

National Assembly for Wales: Standards of Conduct Committee Creating the right culture: Inquiry into the Review of the Code of Conduct for Assembly Members

SoC(5) RCC04

Evidence from Equality and Human Rights Commission

1. The Equality and Human Rights Commission (the Commission) is a statutory body established under the Equality Act 2006. It operates independently to encourage equality and diversity, eliminate unlawful discrimination, and protect and promote human rights. It contributes to making and keeping Britain a fair society in which everyone, regardless of background, has an equal opportunity to fulfil their potential. The Commission enforces equality legislation on age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation. It encourages compliance with the Human Rights Act 1998 and is accredited by the UN as an 'A status' National Human Rights Institution. Find out more about the Commission's work at: www.equalityhumanrights.com.

Introduction

2. The Commission welcomes the opportunity to respond to the Committee's Review of the Code of Conduct for Assembly Members: Creating the Right Culture.
3. The consultation asks questions relating to the complaints procedure, the development of a respect and dignity policy and the sanctions available to the Committee to deal with inappropriate behaviour. The Commission agrees that these are important areas to consider and welcomes the Committee's consultation. We suggest that the Committee considers setting out more clearly what constitutes inappropriate behaviour and, in particular, uses this opportunity to refer directly to sexual

harassment. Alongside this, we consider this an opportunity to set out how the Assembly intends to create an inclusive culture with workplace policies in place, and to set out the legal framework surrounding Freedom of Expression.

Sexual harassment in the workplace

4. Public concern about sexual harassment has pushed this issue sharply into focus. All employers are expected to demonstrate the steps they are taking to create a workplace where sexual harassment is not tolerated.
5. The consultation's questions primarily focus on the reporting procedures after an incident of misconduct. It is important that priority is given to preventing sexual harassment – or any form of misconduct – in the first instance.
6. The Commission notes that the Inquiry's Terms of Reference and the accompanying questions do not refer directly to sexual harassment. The current Code of Conduct for Assembly Members does not appear to refer to sexual harassment either. We consider this to be a missed opportunity to set out the steps that the National Assembly will take to protect workers. The Assembly should have in place an anti-harassment policy. As set out in Commission guidance, all employers are expected to have in place:
 - an anti-harassment policy that is communicated to workers and is effectively implemented, monitored and reviewed
 - an appropriate procedure for reporting harassment, protecting victims of harassment and taking action if harassment occurs.

7. It is important that sexual harassment is highlighted explicitly in guidance to create a culture in which harassment is talked about and can be eradicated.

Prevalence

8. TUC (Trades Union Congress) research, undertaken in 2016, found that:
 - 52 per cent of women had experienced unwanted behaviour at work – including groping, sexual advances and inappropriate jokes. Among young women aged 16 to 24, that proportion rose to 63 per cent
 - around one in eight women reported unwanted sexual touching of their breasts, buttocks or genitals, or attempts to kiss them at work, and 1 per cent said they had been raped or seriously sexually assaulted in their workplace
 - almost a fifth said they had been harassed by their line manager or another person with authority over them.
9. A 2014 study by the EU Agency for Fundamental Rights found that:
 - one in three women who had experienced sexual harassment felt fearful as a result, while a fifth felt ashamed.

Commission surveys

10. In December 2017, the Commission launched [surveys](#) into sexual harassment in the workplace. One survey was for individuals (women and men) and a separate survey for employers has been distributed across a number of sectors in Britain. We wanted to hear from people who had experienced, witnessed or supported others with workplace sexual harassment, to tell us what might have helped in their case and what changes need to be made to tackle this issue. The surveys closed in January 2018.

11. We will use the evidence provided to understand what steps employers are taking to ensure that their workplaces are free from sexual harassment. We also want to find out if staff feel able to report sexual harassment without fear of victimisation and are confident that investigations will be conducted appropriately. We are due to report in March 2018 highlighting best practice and proposing recommendations for reform.
12. The Committee should consider the findings and recommendations of the Commission's upcoming report into sexual harassment in the workplace.

Sexual harassment and the law guidance

13. In 2017, the Commission published [Sexual harassment and the law: guidance for employers](#). This document contains practical guidance for employers on sexual harassment in the workplace, including:
 - definition and examples of what sexual harassment is
 - your responsibilities as an employer
 - what a sexual harassment policy should include
 - how to put the policy into practice
 - how to handle sexual harassment complaints
 - criminal behaviour
14. In setting out employers' obligations, the guidance states:
15. You have a duty of care to protect your workers and you will be legally liable for sexual harassment in the workplace if you have not taken reasonable steps to prevent it.
16. Sexual harassment is prohibited in all workplace contexts and related activities, including at office functions and parties, on training courses and at conferences. Sexual harassment can be

perpetrated by other workers and non-workers, including contractors, agency staff, clients or customers.

17. There are no minimum requirements you can rely upon to demonstrate that you have taken reasonable steps to protect your workers, but all employers will be expected to have in place:
 - an anti-harassment policy that is communicated to workers and is effectively implemented, monitored and reviewed
 - an appropriate procedure for reporting harassment, protecting victims of harassment and taking action if harassment occurs.

18. The essential elements of an anti-harassment policy include:
 - a commitment to a zero-tolerance approach to sexual harassment
 - a statement that sexual harassment is unlawful
 - a clear definition of sexual harassment with examples relevant to the employer's working environment
 - defined reporting channels for staff who wish to report harassment
 - a range of approaches for dealing with harassment from informal resolution to formal disciplinary process
 - a range of appropriate consequences and sanctions if harassment occurs
 - a prohibition on victimisation or retaliation against a complainant
 - information about support and advice services.

19. Implementation of anti-harassment policies is crucial to the creation of a safe and positive workplace environment. If a policy is not properly implemented, you are likely to be liable for failing to take reasonable steps to prevent harassment.

20. Effective implementation of an anti-harassment policy includes:
- anti-harassment training for all staff and the opportunity for ongoing reflection in the workplace
 - verbal communication of the policy during staff induction
 - discussion and reinforcement of the policy at staff meetings or through your usual line management processes
 - translation of the policy for a linguistically diverse workforce if necessary
 - evaluation of harassment in the workplace through regular staff surveys on dignity at work where these are in place.
21. You can choose to deal with sexual harassment complaints through your existing grievance policy or through your anti-harassment policy. However, you should be aware that complaints of sexual harassment are often very sensitive and complex. Anybody dealing with sexual harassment complaints should receive specialist training. The grievance process should:
- address any complaint in a fair and timely manner
 - provide the opportunity for quick and informal resolution of less serious complaints
 - set out the investigation process in detail
 - state that disciplinary action up to and including dismissal may be taken under your disciplinary procedure if a complaint of sexual harassment is upheld
 - state that the alleged perpetrator may be suspended during the investigation as a precaution for the protection of the complainant or to prevent interference in the investigation
 - ensure the confidentiality of employees, subject to any requirement to involve external agencies
 - respect the principles of procedural fairness
 - offer formal support to the complainant, including counselling in serious cases

- give a guarantee that the complainant will not be disadvantaged by making the complaint
 - make adjustments to enable the complainant to participate in the disciplinary process without fear of victimisation.
22. It is important that clear policies and procedures are in place for both those making complaints and individuals who have had complaints made against them. As part of this, mental health support should be made available.
23. Support for those that have experienced sexual harassment is available through, for example, the Wales Live Fear Free helpline and local specialist violence against women and men services. It is important that the National Assembly has contact with relevant support organisations and that staff are made aware of the provision of these services.
24. **The Committee should consider the Commission's Sexual Harassment and the law guidance and put in place the procedures it outlines.**

Creating an inclusive culture and workplace policies

25. Creating an inclusive culture is central to improving conduct. Assembly Members and staff should be representative of a diverse Wales. A diverse workplace helps create a culture that promotes equality and one in which individuals do not become isolated.
26. The National Assembly has power dynamics between individuals that are particular to its nature as a political institution. Elected Members are in senior positions of power, and they work alongside political support staff who are directly employed by them and with Assembly staff whose role it is to assist them.

27. Furthermore, National Assembly and Welsh Government staff work closely with Assembly Members in the Senedd and Ty Hywel. It is important that the Code of Conduct aligns with Welsh Government guidance, such as the Ministerial Code. Relevant policies should cover volunteers and interns. Efforts must be made to ensure Assembly members, staff and others are fully aware of the procedures.
28. The National Assembly has taken many steps to be an inclusive employer, as has been recognised in the recent Stonewall Award. These steps are to be warmly welcomed. The National Assembly can take further steps to promote equality and tackle discrimination in the workplace, which will help foster a culture in which conduct is improved.
29. The Commission's [Working Forward campaign](#) aims to make workplaces the best they can be for pregnant women and new parents. By joining Working Forward, organisations show a commitment to diversity, inclusiveness and gender equality. The Welsh Government is a member of Working Forward and it would be welcome if the National Assembly followed suit.
30. The campaign follows research carried out by the Commission and the UK Government's Department for Business into pregnancy and maternity related discrimination and disadvantage. Survey findings included that:
 - 87% of employers in Wales feel it is in the best interests of organisations to support pregnant women and those on maternity leave
 - 71% of mothers reported negative or discriminatory experiences

- 46% of mothers reported a negative impact on their career (opportunity, status, job security)
 - 36% of mothers would have liked flexible working arrangements but were fearful to be viewed negatively.
31. Alongside [Working Forward](#), the Commission in Wales has worked closely with employers so that they take account of other equality and human rights concerns. For example, we have encouraged employers to adopt [workplace policies on mental health and violence against women and domestic abuse](#). And our [Fairness not favours report](#) explores why faith-friendly workplaces matter and what can be done to create them.
32. The Committee should consider the introduction of further workplace policies to help foster an inclusive and supportive workplace culture.

Freedom of Expression

33. In 2015, the Commission published our [Freedom of Expression Legal Framework guidance](#). This guide explains the legal framework that protects freedom of expression and the circumstances in which that freedom may be restricted in order to prevent violence, abuse or discrimination. It explores the boundaries between freedom of expression, unlawful discrimination and harassment, and hate speech. It also considers various contexts in which freedom of expression is curtailed. The guide is intended for those who are interested in how the law regulates potentially offensive forms of expression. This guidance should be relevant should the Committee consider the language used by Assembly Members during Assembly business and events.
34. Key points from the guidance include:

- Freedom of expression is a fundamental right protected under the Human Rights Act 1998 by Article 10 of the European Convention on Human Rights. It is also protected under the common law.
- Protection under Article 10 extends to the expression of views that may shock, disturb or offend the deeply-held beliefs of others.
- Any restrictions on freedom of expression must always be clearly set out in law, necessary in a democratic society for a legitimate aim, and proportionate.
- Subject to these conditions, freedom of expression may be limited in some circumstances and in particular does not protect statements that unlawfully discriminate against or harass, or incite violence or hatred against, other persons and groups, particularly by reference to their race, religious belief, gender or sexual orientation.
- No one can rely on the human right to freedom of expression to limit or undermine the human rights of others.
- It is not always easy to draw the boundary between expressing intolerant or offensive views (which are afforded protection under Article 10) and hate speech or other very offensive communication so serious that it is not so protected. Factors likely to be relevant in making the distinction will include the intention of the person making the statement, the context in which they make it, the intended audience, and the particular words and form of communication.
- Freedom of expression is protected more strongly in some contexts than others. In particular, a wide degree of tolerance is accorded to political speech and debate during election campaigns.
- It is nonetheless a criminal offence to stir up hatred on racial or religious grounds or on the ground of sexual orientation.

Offensive or insulting language may also constitute harassment, either under the Equality Act 2010, or if directed at an individual under the Protection from Harassment Act.

- In addition to the criminal law, there are a number of different contexts in which the law provides additional protection against offensive or harassing conduct. These contexts include employment, service delivery and education.

35. Public bodies must respect the rights to both freedom of expression and freedom from discrimination. They are also subject to particular duties which require them to have due regard to the need to promote good relations between different communities protected by equality law. This may require them actively to challenge the use of offensive communication.
36. The Committee may also want to be aware of the Commission's 'Delivering the Prevent duty in a proportionate and fair way in Wales' guidance. ¹This guidance is primarily relevant to higher education bodies, but it contains information relevant to identifying, challenging and addressing all forms of extremism in order to help prevent vulnerable people from being drawn into terrorism. The UK Government's intention is for the Prevent duty to be discharged in a sensitive and proportionate way that takes account of the Public Sector Equality Duty (PSED) and the need to maintain open and free speech. Our guidance sets out how to use equality and human rights law in the context of Prevent.
37. **The Committee should consider the Commission's Freedom of Expression Legal Framework guidance with regard to the conduct of AMs.**

¹ <https://www.equalityhumanrights.com/en/publication-download/delivering-prevent-duty-proportionate-and-fair-way-wales>

Summary of recommendations

38. The Committee should consider the findings and recommendations of the Commission's upcoming report into sexual harassment in the workplace.
39. The Committee should consider the Commission's sexual harassment and the law guidance and put it place the procedures it outlines.
40. The Committee should consider the introduction of further workplace policies to help foster an inclusive and supportive workplace culture.
41. The Committee should consider the Commission's Freedom of Expression Legal Framework guidance with regard to the conduct of Assembly Members.