CONSULTATION RESPONSE BY DOUGLAS BAIN CBE TD

Introduction

The answers and recommendation set out in this response are informed by experience gained whilst Northern Ireland Assembly Commissioner for Standards from 2012 - 2017 and as Acting Senedd Commissioner for Standards since November 2019.

Answer 1. I welcome the move to a predominantly rules based Code bolstered by overarching principles. I believe this will assist Members, the public and the Commissioner in its proper interpretation and application.

Answer 2. I believe that the current position under which the Code applies to Members at all times and in all circumstances should continue. Conduct in the course of a Member's private and family life can, on occasion, reflect badly not only on that Member but also on the Senedd as a an institution. In the absence of any other way of dealing with such behaviour, such as a recall petition procedure, it must be amenable to the complaints process. If it is not, there is a risk of the Senedd appearing to condone such conduct which could further undermine public confidence in the institution.

Other comments on Part 1

Paragraph 2 – the substitution of 'required' for 'expected' in line 1 would reinforce the mandatory nature of compliance with the principles and be consistent with paragraph 6 of the draft Code

Paragraph 3 – the formalisation of the long established practice is welcomed but I believe that consideration should be given to a provision allowing the Llywydd or a Chair to refer a matter to the Commissioner for investigation. Some conduct that takes place in plenary or in committee could require investigation and only the Commissioner has the statutory powers of investigation that might be required. Further, undertaking such an investigation would divert the Llywydd or a Chair from their key work.

Paragraph 5 – a significant number of complaints are received each year about the standard of service provided by Members (8 in 2019-20) and about the conduct of Ministers (3 in 2019-20). Dealing with these complaints is wasteful of resources and it is apparent that some complainants feel aggrieved when told that their complaint is not admissible. Consideration should be given to the inclusion of text making clear that the Code does not apply to the conduct of a Member whilst acting in a

Ministerial capacity and that it applies to the conduct of Members and not to the standard of service provided by them.

Answer 3. In principle I welcome the attempt to make the explanatory text for each Principle more relevant to the roles of Members. Throughout the explanatory text 'must' should be substituted for 'should' wherever it occurs. I question the use of 'strengthen' in the text of the Integrity Principles and 'promote' in text of both the Respect and Leadership Principles. These words could be interpreted as meaning that everything a Members does must try to increase confidence in the integrity of the Senedd etc and to strive to increase equality of opportunity and all the other Principles. In practice most actions of Members will be neutral as regards these matters. The current wording risks complaints that might technically be admissible, about conduct which in no way diminished confidence in the integrity of the Senedd or the other Principles. Whilst enhancement of public confidence and of equality of opportunity and support for the Principles is a laudable objective I doubt that it should be a duty failure in which could be a breach of the Code. I believe that consideration should be given to the following revisions –

- Integrity Principle - substitute 'not undermine' for 'maintain and strengthen'
- Respect Principle – amend to read 'Members must not behave in ways that reduces equality of opportunity and must not ….. '
- Leadership Principle – omit 'promote and'.

Answer 4. Subject to the comments at Answer 3, I welcome the inclusion of a new Respect Principle.

I believe that further consideration should be given to the definitions in paragraph 8 of the draft Code to ensure that these restrictions on the right to freedom of expression provided for in ECHR Article 10.1 are compatible with Article 10.2.

The definition of bullying at paragraph 8(1) of the draft Code is difficult to square with the text the Dignity and Respect Policy Accompanying Guidance on Inappropriate Behaviour which appears to require 'persistent unacceptable behaviour (or a single grossly unacceptable act)'

Further, under the Policy it is clear that that the intention of the perpetrator is irrelevant in determining whether conduct constitutes inappropriate behaviour. No such provision is included in the draft Code.

To guard against the risk of spurious or contrived complaints that the conduct of a Member has engaged in any of the types of behaviour specified in paragraph 8 of the draft Code, consideration should be given to a reasonableness test similar to that in paragraph 9(6) of the draft.

Paragraph 8(2) would appear to make no distinction between lawful and unlawful or unacceptable discrimination.

Answer 5. In addition to the points on specific rules set out below I have two general points that I believe should be considered. First, the Rules would be clearer if they were all framed as either what Members must do or what Members must not do rather than as a mixture of the two. Second, clarity and ease of reference would be increased if they were described as Rules. Adoption of these suggestions would result in a format along the following lines -

'Rule 1**.** You must uphold the Overarching Principles

Rule 2. You must act truthfully in the conduct of public business.'

Sub-paragraph 9(2) – restricting the requirement to act truthfully to public business is inconsistent with the application of the Code to the conduct of Members at all times and in all circumstances.

Sub-paragraph 9(4) – requires further consideration – please see my comment on paragraph 8(2) in Answer 4 above.

Sub-paragraph 9(5) – as drafted this provision would be likely to cause significant difficulty due to the lack of any definition. What is the criminal law? Does it include minor road traffic offences? How is it determined wherever a Member has upheld the law? It is straightforward where there has been a conviction or a formal caution has been accepted. But what is the position if there has not? It could be that there was insufficient evidence to reach the criminal standard of proof. Would the Commissioner then have to investigate a complaint to see if the evidence was sufficient on the civil standard? Although not ideal, consideration should be given to adoption of the Northern Ireland requirement that Members have only failed to uphold the criminal law if they have been convicted or have accepted a formal caution. The issue of very minor breaches of the criminal law could be dealt with under the proposed changes to the complaints procedure set out in Answer 8 below.

Sub-paragraph 9(6) – it would appear that this provision is unnecessary as the conduct would be covered by paragraph 9(1).

Sub-paragraph 9(8) – this provision is unnecessary as it is, by virtue of section 6(3)(a)(i) of the Measure a relevant interest. The Commissioner already has power to investigate a complaint of its contravention. Consideration should be given to deleting this provision in its entirety or deleting all after 'Senedd' to make it a duty to comply with Standing Orders generally.

Sub-paragraph 9(13) – it is not clear what 'officials' are covered by this provision. Given the wide application of the Code there is a strong case for it covering any official employed by a public authority.

Sub-paragraph 9(14) – without prejudice to my comments below on paragraph 11 below I believe that the duty not to interfere should be extended to include interference with the duties of the Standards Commissioner.

Sub-paragraph 9(17) – this duty should be extended to apply also to the duties set out in Part 4.

Part 4 – I believe the duties currently in Part 4 should be included in Part 3. Separating them may create a misleading impression that there are in some way different from the Part 3 duties. Paragraph 10 could then be deleted.

Paragraph 11 – Given the application of the Code to Members at all times and in all circumstances the text down to the end of 11(4) is unnecessary.

Sub-paragraphs 11(i) to (iv) would be better presented as separate rules.

Sub- paragraph 11(ii) – the word order may merit consideration – 'any rules made by the Senedd under the Measure' might be clearer.

Sub-paragraph 11(iv) – the duty not to lobby should be extended to prohibit the lobbying of the Commissioner's staff or the Commissioner

Sub-paragraph 11(v) – given conduct identified whilst Acting Commissioner I think there is a strong case for extending this provision to include a duty not to suborn or attempt to suborn witnesses.

Paragraph 12 – this should be extended to prohibit misrepresentation of any recommendation made by the Commissioner for Standards.

Subject to the above recommendations I believe that the proposed rules are sufficiently clear, that all of them are necessary and that no further rules are required.

Answer 6. I welcome the proposed provision of standalone Guidance. In addition to the subjects identified in the consultation document it would be useful if it covered also the admissibility criteria. That might reduce the number of inadmissible complaints received.

Answer 7. The inclusion of examples would add to the clarity of the proposed guidance and is to be welcomed. The examples should cover complaints that would not be admissible. It is imperative that there is close co-operation with the Commissioner from the outset in the development of any such guidance.

Answer 8. The time is now right for a fundamental review of the complaints procedure documents with the objective of making it more precise, eliminating unnecessary provisions and introducing new provisions to deal with issues that have emerged since the current version was approved in 2013. The 2013 document contains a description of the process and rules that must be followed. I recommend separation of the two elements and that the rules are drafted more tightly than in the 2013 text. A style closer to that used in the equivalent Northern Ireland Assembly provision (the Assembly Members (Independent Financial Review and Standards) Act (Northern Ireland) 2011 (General Procedures) Direction 2016) would be more appropriate. Many of the current provisions could be omitted entirely, combined or shortened in length. It should be remembered that no two investigations are the same and the Commissioner should, subject to compliance with the Measure and the new procedures, be left to decide the most appropriate way of dealing with each complaint.

Under the present procedure there is no way to challenge the Commissioner's decision on the admissibility of a complaint. Whilst most admissibility decisions are clear cut there are some, particularly those on complaints about views expressed by a Member, that are finely balanced. I believe that a decision that a complaint is not admissible should be amenable to challenge by way of a new right to have the matter referred to the Standards of Conduct Committee.

In outline that new referral procedure would be as follows –

- The Commissioner would notify the complainant of the not admissible decision, the reasons for it and the right to have the matter referred to the Committee for re-consideration.
- That right would have to be exercised by notice in writing to the Commissioner within a prescribed period.
- If no notice was received within that period the matter would be at an end and the admissibility decision would stand.
- If notice was received the Commissioner would refer the matter to the Committee giving the reasons for the original decision.
- If the Committee agreed that decision the Commissioner would be informed and would in turn inform the complainant.
- If the Committee did not agree the Commissioner's decision it would be referred back for reconsideration.
- If on reconsideration the Commissioner found the complaint admissible the complainant would be informed and it would proceed to a formal investigation.
- If the Commissioner remained of the view that the complaint was not admissible he would report that to the Committee giving the reasons.
- If the Committee continued to disagree with the Commissioner's decision the matter would be referred back and the Commissioner would, after notifying the parties, commence a formal investigation

Although that may appear complex it would in practice be straightforward and require few resources. It is likely that very few complainants would exercise the right of referral and that the Committee would only rarely disagree with the Commissioners decision. A similar right of review is available under the Northern Ireland Assembly complaints procedure.

The new procedure should be included empowering the Commissioner to discontinue any investigation if satisfied that –

- the complainant has, without reasonable excuse, failed to co-operate with the Commissioner;
- the complaint is vexatious;
- the alleged conduct is not sufficiently serious to justify further consideration;
- the complainant no longer insists upon the complaint;
- the victim of the alleged conduct, who did not make the complaint, does not wish the complaint to proceed;
- the complaint repeats substantially an allegation that has already been considered by the Commissioner and no significant additional evidence has been provided;
- the complaint would more appropriately be investigated by the police or other public body;
- it is not in the public interest to proceed with the consideration of the complaint; or
- the complainant or any other person has, without good reason, caused the complaint to be submitted outside the prescribed period.

All but the last of these scenarios were encountered during my tenure in Northern Ireland: none of them are covered by the current Senedd procedure. The need for the last scenario was identified during the past year. A complaint was submitted about conduct well outside the current time limit but which had to be held admissible because the information on which it was based had been passed to the complainant by a Member only very shortly beforehand. The Member had been in possession of the information since the time of the conduct about which the complaint was made. The Members used the device of passing the information to one of his supporters to avoid the twelve month time limit and to have the complaint made at a time of his choosing.

As a safeguard any use of the power to discontinue consideration of a complaint would be subject to the referral procedure outlined above.

It is not appropriate in this consultation response to set out the large number of minor changes that could be made to improve the complaints procedure. Many of them relate to the work of the Standards Commissioner and I urge the closest consultation between the official tasked to draft the new procedure document and the

Commissioner. Below I mention only the parts of the 2013 text most in need of revision –

- Section 3 – in criterion v the time limit for submission of a complaint should be shortened to six months (please see Answer 10 below); in criterion vi all before 'there is enough evidence' should be omitted - it adds nothing and has confused some complainants
- Section 5 – this serves no purpose and should be omitted. If the Commissioner is satisfied that a Members has failed to co-operate with the investigation as required by paragraph 15 of the Code of Conduct that finding can be included in the investigation report.
- Paragraph 6 – sub-paragraph (ii) should be extended to allow the Commissioner to report criminal conduct not just to the police but also to other appropriate law enforcement agencies.
- Paragraph 7.3 – would appear unnecessary. Unless invited the Commissioner does not attend any meetings of the Committee.
- Section 8 – should be omitted (please see Answer 12 below.
- Section 10 – if the proposal to allow the Commissioner to discontinue investigations is adopted section 10 would become unnecessary. If it remains, consideration should be given to making the Committee rather than the Chair responsible.

Answer 9. There is a strong case for empowering the Senedd to require re-payment of expenditure incurred as a result of a Member's misconduct. In my report of my investigation of a complaint against Gareth Bennett AM (Report 01-19 to the Assembly under Standing Order 22.9) I found that his failure to co-operate with my investigation had led to expenditure of at least £500. The Committee had no power to require him to pay that sum and could only invite him do so. No repayment has been made. The inability to secure payment, in such circumstances, cannot but tend to diminish public trust and confidence in the Senedd. Any new sanction should also cover recovery of any sums improperly obtained or used for an improper purpose such as payments to AMSS paid for undertaking party political work but being paid out of Commission resources.

A power to recommend expulsion is not available in any other United Kingdom legislature and I am not aware of any compelling case for its introduction in the Senedd. Whilst a power to recommend that a Member be subject to a recall petition is available to the House of Commons the differences in the electoral systems make the introduction of such a power in Wales problematic. It would require very careful consideration and wide consultation.

My main concern about sanctions is that the level of them appears to be significantly low and out of step with those imposed on Welsh councillors, Members of the House

of Lords, MPs, MSPs and MLAs for similar acts of misconduct. To secure that the level of sanctions recommended to the Senedd is broadly equivalent to those elsewhere and to bring greater transparency to the process consideration should be given to the creation of a document equivalent to the guidelines published by the Sentencing Council for England and Wales. Such a document should include the aggravating and mitigating factors to which the Committee will have regard when deciding on the recommended sanction. The mitigating factors should include an early acceptance of contravention that avoids the need for a full investigation and so saves both time and expenditure. Aggravating factors should include any failure to co-operate with the investigation and the Member's previous conduct.

Answer 10. I believe the current 12 month time limit is too long and that it should be reduced to six months. If the complaints system is to maintain credibility it is important that misconduct is dealt with promptly. It is likely to take at least six months from receipt of a complaint by the Commissioner to its consideration in the Senedd. That means that with the current twelve month limit more than 18 months could have passed since the misconduct. A six month time limit, the time limit for bringing summary prosecutions and in the Northern Ireland complaints process would, in my view, be more appropriate.

I recognise that there would be occasions where there would be good reason why a complaint had not brought within six months. To cater for these, the Standards Commissioner should be empowered to consider complaints outside that period if satisfied that there was good reason for the delay in submission. The Commissioner's decision not to use that discretion could be made subject to the referral procedure outlined at Answer 8 above.

Answer 11. It is the Standards of Conduct Committee not the Standards Commissioner who takes the decision on whether there has been a contravention of the Code or another relevant provision. To enable them to make an informed decision I believe it is essential that the Commissioner's report contains all the material on which the conclusion in the report was founded. Natural justice requires that the complainant and the Members under investigation should also be aware of all relevant evidence. On occasion that evidence will include very personal information or information of what occurred at a private meeting of a political party. Such information should not be put into the public domain. The present practice is for the Committee to publish the Commissioner's report as an annex to their report to the Senedd. I see no need for the Senedd to see the Commissioner's report or for it to be published. The Committee's report contains a summary of the key facts. The Senedd is concerned only with whether or not to approve the sanction recommended

by the Committee and does not, for that limited purpose, need to see the detailed report by the Commissioner.

Another way of avoiding publication of sensitive material would be by redaction of it from the version of the Commissioner's report annexed to the Committee's report. Redaction can be a very time consuming exercise and not infrequently results in a document that is not easy to comprehend. I do not favour it as a solution.

A third option would be for either the Commissioner or the Committee to prepare a summary report which could be annexed to the Committee's report to the Senedd. That would be time consuming and would result in there being three reports on each complaint: the Commissioner's full report, the summary report and the Committee's report. It is likely that the Committee's report would reflect almost all the content of any summary report. I do not favour this solution.

Question 12. Given the independent nature of the Senedd Commissioner for Standards I see no justification for the present appeals process which not only adds expense but can also be used by the Members under investigation to further delay the complaints process which can undermine public confidence in the integrity of the process. The Commissioner's conclusion on whether or not the Code of Conduct has been contravened is already subject to review by the cross-party Standards of Conduct Committee. And although the Senedd cannot carry out a review of the evidence it can decide not to endorse imposition of the Committee's recommended sanction. If a Member considers that a decision by the Committee is perverse it can be challenged by way of judicial review

Douglas Bain CBE TD

Acting Senedd Commissioner for Standards 21 January 2021.