisfied that the investigator had exceeded her role as investigator and had usurped the decision-making function of the Commissioner. The role of each is clearly set out in the procedure, and there is nothing before the sub-panel to suggest the investigator departed from what was set out in the procedure concerning making recommendations. Accordingly, the appeal on this ground was not made out.

Whether the investigation was materially flawed because the wrong test was adopted in considering whether the conduct was of a sexual nature.

2.26 The Sexual Misconduct Policy requires the behaviour under consideration to be "conduct of a sexual nature", but there is no definition of this in the

Policy. The Policy provides examples of conduct that may constitute sexual misconduct. The Policy also refers to the Equality Act's definitions of sexual harassment, noting that this is one form of sexual misconduct.

2.27 In considering what constitutes conduct of a sexual nature, the relevant section of the Equality Act 2010 is 26(2)(a) and (b) where it states that for there to be harassment there must be:

(a) Unwanted conduct of a sexual nature; and

(b) That conduct must have the purpose or effect referred to in section 26(1)(b), namely (i) violating the complainant's dignity, or (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for the complainant.

2.28 How to define "sexual nature" is not set out in the Equality Act. However, in considering what constitutes conduct of a sexual nature, the sub-panel considers how its provisions have been applied in case law to be a useful starting point. Under the Equality Act, in determining whether conduct is of a sexual nature, all the circumstances must be considered, including a complainant's perception of the behaviour and whether it is reasonable to conclude that the conduct is sexual in nature. The complainant's perception alone is not determinative of whether or not the conduct is of a sexual nature.

2.29 In taking this approach, the sub-panel also follows the sub-panel in the case of Mr Ross Thompson.²

2.30 In that case, in determining whether the conduct being considered breached the Sexual Misconduct Policy was conduct of a "sexual nature", the Commissioner examined all the circumstances, including the complainant's claim that the conduct was of a sexual nature. The Commissioner concluded that this element was not proven. The sub-panel, following an appeal by the complainant, agreed that the respondent's "conduct of leaning on the complainant and invading his personal space" was not proven, on the balance of probabilities, to be of a sexual nature.³

² The Independent Expert Panel, *The Conduct of Mr Ross Thompson*, HC 1235, 23 February 2021, in particular paras 2.30 to 2.35.

³ *Ibid* para 2.31.

The test which was correctly applied by the Commissioner and the sub-panel in the case of Mr Ross Thompson makes clear that a complainant's perception that the conduct is of a sexual nature is not the only element to be considered and is not, on its own, decisive.

2.31 The investigator in this case, however, appeared to have given undue weight to the complainant's perception without giving sufficient weight to the other circumstances, including the perception of the witnesses and the fact that some of the accounts of the witnesses contradict the account given by the complainant. In her final report at paragraph 6.69, the investigator noted that witnesses 3 and 5, saw the respondent physically touch the complainant in the Stranger's Bar on 8 January 2020, and their evidence concurs with the complainant's account that the respondent touched his arm and back. They also saw the respondent pull the complainant closer to her and noted that he pulled away. The witnesses observed that this behaviour occurred over a period of five to fifteen minutes.

2.32 The investigator noted in her draft Report that:

While neither of them perceived R's manner in doing this as being overtly sexual, both commented that if it had been a man touching a woman in that way, they might have thought differently. The evidence thus concurs with C's claim that R touched him, that this physical contact was unwelcome to him, and that it happened when R was inebriated.

2.33 The investigator comments in her final report (para 6.85) that she did "not view the witness discrepancies outlined above as fundamentally undermining C's account or as casting doubt on the reasonableness of C's perception that R's conduct towards him was of a sexual nature". This appears to emphasise that the investigator considered the complainant's perception of the conduct to be central. The investigator states that: "In assessing allegations of sexual misconduct, much depends on the perception of the person experiencing the conduct and whether it is reasonable for that person to have perceived the conduct as sexual in nature".

2.34 A further example of the investigator appearing to prioritise the perception of the complainant in her analysis is provided in the addendum to the FAR. The investigator states, "While others did not perceive R's touching of C in

the bar, nor her later request to him to go home with her, to have been sexual in nature, C did perceive it to be sexual and this is what the report conveys. In the investigator's view, given the whole context of the events of the evening of 8 January 2020, *it was reasonable for C to have perceived that R's behaviour towards him was sexual.*" [emphasis added]

- 2.35 The sub-panel noted that the investigator, in her draft report, appeared not to be wholly satisfied that the propositioning comments were made, and given this, failed to reach a conclusion on this point in her draft report. However, in the final report, her position had changed in that she concluded that the remarks were made (the effects of the changes made to the draft report are dealt with below).
- 2.36 The sub-panel have concluded that the investigator placed too much weight on the complainant's perception that the touching was sexual. Had the investigator applied the test correctly, then she would have taken account of perceptions of all of the witnesses and may have come to a different conclusion.
- 2.37 The sub-panel consider that the investigator's failure to apply the appropriate test, when considering behaviour of a sexual nature, affected the decision made by the Commissioner.

The investigation was materially flawed due to the Factual Accuracy Check process.

- 2.38 Section 7 of the Sexual Misconduct Policy sets out the process for "Factual Accuracy Checks" as follows:

*7.1 Once the Independent Investigator has considered all the evidence and prepared a draft formal assessment report, a copy of the draft must be sent to the complainant and the respondent. This is an opportunity for both parties to check that facts and dates are correct and request corrections, raise concerns if relevant evidence has not been considered or relevant witnesses not interviewed, or raise other concerns about the process of the investigation. The parties will normally have 14 days to raise any issues. The check is **not** [emphasis in original] an opportunity to challenge the Independent Investigator's reasoning or recommendations, unless they are unreasonable or perverse. If the ICGS team (or in the case of an MP the Parliamentary Commissioner for*

Standards) considers that there are significant errors or omissions in the report or concurs with the view that the findings are unreasonable or perverse, the report may be rejected and a new Independent Investigator appointed to carry out the formal assessment.

7.2 Any further action, if either party is not satisfied with the Independent Investigator's report, will be a matter for the relevant decision-making body.

- 2.39 The approach set out by the investigator in an Addendum to the Factual Accuracy Check (FAC) was that she considered the representations made and decided whether they were within the scope of the FAC, or outside the scope. The investigator also decided whether a representation was objective, in that a correction was needed, or whether it was subjective, in which case the investigator set out a brief explanation of why it would not be taken into consideration by her.
- 2.40 However, for the reasons set out below, the sub-panel considers that the investigator's approach went much further than permitted by the Policy. The sub-panel, in deciding this appeal, considered the investigator's draft FAR, the Addendum to the FAR, and the final FAR.
- 2.41 The sub-panel consider that the final FAR was altered following representations from the respondent concerning the inconclusive nature of findings of fact made by the investigator. In particular, the respondent made representations to the investigator that the investigator had not proved that the alleged behaviour was conduct of a sexual nature and had applied the incorrect test.
- 2.42 The investigator, in the comments in the addendum, and in response to the respondent's submissions, states that the respondent's representations go "beyond a factual accuracy response and expresses a view on the conclusions reached by the Independent Investigator." In her response, the investigator states that: "[...] she has revisited and clarified the wording in the report to make clear that her finding was that on the balance of probabilities the conduct was of a sexual nature [...]"
- 2.43 In the draft report, the investigator wrote that "In these circumstances, the Independent Investigator believes it was reasonable for C to have

- perceived R's conduct in repeatedly touching him as constituting sexual harassment, *regardless of whether she did, or did not, at the same time ask him to go home with her to "shag me"* [emphasis added].
- 2.44 In the draft report, the investigator had not reached a conclusion that these words were said. This equivocation had been removed from the final report following comments by the respondent during the FAC as to the lack of a finding on this issue.
- 2.45 The sub-panel consider that amendments made by the investigator which dealt with the lack of a finding on this issue went beyond "clarifying" her findings, as suggested by her in the addendum to her report. The investigator concluded in the final FAR that, on a balance of probabilities (something that she had not previously stated), the wording "come home and shag me" were said by the respondent. However, no additional reasoning is given as to why the investigator had not previously found these words to have been used when she had completed her investigations and produced the draft report.
- 2.46 A further change made by the investigator to the FAR following the FAC was that the complainant's evidence included the statement that "he had been subject to harassment since taking up his role in 2016 and was never sure how to handle it effectively".
- 2.47 In her final report, the investigator includes part of this quote, expanding "harassment" to state "sexual harassment": "he was "never sure how to handle it [sexual harassment] effectively". The sub-panel consider that such changes in the complainant's evidence without explanation, undermine the findings of the investigator.
- 2.48 The sub-panel finds that the investigator's changes to the draft report, when challenged on her lack of findings that the conduct was of a sexual nature, went beyond the scope set out in paragraph 7.1 of the Policy. The amendment that was made was fundamental to the investigator's conclusions. Accordingly, the investigation was procedurally unfair as the investigator failed to adopt a fair and transparent procedure. The respondent was entitled to believe that the conclusions reached in the draft report would remain the conclusions of the investigator, and what occurred

amounted to the investigator strengthening her conclusions on issues upon which she had previously been equivocal.

- 2.49 The Commissioner stated that she was “satisfied with the investigator’s approach to the factual accuracy checking process and how the submissions from both parties were handled”. However, the sub-panel finds that the procedure followed by the investigator exceeded what was permitted under Section 7.1 of the Sexual Misconduct Policy. In the sub-panel’s view, the Commissioner gave too little weight to the discrepancies between the draft and final report. The changes to the final report made findings which were detrimental to the respondent and appear to have been made as a result of the respondent making representations concerning discrepancies in the report.
- 2.50 In the sub-panel’s view, the flaws in the investigator’s approach were such that the Commissioner was placed in a very difficult position. She could have decided, no doubt with great regret, that the investigation had to be carried out again by another investigator, as she has done on occasion in the past. She could properly have decided that the recommendations of the investigator were insufficiently founded and were flawed, but that there was sufficient primary evidence for her to reach her own conclusions, setting the reasoning and recommendations of the investigator to one side. What she could not properly do, in our view, was to rely on the report and recommendations of this investigation, for the reasons we have given.
- 2.51 The sub-panel finds that the investigation was materially flawed in a way that affected the decision of the Commissioner.

The investigator’s treatment of the respondent’s sensitive personal information.

- 2.52 In the addendum to the draft investigation report, which was prepared following the factual accuracy check process, the investigator stated that sensitive medical evidence had been submitted by the respondent which “indicated the unlikelihood of her behaving towards the complainant in the manner alleged”. The investigator noted that the evidence “had the potential to add weight to how likely it was that R acted in the ways alleged”. In addition, the evidence had been listed as a mitigating factor in the draft FAR but was removed from that section in the final FAR, and placed in an earlier factual section listing evidence, following representations by the

complainant.

- 2.53 However, in the final FAR, the investigator states, in relation to the sensitive personal information, that “given the evidence of witnesses referred to in relation to Allegation 1, it is not pertinent to the investigation and does not form part of the investigator’s conclusion [...]”.
- 2.54 The sub-panel considers that the way in which the investigator dealt with this matter firstly in the draft FAR in which the investigator referred to it as “having potential to add weight to the likelihood of the respondent acting in the way alleged”, and then set it aside in her final FAR, without explaining why she had changed her view, was inconsistent and procedurally unfair.
- 2.55 The Commissioner also does not mention this evidence or make any finding on its relevance to her decision, in her memorandum.
- 2.56 Given the inconsistent treatment of the evidence, and potential for the evidence to have been important in any process of weighing up the likelihood of various behaviours having occurred, the sub-panel considers that the investigator’s approach was materially flawed in a way that affected the decision of the Commissioner.

The Investigative interviews and the procedure adopted by the investigator.

- 2.57 The sub-panel would like to raise one further issue of concern with the investigation that has become apparent in our review of the evidence in this case. The sub-panel was provided with the investigator’s notes of the witnesses’ interviews. In reviewing the notes, the sub-panel was concerned by the process adopted by the investigator in which it appears that she shared the detailed nature of the allegations prior to asking for the witnesses’ evidence.
- 2.58 One example of what was stated at the beginning of the interview is set out below.

[The complainant alleged that the respondent] [...] subjected him to unwelcome physical contact of a sexual nature on 8 January 2020 in the Stranger’s Bar in the Houses of Parliament when she was drunk, i.e., she stroked his arm and back (over his clothing) and asked him to “come home and shag me”. [The complainant] alleges she repeatedly

propositioned him in this way in the Stranger's Bar that night and later she tried to pull him into a taxi with her at the end of the night at Carriage Gates, again asking him to go home with her. [The investigator asked the witness] if he was present on the night in question and if so, to describe what he saw and heard [...]

- 2.59 This approach is repeated in other interviews. The sub-panel consider that giving the details of the complaint to the witnesses, before asking them about their own account of what they could independently recall, may cast doubt on the independence of their recollections and the extent to which their account could have been influenced by what they had heard described by the investigator. While we note our concern about this aspect of the investigation, it has not been determinative in this case.

Breaches of Confidentiality

- 2.60 The respondent, in her appeal, stated “The PCS reprimands C for his breaches of confidentiality and engagement with the media, but concludes that an outcome should be provided because of the media interest caused by C. This is unreasonable.”
- 2.61 The issue of breaches of confidentiality was dealt with by the Commissioner at paragraphs 19-25 of her memorandum. Paragraphs 23 states:
- I considered this breach of confidentiality carefully. The complainant has not abided by the rules that are in place to protect him [...], and the wider parliamentary community including potential future complainants. I was concerned about the harm these breaches caused to [the respondent] and the damage they will have caused to the integrity of the Scheme. However, on this occasion, I decided it was in the interests of natural justice and, given the publicity this case has attracted, fair to both parties to resume my decision making and bring this matter to a conclusion. In doing so, I considered whether the complainant's breaches of confidentiality affected the credibility of his complaint; it is my view that they do not. I was also confident that the information shared by the complainant did not prejudice my fair consideration of his complaint [...]*
- 2.62 The Commissioner noted that she was “grateful to [the respondent] for maintaining confidentiality of the process despite these breaches by the

complainant”.

- 2.63 The sub-panel noted that from the outset this case has been tainted by persistent breaches of confidentiality by the complainant. The publicity in this case was considerable and persistent. The sub-panel noted the Commissioner’s assessment that the complainant’s actions in breaching confidentiality were a “deliberate attempt to publicly discredit” the respondent. The sub-panel also noted that significant harm and impact caused by the breaches of confidentiality including the respondent being subjected to significant online abuse and harassment, including sexual threats, as well as derogatory graffiti at her place of work which necessitated an increase in personal security.
- 2.64 Nonetheless, the sub-panel agrees with the Commissioner that it was important for the process to be completed as a serious allegation had been made, and given the exceptional levels of publicity, it was right that this matter should be determined.
- 2.65 The sub-panel take the issue of confidentiality very seriously. The confidentiality of the ICGS process plays a vital role in enabling complainants to come forward, safe in the knowledge that their complaint will be investigated without attendant publicity and that they will be protected with anonymity. A breach of confidentiality also erodes the trust of all the Parliamentary staff and MPs who are subject to the Behaviour Code and the Independent Complaints and Grievance scheme. The sub-panel consider that knowingly breaching confidentiality may hamper the ability of the investigator, the Commissioner, and the Independent Expert Panel to deal with cases. Breaches of confidentiality, therefore, risk the integrity of the ICGS scheme and its decision-making processes, with the potential to affect their outcome. Accordingly, the sub-panel consider that when such breaches occur that fact may be reflected in any sanction.
- 2.66 However, given the decision of the sub-panel on the appeal, the issue of sanction is not one that the sub-panel is required to determine.

Conclusion

- 2.67 In all the circumstances the sub-panel has decided that the respondent’s appeal is upheld on the following ground:

- The investigation was materially flawed in a way that affected the decision of the Commissioner.

2.68 Therefore, the decision of the Commissioner to uphold Allegation 1 is set aside.