



# Commissioner for Ethical Standards in Public Life in Scotland

## **CONDUCT of MEMBERS of the SCOTTISH PARLIAMENT**

**Report by**

**the Commissioner for Ethical Standards in Public Life in Scotland**

**to**

**the Scottish Parliament**

**on**

**complaint no. MSP/2119/17-18/23**

**Complainer :- Mr James Dornan, MSP**

**Respondent :- Mr Mark McDonald, MSP**

**30 May 2018**

**Commissioner for Ethical Standards in Public Life in Scotland**

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# **CONDUCT of MEMBERS of the SCOTTISH PARLIAMENT**

## **Report on complaint no. MSP/2119/17-18/23 to the Scottish Parliament**

**Complainer :- Mr James Dornan, MSP**

**Respondent :- Mr Mark McDonald, MSP**

### **1.0 Introduction**

- 1.1 The Standards, Procedures and Public Appointments Committee issued a Direction on 16 March 2018 ("the Direction") in pursuance of their powers under section 12 of the Scottish Parliamentary Standards Commissioner Act 2002, as amended ("the 2002 Act"). A copy of the Direction is included at **Appendix 1** to this Report.
- 1.2 The Direction refers to a letter from Mr James Dornan, MSP which sets out a complaint ("the complaint") about the conduct of Mr Mark McDonald, MSP. The Commissioner is directed to treat the complaint as admissible, thereby removing the need for Stage 1 of the investigation process set out in the 2002 Act.
- 1.3 The Direction specifies that section 7 (1) of the current, 7<sup>th</sup>, edition of the Code of Conduct for Members of the Scottish Parliament ("the Code") including in particular section 7 (6), and sections 7.1.1 and 7.2.3 of the 6<sup>th</sup> edition of the Code, which was in force from 29 April 2016 to 29 August 2017, are to be treated as the relevant provisions of the Code for the purposes of my investigation. These provisions are set out in **Appendix 2** to this Report.
- 1.4 Investigation of the complaint has been undertaken in terms of: Section 8 of the 2002 Act; the Directions by the Standards Procedures and Public Appointments Committee dated 1 March 2012 ("the 2012 Directions"); and the Direction.
- 1.5 This Report is submitted to the Parliament in terms of section 9 of the 2002 Act.

### **2.0 Complaint**

- 2.1 The complainer is Mr James Dornan, MSP ("the complainer"). Mr Dornan is the MSP for Glasgow Cathcart and is a member of the Scottish National Party. His complaint is about Mr Mark McDonald, MSP ("the respondent").
- 2.2 Mr McDonald is the MSP for Aberdeen Donside and is an Independent member of the Parliament. He was first elected to the Parliament in May 2011 as a member for the North East Scotland Region and as a member of the Scottish National Party. He became the member for Aberdeen Donside in June 2013 and was re-elected in May 2016. Mr McDonald was appointed as Minister for Childcare and Early Years shortly after his re-election. He resigned from that post on 4 November 2017. Mr McDonald resigned from the Scottish National Party on 6 March 2018.

- 2.3 The complaint alleges that a female member of staff employed by the complainer was a "targeted victim of harassment and sexual innuendo at the hands of" the respondent. It is alleged that the respondent sent highly inappropriate messages on social media and showed unwanted attention within the Parliament grounds on a number of occasions towards the individual (referred to in this Report as "Witness A"). The complainer alleges that on one occasion he had to leave an event which he was hosting at the Parliament to escort Witness A to a waiting car because she was sure that the respondent was waiting for her close to the exit from the Parliament building. He alleges that the respondent used his position as a Government Minister to harass Witness A and that she, as a result of that and other pressures, was hospitalised and required several months of rehabilitation.
- 2.4 I was aware of media reports of a number of other allegations involving the respondent and the fact that an investigation into various allegations against him had been conducted on behalf of the SNP. I understand that the respondent was informed of a complaint on 3 November 2017. As a consequence, the respondent chose to resign from his ministerial post on 4 November. The respondent was suspended from the SNP parliamentary group on 16 November 2017, after a further complaint had been made. He was advised of the outcome of the SNP investigation on 5 March 2018.
- 2.5 The Direction requires me to take into account any information which may relate to the complaint. I had the opportunity to review the evidence gathered during the SNP investigation and decided that information in relation to one of the findings was relevant to the complaint. That is because the finding relates to an allegation about the conduct of the respondent in the period following 29 April 2016 towards a relatively junior, female member of MSP staff (identified in this report as "Witness B").
- 2.6 In conducting the investigation and in preparing this Report, I had regard to: the media coverage of allegations involving Mr McDonald; the potential for further distress to be caused to persons who may have had an involvement in circumstances relevant to those allegations; the wishes of persons from whom information has been obtained; the complainer's endorsement of that position in relation to Witness A; Mr McDonald's public statement at the time of his resignation from the SNP that no individual should be asked to identify themselves; and to the Witness Policy and Guidance which apply to investigations by my office and are published on the office's website. Paragraphs (6) and (7) of the 2012 Directions make reference to individuals who may appear to be a "vulnerable person". I decided that both Witness A and Witness B should be treated as vulnerable persons and that their identity should be withheld in the preparation of this report. The identity of each of them was known to the respondent by virtue of the circumstances of the allegations in the complaint and in the SNP investigation.

### **3.0 Investigation and findings**

- 3.1 Interviews were held with the complainer, with Witness A, and with the respondent. Contact was also made with a friend of Witness A to whom she made reference in her evidence. Witness B had provided evidence to



the SNP investigation indirectly, via a solicitor nominated by the SNP. She did not wish to participate in this investigation, except to confirm her agreement to the factual information set out in this Report being disclosed. The facts were not disputed by the respondent.

- 3.2 Summaries of the interviews held with the complainer, Witness A and the respondent form, respectively, **Appendices 3, 4 and 5**. These were issued to the witnesses in terms of paragraph (9) of the 2012 Directions. No representations were received other than minor, factual corrections which have been incorporated.
- 3.3 Witness A has been employed by the complainer as office manager since the end of May, 2016. She is a member of the SNP and was elected as a member of [REDACTED] Council [REDACTED] in [REDACTED]. She did not stand for re-election in May 2017. Witness B worked in the respondent's parliamentary office in a variety of roles both before and after his re-election in May 2016, but ceased to do so some weeks after his appointment as a minister.
- 3.4 Following the election and his appointment as a minister, the respondent decided to take a lease of a flat in Edinburgh. At the point at which a deposit was due to be paid, according to his evidence, the respondent was not in a position to pass across his card details or to make payment in person. He asked his assistant, Witness B, to make the payment on his behalf, intending to reimburse her. She agreed.
- 3.5 The deposit of £476.14 was paid on 28 May 2016. This was reimbursed by the respondent on 21 June. The dates of these payments are shown in the extract bank statements attached at **Appendix 6**.
- 3.6 The respondent indicated that it was not uncommon for members' staff to be asked to undertake tasks which were outside the scope of normal duties. He referred to the pressures which followed his ministerial appointment and to concurrent family health issues in respect of the delay in making payment. However, he accepted that it had been wrong to ask his member of staff to pay the deposit on his behalf. He also acknowledged that, having done so, he ought to have reimbursed her sooner. The respondent regretted his actions and advised that he had issued a written apology to Witness B following the investigation of complaints by the SNP.
- 3.7 The evidence given by Witness A and by the respondent indicates that contacts between them began on public social media pages around the time of the 2016 Holyrood election campaign. The respondent thought that the contact began in late 2015. At some stage, which neither party could pinpoint given the passage of time, they also began to exchange private messages on twitter or Facebook. In his evidence, the complainer described this as "fairly innocent stuff". Witness A stated that, after the initial public exchanges, there were direct messages between her and the respondent which were of a more private nature. She could not recall by whom they had been initiated. She advised that these did not cause her any particular concern albeit that she had commented to the complainer that some of the respondent's messages seemed 'quite full on'. There was

no evidence presented to me which suggested that these early exchanges involved inappropriate behaviour on the part of the respondent.

- 3.8 The complainer described Witness A as being very friendly, and said that she was always interacting with people on social media. Witness A described herself as gregarious, outgoing and friendly. The respondent was aware that Witness A had an interest in matters concerning children and early years, which was his ministerial remit. He considered that it was appropriate for him, as the responsible minister, to seek to discuss these matters with another interested, elected representative.
- 3.9 The respondent had been due to speak at a conference in Inverness on the morning of Friday, 30 September 2016. His plan was to travel from Inverness to Glasgow by train and stay the night there ahead of speaking at an early years conference in Glasgow the following morning. He recollected a discussion with Witness A on private social media about the possibility of meeting up for a drink in Glasgow after work on the Friday. He advised that Witness A had declined on the basis that she would be attending a fund raising event in her local area.
- 3.10 Witness A said that she had become concerned that the respondent was becoming too friendly towards her. The complainer said that he had been aware of Witness A's concern that the respondent was persisting in making approaches to her, and was "not taking the hint". This appears to have been based in part on Witness A's impression that the respondent frequently appeared to be present when she was in common parts of the Parliament, such as the ground floor restaurant or the Garden Lobby. Witness A said that the respondent's behaviour towards her in these areas of the Parliament was markedly different after the events of 27 September 2016. However, neither the complainer nor Witness A was able to identify any specific incidents or behaviours which stood out in this context. I do not, therefore, consider that I can give any weight to this aspect of the complaint.
- 3.11 Witness A said that, at some point during the day on 27 September 2016, the respondent sent an email asking if she would like to meet for a coffee at the Parliament. This is not disputed by the respondent, although he has been unable to trace an email containing the invitation. He said that it was common for members and staff to be gathered in the Garden Lobby area of the Parliament, having discussions over tea or coffee. Given that both he and Witness A had an interest in the same areas of policy and practice, he saw nothing exceptional in seeking to catch up in that way.
- 3.12 Witness A found the invitation to be intrusive, in the context of her growing concern about the respondent's apparent persistence. She felt pestered by the respondent at work. It is not clear from the evidence whether Witness A replied to the invitation. The complainer's recollection was that the respondent had contacted Witness A on a number of occasions on that day suggesting that they should meet for a coffee. However, neither Witness A nor the respondent has made reference in their evidence to multiple contacts on that day.
- 3.13 The complainer was due to host an event at the Parliament on the evening of 27 September 2016. The event was for Colleges Scotland and was held

in the Members' Room, which is situated on the first floor of the Parliament building.

- 3.14 The event began at 6 pm, and Witness A attended along with the complainer. Witness A advised that her intention had been to leave the event and walk from the Parliament to Waverley station to catch a train home. However, at some point during the evening, she formed the opinion that the respondent was waiting in the Garden Lobby with the intention of intercepting her as she left the building. Witness A did not wish that to happen, and became agitated. She stated that she did not feel confident to leave the building on her own and walk to the station, nor even to take a taxi. Witness A contacted a friend and asked him to collect her in his car and drive her home. He agreed. The complainer later escorted Witness A from the Parliament building to the waiting car and she was driven home.
- 3.15 The respondent's version of what happened that evening is that, after Decision Time at approximately 5 pm, he went back to his office in the Ministerial Tower. He attended to some ministerial correspondence, then left the office and went down the stairs which lead to a lobby area outside the entrance to the Members' Room. He had no reason to go in to the event, and did not do so. The respondent says that he then went down the stairs to the Garden Lobby, and crossed it to go to the bar, in order to see if any of his backbench colleagues were there. Finding that there were none, he claims that he walked back across the Garden Lobby, left the Parliament building, and returned to his flat. He denies that he waited, or skulked, in the Garden Lobby area.
- 3.16 The respondent recalled passing Witness A on the stairs between the first floor and the Garden Lobby, as he was heading down towards the bar. The respondent says that they had a brief conversation in which Witness A asked how he was getting on, and about his ministerial work. He thought that something might have been said about not having managed to meet up for coffee.
- 3.17 The evidence given by the complainer and by Witness A about the circumstances surrounding the Colleges Scotland event is not consistent. This is perhaps not surprising, given that it occurred some 18 months before the complaint was submitted.
- 3.18 Witness A gave evidence to the effect that the respondent attended the event in the Members' Room but that she did not speak to him other than possibly to say "Hi". The complainer could not recall if the respondent did attend. The respondent denies that he attended.
- 3.19 Witness A said that she saw the respondent in the Garden Lobby area, and that he was wearing a jacket and carrying a leather bag on his shoulder. She claims to have seen him from the event. However, that is not physically possible. In order to be able to see someone in the Garden Lobby area, it would be necessary to exit from the Members' Room, walk a short distance across the lobby area outside the room and look or walk down the stairs which lead to the Garden Lobby.

- 3.20 Witness A was uncertain as to the time which elapsed between her making contact with the friend who came to collect her and the point at which he did so. She estimated that it must have been about 20 minutes. Witness A claims that the respondent was skulking in the Garden Lobby area, between the cash machine and the Allowances desk, throughout that period.
- 3.21 The friend who drove to the Parliament to collect Witness A recalled clearly that he was at, or just leaving, Motherwell station when he received her request. His view was that it would have taken approximately 45 minutes to drive from there to the Parliament.
- 3.22 Witness A was accompanied by the complainer when she left the Parliament building. Her evidence was that they passed the respondent on their way out. In fact, she said that he walked alongside them for the short distance between the Parliament's Pass holders' exit and the turnstiles at the foot of the Canongate. Witness A recalled that the respondent spoke to them as they were leaving the building, and asked if she was going to the station. She did not respond but she said that the complainer did so, frostily.
- 3.23 The complainer recalled that they had had to walk past the respondent, who was waiting inside the Parliament building. He said that he had been asked by Witness A not to say anything to the respondent. He was not certain if the respondent had said anything as they passed.
- 3.24 Witness A recalled that the car was parked across the road from the public entrance to the Parliament building, outside Holyrood Palace. That accords with her friend's recollection. The complainer was less clear in his evidence as to where the car was parked.
- 3.25 The respondent denies that he saw or spoke to the complainer that evening.
- 3.26 I have concluded that there was a lapse of approximately 45 minutes between Witness A making contact with her friend and his arriving to collect her. There is no evidence to support Witness A's assertion that the respondent was waiting, or skulking, in the Garden Lobby area throughout the period between her making contact with her friend and leaving the Parliament building. I considered that for the respondent to have done so would have amounted to quite exceptional behaviour. I have therefore concluded, on the balance of probabilities having regard to the evidence available to me, that the respondent did not wait for an extended period of time in the Garden Lobby area of the Parliament for Witness A to leave the Colleges Scotland event.
- 3.27 Similarly, the evidence led me to conclude that the respondent did not attend the Colleges Scotland event in the Members' Dining Room. My conclusion is supported by the fact that none of the photographs of the event, which are available on the Colleges Scotland website, show the respondent being in attendance. Given his status as a minister, I would have expected him to feature, had he been there.

- 3.28 I do not doubt that Witness A saw the respondent that evening. Nonetheless, her recollection in relation to when and where she saw him cannot be reconciled with my conclusion that the respondent did not attend the Colleges Scotland Event and the physical impossibility of observing the area in which it is alleged that the respondent loitered from the Members' Room. The evidence suggests that Witness A could not, therefore, have observed the respondent at, or from, the event except possibly fleetingly as he passed on his way down from the Ministerial Tower.
- 3.29 The respondent's description of his meeting with Witness A that evening was that they met, and had a brief conversation, on the stairs. I noted that Witness A stated in her evidence that, when she saw the respondent, he was wearing a jacket and carrying a leather bag. She said that her belongings must have been collected at some point in the evening from the complainer's office in the Members' Block, but she could not recall if or how she had done so. The most direct route between the Members' Room and the complainer's office is via the stairs and the Garden Lobby. If Witness A did retrieve her belongings from the Members' Block, it is therefore quite possible that she passed the respondent on the stairs leading to and from the Garden Lobby. That would also be consistent with the limited timings which can be established. These are that: the event started at 6 pm; Witness A contacted her friend at approximately 6.30 pm and was collected by him approximately 45 minutes later. On balance, in the light of all of the evidence available to me, I prefer the respondent's explanation of his meeting with Witness A that evening.
- 3.30 There is then a question as to whether the respondent spoke to Witness A and to the complainer as they left the building. The respondent denied that he had done so. The complainer said that he and Witness A had had to walk past the respondent, but that he could not recall the respondent speaking to them. Witness A recalled the respondent speaking and the complainer responding to him in frosty terms. I considered, given the circumstances, that it would have been strange for there to have been no conversation, if indeed they had passed in close proximity. In the light of the contradictory evidence of the complainer and Witness A, and the respondent's denial, I have been unable to reach a conclusion as to whether the respondent was present at the point when the complainer and Witness A left the Parliament building. However, even if the respondent was present and did walk to the turnstiles with the complainer and Witness A, there is no evidence to suggest that either did or said anything inappropriate at the time.
- 3.31 **Appendix 7** shows a screenshot of private messages sent to Witness A by the respondent at 19.51. Witness A alleges that they were received by her when she got home from the event at the Parliament building on 27 September 2016. The respondent does not dispute that he sent them. He does not have a record of any messages received by him as part of an exchange of which they might have formed part. In the absence of any contrary evidence, I have concluded on the balance of probabilities that the messages were sent on the evening of 27 September 2016.
- 3.32 Witness A said that the messages caused her considerable upset, and that she burst into tears on receiving them. She said that she was under what

she described as “mega pressure” at the time. She was convinced that the messages had been sent to test her reaction, and at the same time was concerned that she had angered a government minister whose responsibilities were relevant to the committee of which her employer was convener.

- 3.33 The respondent claimed that the messages represented misguided humour on his part, referring to a couple of failed attempts to meet up with Witness A. He said that there was no malice on his part, nor any intention to engage in any form of innuendo. However, he accepted that the messages caused hurt, and acknowledged that there could be a distinction between intention and interpretation. He had recognised the problem, and for that reason had taken the decision to resign as a minister and issue an apology.
- 3.34 The reference in the second of the three messages to being “dingyed” twice supports Witness A’s evidence that she had rejected the respondent’s attempts to arrange a meeting, and that she found them unwelcome. There is clearly an element of sexual innuendo in the third message. Even if the messages were a clumsy attempt at humour on the part of the respondent, they were wholly inappropriate. The respondent has accepted that.
- 3.35 The evidence of Witness A was that she forwarded the messages to the complainer that evening. The complainer’s evidence was that he was furious, and wanted to confront the respondent. However, he did not, because Witness A did not want him to take that course of action.
- 3.36 The respondent has challenged that interpretation of events, on the basis of a light hearted public social media exchange between him and the complainer later on the evening of 27 September 2016, as shown in the screenshots in **Appendix 8**. However, I have no doubt that Witness A did forward the messages to the complainer, as it was he who provided them to the investigation.
- 3.37 The complaint makes reference to Witness A being admitted to hospital with a stress induced “stroke” in July 2017. The complainer refers to Witness A being “under other extreme pressure” at the time, and alleges that this was compounded by the respondent’s harassment of Witness A.
- 3.38 Witness A provided more detail about the deterioration in her health which led to her being hospitalised in June 2017, and the factors which she considered had contributed to her condition. It was identified by medical staff as an extreme reaction to stress. The factors included difficulties which she had experienced in her role as an elected member of [REDACTED] Council, including two complaints to my office about her conduct, family circumstances, and the way in which she had been portrayed in the media. It is clear that Witness A was subject to pressures in more than one area of her life. However, I am not in a position to make any judgement as to the extent to which the conduct of the respondent, or Witness A’s perception of it, contributed to the impact of those pressures on her health.

- 3.39 The respondent has expressed surprise that no earlier attempt was made to raise with him the concerns of the complainer or of Witness A. He drew attention to the social media exchange with the complainer late in the evening of 27 September 2016, noted in paragraph 3.36 above. He noted that the complainer continued to behave towards him in a friendly manner in the Parliament after that evening. The respondent also made specific reference to the day of the Scottish Cup Final in Glasgow between Celtic and Aberdeen, on 27 May 2017. His evidence was that the complainer collected him from the hotel, and they campaigned together in East Renfrewshire, before the complainer drove him back to Hampden Park for the match, all on an apparently friendly basis.
- 3.40 The complainer referred to the reluctance of Witness A to make any complaint, prior to the revelations about Harvey Weinstein, and to the difficulty of raising an issue with the party's Business Manager when the person involved was a Government Minister.
- 3.41 The complaint alleges that Witness A was "a targeted victim of harassment and sexual innuendo at the hands" of the respondent. Section 7.2.3 of the 6<sup>th</sup> edition of the Code is headed Treatment of Staff and includes a statement that:
- "Complaints from staff of bullying or harassment, including any allegation of sexual harassment, or any other inappropriate behaviour on the part of members will be taken seriously and investigated".
- 3.42 The provision clearly applies to the staff of MSPs. However, there is no definition of "harassment". I have therefore had regard to the definition set out in section 26 of the Equality Act 2010.

## **26 Harassment**

- (1) A person (A) harasses another (B) if—
- (a) A engages in unwanted conduct related to a relevant protected characteristic, and
  - (b) the conduct has the purpose or effect of—
    - (i) violating B's dignity, or
    - (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
- (2) A also harasses B if—
- (a) A engages in unwanted conduct of a sexual nature, and
  - (b) the conduct has the purpose or effect referred to in subsection (1)(b).
- (3) A also harasses B if—
- (a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,

(b) the conduct has the purpose or effect referred to in subsection (1)(b), and

(c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.

(5) The relevant protected characteristics are—

age;

disability;

gender reassignment;

race;

religion or belief;

sex;

sexual orientation.

3.43 It is clear that the messages sent to Witness A by the respondent on the evening of 27 September 2016 were unwanted and disrespectful. They involved an element of sexual innuendo and, therefore, of conduct of a sexual nature. Although the respondent has denied that it was his intention, I consider that sending the messages had the effect of creating an intimidating, degrading, humiliating or offensive environment for witness A and involved sexual harassment. It also showed a failure to treat Witness A with the courtesy and respect required by section 7.2.3 of the 6<sup>th</sup> Edition of the Code.

3.44 I consider that the respondent's conduct towards Witness B showed a lack of respect, in terms of section 7.2.3 of the 6<sup>th</sup> Edition of the Code. However, I do not consider that the respondent's conduct as outlined in paragraphs 3.4 to 3.6 involved harassment of Witness B.

## **4.0 Summary of Findings**

4.1 There are facts relevant to the complaint which are not in dispute. These are as follows:-



- (i) The respondent was appointed as Minister for Childcare and Early Years following his re-election as the member for Aberdeen Donside in May 2016.
- (ii) On or around 28 May 2016, the respondent asked his office assistant (Witness B) to make payment of the sum of £476.14 to secure the lease of a flat in Edinburgh for the use of the respondent.
- (iii) The respondent reimbursed his assistant on 21 June 2016.
- (iv) The respondent and Witness A engaged in social media exchanges over a period between the 2016 Holyrood election campaign and late September of that year.
- (v) Some of the exchanges were on public pages, and others were private messages between the respondent and Witness A.
- (vi) The complainer hosted an event for Colleges Scotland in the Members' Room at the Parliament on the evening of 27 September 2016.
- (vii) Witness A attended the event along with the complainer.
- (viii) Witness A asked a friend to collect her from the Parliament and give her a lift home.
- (ix) The complainer escorted Witness A from the Parliament building to the point where her friend was waiting in his car.
- (x) Later that evening, Witness A received text messages from the respondent in the terms set out in the screenshot attached at Appendix 7.

Having completed the investigation in this case, I have also found the following to have been established as facts on the balance of probabilities:-

- (xi) The respondent's actions in asking his assistant (Witness B) to make payment of the deposit on a flat lease on his behalf, and the time which elapsed before repayment was made by him, involved a failure on the part of the respondent to treat her with courtesy and respect.
- (xii) On 27 September 2016, the respondent sent an email via the parliamentary email system to the respondent inviting her to have a coffee with him.
- (xiii) Before the end of the Colleges Scotland event, Witness A saw the respondent as they passed on the stairs leading between the Garden Lobby of the Parliament and the Members' Room.
- (xiv) The respondent did not attend the Colleges Scotland event.

- (xv) Witness A became concerned that the respondent intended to intercept her as she left the Parliament building on her way home from the event.
- (xvi) A friend of Witness A met her outside the Parliament building approximately 45 minutes after the fact noted at (ix) above.
- (xvii) Receipt of the messages shown in Appendix 7 caused Witness A to be distressed.
- (xviii) The last of the messages, read with the second message, contained sexual innuendo by association with the notion of Witness A “fingering” the respondent.
- (xix) The respondent failed to show courtesy and respect to Witness A when he sent the messages.
- (xx) The messages were unwanted, contained sexual innuendo, and had the effect of creating an intimidating, degrading, humiliating or offensive environment for Witness A and, therefore, constituted sexual harassment by the respondent.

## **5.0 Proposed Report**

- 5.1 Following the investigation I submitted my proposed Report to the respondent on 10 May 2018 and invited his representations.
- 5.2 He replied by letter on 23 May 2018 and his letter is set out as **Appendix 9**. The report has been adjusted as noted in **Appendix 10**.

## **6.0 Conclusions**

- 6.1 I have therefore concluded that the respondent failed to treat Witness A with respect, and that his conduct towards her involved sexual harassment, in breach of section 7.2.3 of the Code (6<sup>th</sup> Edition, 29 April 2016) and that the respondent’s treatment of Witness B also involved a failure to treat her with respect and was, therefore a breach of paragraph 7.2.3 of the Code (6<sup>th</sup> Edition, 29 April 2016).

Bill Thomson  
Commissioner



The Scottish Parliament  
Pàrlamaid na h-Alba

### **Standards, Procedures and Public Appointments Committee**

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16 March 2018

Dear Commissioner

#### **Complaint against Mark McDonald MSP**

In exercise of the powers conferred by section 12 of the Scottish Parliamentary Standards Commissioner Act 2002 (“the 2002 Act”), and by virtue of Rule 3A.2 of the Standing Orders of the Scottish Parliament the Standards, Procedures and Public Appointments Committee of the Scottish Parliament gives the following direction to the Commissioner for Ethical Standards in Public Life in Scotland:

With reference to the attached letter of complaint, received from Mr James Dornan MSP dated 12th March 2018, alleging that a member of Mr Dornan’s staff was a targeted victim of harassment and sexual innuendo by Mr Mark McDonald MSP, that the Commissioner—

- a) Undertake an investigation into the complaint about the conduct of the member of the Parliament.
- b) Take into account any information which may relate to the complaint.
- c) Treat the complaint as admissible. Further, the relevant provisions which are to be treated as having been identified by the Commissioner for the purposes of the first test within section 6 of the 2002 Act are sections 7 (1) of the Code of Conduct for Members of the Scottish Parliament (“the Code”) including in particular section 7 (6) of the Code (and formerly sections 7.1.1 and 7.2.3 of the 6<sup>th</sup> edition of the Code in force from 29 April 2016 to 29 August 2017).
- d) Treat the complaint as having met all the requirements specified within section 6 (5) of the 2002 Act.

The Committee look forward to receiving your Report at the conclusion of your investigation.

Yours sincerely

A handwritten signature in cursive script, reading 'CHaughey', enclosed within a thin rectangular border.

Clare Haughey MSP  
Convener  
Standards, Procedures and Public Appointments Committee

Clare Haughey MSP  
Convener  
Standards, Procedures & Public Appointments Committee

SPPA.Committee@parliament.scot

To the Convener of Standards, Procedures and Public Appointments Committee,

I wish to lodge a formal complaint against a Member of the Scottish Parliament – namely Mark McDonald. I have a member of staff who was a targeted victim of harassment and sexual innuendo at the hands of this member. This member of staff would like to remain anonymous, if possible, to prevent any further hurt or distress.

My staff member first approached me to tell me of her distress at the end of 2016. I encouraged her to take it further but as Mr McDonald was a Government Minister at the time she was both afraid and anxious at the prospect. My staffer kept me informed of any contact from Mr McDonald and it was only at her insistence that I did not take this further. Mr McDonald sent her highly inappropriate messages on social media, which my staff member immediately showed me. I also witnessed him show unwanted attention within the Parliament grounds on a number of occasions. On one occasion I had to leave an event I was hosting to escort my staff member to a waiting car as she was sure Mr McDonald was waiting for her. As we left the building he was standing close to the exit, and I have no doubt he was indeed waiting for her.

When the “Weinstein” allegations started to break my staff member reported Mr McDonald to the Scottish National Party; the change in the perceived public response to victims helped enable her to do so.

The party has since conducted an investigation, including an investigation into allegations from other staffers, and Mr McDonald has since resigned from the SNP, left the SNP parliamentary group and his position as a Government Minister. However, Mr McDonald has now indicated that he will be returning to the Scottish Parliament. In my view having Mr McDonald in the same workplace as his victims would be clear negation of the duty of care that the parliament has to all its members of staff. In any other workplace I would expect my staff member to be protected from this kind of behaviour and the Scottish Parliament should be no exception.

In July 2017 my staff member became so unwell due to stress she was admitted to Wishaw General Hospital with a stroke, she then spent several months rehabilitating and six months off of her work, which had a massive impact on my office and on her life. It would be wrong of me not to mention that she was under other extreme pressure, but this was compounded by a Member who should have known better and who, in my opinion, used his position to harass her. I have a duty of care to all my members of staff and subjecting them to work with

someone who has admitted to wrongful behaviour just feels out of the question. Something must be done to ensure her and others safety, and that her well-being and mental health is protected.

I look forward to your committee giving this matter speedy and serious consideration, and would appreciate a timely response on this pressing matter.

Kind Regards,

James Dornan MSP  
Glasgow Cathcart constituency

## **Code of Conduct for MSPs**

6<sup>th</sup> edition of the Code - 29 April 2016 to 29 August 2017:

### **SECTION 7: GENERAL CONDUCT AND CONDUCT IN THE CHAMBER OR IN COMMITTEE**

#### **7.1: Introduction**

7.1.1 Members must comply with the requirements of this Code of Conduct, with the Standing Orders, with any other decision of the Parliament and with any statutory provision. The following provisions cover the general conduct of members.

#### **Treatment of staff**

7.2.3 Parliamentary staff (which includes contractors providing services to the Parliament) together with the staff of MSPs are expected to treat members with courtesy and respect. Members must show them the same consideration. Complaints from staff of bullying or harassment, including any allegation of sexual harassment, or any other inappropriate behaviour on the part of members will be taken seriously and investigated.

7<sup>th</sup> edition of the Code:

### **SECTION 7: MSPs' GENERAL CONDUCT**

1. Members must comply with the requirements of this Code of Conduct (the Code), with the Standing Orders, and with any other decision of the Parliament relating to the conduct of MSPs.

#### **Treatment of others**

6. In addition, Members must treat parliamentary staff (which includes contractors providing services to the Parliament) together with the staff of MSPs with courtesy and respect. Complaints from staff of bullying or harassment, including any allegation of sexual harassment, or any other inappropriate behaviour on the part of members will be taken seriously and investigated.

### **Summary of interview with James Dornan, MSP**

Mr Dornan first became aware of any issue involving Witness A and the respondent in September or October of 2016. The respondent had been contacting her on messenger and other forms of communication about going for a coffee, or saying that they could catch up at conference, or that he would be in Glasgow. Mr Dornan described this as "fairly innocent stuff". He said that witness A was very friendly and was always interacting with people on social media. However, she had become concerned that the approaches from the respondent were persisting. Although she had been making excuses, he was not taking the hint. Mr Dornan described this as the respondent continuing to try to push his way into her life.

Mr Dornan said that he was furious when he saw the text messages set out in Appendix 7 which had been forwarded to him by witness A. He had been going to confront the respondent, but witness A asked him not to, because the respondent was an education minister and Mr Dornan was convener of the education committee. She did not want to cause problems for Mr Dornan: he respected her decision.

Mr Dornan referred to an education event which he was hosting in the parliament. He said that it was held in the parliament's garden lobby, starting at 6 pm: it would have been due to finish between 7.30 and 8 pm. Witness A had been there with him. Mr Dornan could not say how many had attended.

Mr Dornan said that witness A had been nervous about the respondent, who always seemed to be about. Sure enough, he said, the respondent was in the garden lobby, on the periphery of the event, although he did not attend it. Mr Dornan understood that the respondent had contacted witness A a number of times on the day of the event, suggesting that they should meet up for coffee.

Mr Dornan said that witness A had asked him to accompany her to a car outside the parliament building, where a friend of witness A was waiting to collect her. She had asked him to come back to the parliament building to give her a lift home.

Mr Dornan said that they left by the passholders' entrance, and the car was parked at the taxi pick up point at the foot of the Canongate. He recalled that they had had to walk past the respondent, who was inside the building, to get to the exit. Mr Dornan could not recall the respondent saying anything, although he thought that he might have said something in passing. Mr Dornan said that he had been asked by witness A not to say anything.

Mr Dornan explained that there was no single event which had given rise to his complaint. Rather, it was a building effect, culminating in the text messages. It was like grooming.



Mr Dornan explained that the matter had not been taken up by him with the party's business manager, as envisaged in the Code of Conduct, because it was difficult to do so when the person in question was a government minister. It was not so straight forward as an issue between two MSPs. There had been no attempt at conciliation. They had simply avoided the respondent.

Mr Dornan referred to the health issue experienced by witness A in July 2017. He understood that it was stress induced, but not because of any particular incident. He emphasised that he had never claimed that the respondent's conduct had been the sole reason for it. There were, he said, a number of contributing factors.

Mr Dornan explained that witness A was glamorous and said that she had had to "put up with a lot of this sort of stuff" in politics. She had not been able to escape it at the parliament, and Mr Dornan had seen the impact on her. He said that it contributed to where she found herself.

Mr Dornan said that witness A had made a complaint to the SNP headquarters after the Weinstein story had broken and she had written a blog about behaviour experienced during her time as an elected councillor. It was clear that something had happened and the party had made contact with her. She had then reported the circumstances which led to this complaint. He understood that she had agreed to do so after speaking to others, including her family.

Mr Dornan said that there had been no apology from the respondent to witness A. She had had to hold on to the issue for over a year, and it had periodically come back to hit her. He was in no doubt that she would be unable to work in the parliament building if the respondent was there.

### **Summary of interview with Witness A**

Witness A began working for James Dornan, MSP at the end of May 2016, shortly after the election. She generally worked in his constituency office on Mondays and Fridays and on other days in his office at the Scottish Parliament.

Witness A was a member of the SNP and had been elected as a member of [REDACTED] Council [REDACTED] in [REDACTED]. She sometimes adjusted her working patterns to accommodate council business.

Witness A referred to social media links between party members as the means by which she first had any contact with the respondent. She thought it would have been during the campaign for the Holyrood election in 2016, when the respondent had been a candidate in the North East region. There were occasional social media exchanges, originally on a public twitter feed. At some point thereafter, there were direct messages between the respondent and witness A which were of a more private nature. She could not recall the point at which the direct messages began nor by whom they had been initiated. These did not cause her any particular concern, albeit that she had commented once or twice to James Dornan that the respondent was "quite full on".

Witness A explained that she exchanged greetings with the respondent at the Parliament, after the election, and that the direct messages became a bit more personal, both on Twitter and on one or the other's Facebook page. She acknowledged that some were simply in response to messages she had posted about abuse which she had received in her council role.

Witness A described herself as a gregarious, outgoing and friendly person. However, sometime after she had taken up the role in with James Dornan, she found that she had to deal with difficult issues due to her treatment in the council and in the local press and because of issues which occurred in her own family.

After the election, the respondent was appointed as the Minister for Childcare and Early Years, and James Dornan was elected as Convener of the Education and Skills Committee. Witness A explained that, in terms of the hierarchy within the party, this meant that the respondent, as a junior minister, was in a position which was significantly senior to her as a staffer.

Witness A began to feel that the respondent was being too friendly towards her, given his ministerial and family status. She said that, although the respondent and her employer had offices in separate parts of the parliamentary estate, it was common for ministers, members and staffers to meet in the parliament's ground floor restaurant or in the garden lobby. She had the impression that the respondent frequently appeared to be around when she was there.

In September 2016, on the day of an evening event at the parliament which was to be hosted by James Dornan, the respondent sent witness A an email asking if she wished to meet for coffee. Having spoken to James Dornan about the invitation, Witness A declined. She had a feeling that it was not work related, and that it was "different". She was under pressure, particularly with her responsibilities for the event that evening. Witness A felt pestered by the respondent whilst at her work.

The event was hosted by James Dornan on behalf of Colleges Scotland in the former Members' Dining Room at the Parliament on the evening of 26 September. Witness A had a number of responsibilities in connection with the smooth running of the event. She said that she was on edge because of the attention from the respondent and, in particular, his invitation to go for a coffee.

Witness A said that the respondent attended the event, but she could not recall any interaction with him.

The time arrived when witness A planned to walk to Waverley Station to catch a train home. However, when she went to leave, she said that she saw the respondent standing in the garden lobby at the foot of the stairs leading down from the room where the event was being held. He was wearing a jacket and carrying a leather bag on his shoulder. She felt that the respondent was waiting for her and did not feel sufficiently secure to walk to the train station by herself. She said that she was too agitated to take a taxi. She also knew that James Dornan could not leave the event at that stage.

Witness A decided to contact a friend and ask him to collect her from the parliament in his car. She thought that he was on his way home. He contacted her some time later and said that he was parked across the road from the public entrance to the parliament. Witness A could not recall precisely, but thought that around 20 minutes would have passed between her making contact and his arriving outside the parliament.

Witness A asked James Dornan to accompany her to the car, which he did. She could not remember retrieving her belongings from James Dornan's office in the Members' Block. She thought that James Dornan might have fetched them for her.

On the way out of the parliament building with James Dornan, witness A said that they passed the respondent in the garden lobby area. Witness A said that he was loitering in the area at the foot of the stairs which lead down from the room where the event took place, between the cash machine and the Allowances desk.

Witness A said that the respondent asked if she was leaving and going to the station, and that James Dornan replied, frostily, that she was not. She said that

the respondent walked alongside her and James Dornan to the turnstiles at the Canongate exit.

Witness A explained that, at this point in her life, she was still under what she described as "mega pressure" in the council and in the media.

Later that evening, when she was at home, Witness A received a direct twitter message from the respondent saying "that's twice you've dingyed me". She did not reply, but then received a further message from the respondent saying that his phone had tried to autocorrect the previous message to "you've fingered me," and adding "how awkward would that be?". Witness A felt that the message was testing her, to see how she would respond, and it caused her to burst into tears.

Witness A could not recall the time when the messages arrived, but said that she sent them directly to James Dornan and deleted them. Witness A was then concerned that she had upset a government minister, a senior member of the Party.

Witness A said that James Dornan phoned her and said that he intended to report the respondent in respect of his behaviour towards her. She also made contact with a lawyer friend who said that she had to report it. However, she was not willing for any report to be made at that stage.

Witness A said that she had no further contact with the respondent until the subsequent SNP spring conference, later in the year. At the conference, she had moved an amendment to a motion which the respondent had proposed, because she thought that she was right and she wanted to hurt him. She also said that, although the respondent was present in the Parliament's garden lobby and restaurant after the evening of the Colleges Scotland event, his behaviour was different in that he appeared to be avoiding making contact with her.

Witness A expanded on the difficulties which she had been experiencing as a councillor, including what she described as a smear campaign against her following her uncovering some apparent financial mismanagement. She also referred to a specific, unfounded allegation which she considered was simply designed to discredit her. Witness A made reference to how she had been described in the press, for example, in terms of her appearance. There were also family issues. [These involve sensitive personal data, which are withheld from this report, given that it may be made public at a later stage.] In addition, two complaints had been made against her by the same individual about alleged breaches of the Councillors' Code of Conduct.

Over Christmas 2016, witness A reviewed her position and decided that she could not stand for re-election to the council. Her health was suffering. This came to a head in June of 2017. Her condition was identified as an extreme reaction to severe stress. It resulted in her being hospitalised. Although she was

feeling stronger at the time of the interview, witness A indicated that she had still not made a full recovery.

When she began to recover, witness A went abroad on what had been planned as a family trip. At that time, the allegations about Harvey Weinstein became public. She decided to write two blogs, about her own experience of sexual harassment in the council and in the parliament. She also wrote an open letter to Jeremy Corbyn about her treatment by Labour councillors.

She noted that the respondent and others had been tweeting about how disgraceful the Harvey Weinstein situation was.

Following publication of the blogs, James Dornan was contacted by someone from the SNP party headquarters, and shared the messages which witness A had forwarded to him. Witness A was then contacted on behalf of the Party and asked whether she wish to make a complaint. She decided to do so.

Witness A had been contacted by a number of people about their perception of the respondent's behaviour, but none had been willing to come forward with a complaint.

Witness A was aware that the respondent had sent an apology to another woman, but she had only seen the respondent's public apology. She said that it would have gone a long way if he had sent an apology for the hurt which he had caused her, via James Dornan or the party, and indicating that he would stay out of her way. She felt that she could not return to work at the parliament whilst the respondent was there.

**Summary of interview with Mark McDonald, MSP**

Mr McDonald confirmed that he was first elected to the Scottish Parliament in 2011, to represent the North East Scotland Region. In 2013 he stood down to contest the Aberdeen Donside seat, for which he was elected in June of that year and re-elected in May 2016.

Prior to his election, Mr McDonald had worked in the constituency office for a number of elected representatives: Richard Lochhead from 2003 to 2006; Maureen Watt from 2006 to 2007; and for Nigel Don from 2008 to 2011.

On 20 May 2016, he received a phone call from the First Minister's office asking him to attend at Bute House the following day. He was then invited to become Minister for Childcare and Early Years. Mr McDonald then had to move parliamentary office, from the Members' Block to the Ministerial Tower.

Until 2013, Mr McDonald had a flat on Royal Park Terrace. However, he had to terminate the lease following a leak from the upstairs property which brought down the bathroom ceiling, and moved to serviced apartments near the parliament. He decided to look into getting a flat following the 2016 election. His situation was complicated by his appointment as a minister, which entailed significant commitments. Mr McDonald's parliamentary assistant at the time offered to assist with looking for and securing a flat. His staff member was happy to tie up loose ends connected with arrangements for the flat. When it came to paying the deposit, he was not in a position to pass across his card details and asked his assistant to make payment on her credit card, which he would then reimburse. He explained that he was not in a position to make the payment physically, or in person. The payment was made at the end of May, 2016 and the repayment on 21 June 2016.

Mr McDonald acknowledged that he should not have asked his staff member to pay the deposit and that, having done so, the repayment should have been made sooner. He regretted his actions and accepted that it was wrong for him to have asked for the payment to be made in that way.

Mr McDonald explained that his father was undergoing tests at that time which resulted in a diagnosis of terminal cancer. Whilst he did not suggest that the request he made was normal, he did observe that it was not unusual for members' staff to be asked to do things which were outside the normal scope of duties, such as being present to allow broadband to be installed in a property.

Mr McDonald added that he had made a written apology to the person concerned for these actions, following the investigation by the SNP.

In terms of social contact with Witness A following the election in 2016, Mr McDonald said that she was an elected representative with a keen interest in the area of children and young people for which he had ministerial responsibility and they had and they communicated openly. Prior to that, he said that there had

been open exchanges on social media, in the form of relaxed conversation. Mr McDonald produced copies of twitter exchanges from May and July 2016: these are appended. He explained that he no longer had copies of earlier exchanges. They had also spoken in person at a number of events, such as an SNP conference in Aberdeen in 2015.

Following his ministerial appointment in 2016, Mr McDonald said that he had been interested in speaking to elected representatives at local council level with an interest in the agenda for children and young people, formally or informally, about alignment of policy and approaches. He said that witness A had expressed a willingness to be involved in such discussions.

Mr McDonald had been unable, following the SNP investigation, to find any record of an email sent on the parliament's system inviting Witness A for a coffee. However, he explained that it was common for members and staff to be gathered in the garden lobby area having discussions and tea or coffee. Mr McDonald said that that would have been the nature of any approach, had there been one. He could not recall any response from witness A and he said that they had never met up for a coffee.

Regarding the alleged incident at the Colleges Scotland event in the parliament in September 2016, Mr McDonald indicated that the allegation which was put to him during the SNP investigation related to his behaviour in connection with an equality network event hosted by Mr Dornan in November 2016. There was no such event.

Mr McDonald said that he had advised the SNP investigators that he recalled an occasion when he had met Witness A coming down the stairs to the garden lobby at the parliament.

Mr McDonald did not attend the Colleges Scotland event. On reviewing his diary, he noted that he had a number of ministerial meetings during the day but had nothing booked in the evening. After Decision Time at the parliament he had done what he normally did, which was to go up to his office and work through his ministerial papers. He had a debate coming up that week on early learning and child care, which he was going to be leading, and he had to prepare for a meeting the following morning. At the conclusion of that, he said that he left the office and went down the stairs from the ministerial tower, coming out by the lift next to the members' restaurant, where the event was taking place. He said that he did not go in to the event, because he was not required to be there and had no indication that anyone from his constituency would be attending or wanted to speak to him. Mr McDonald could not give an indication of the time of his leaving his office.

Mr McDonald said that he went round the corner to the stairs leading to the garden lobby which is when he met witness A coming up the stairs. He seemed to recall a short conversation to the effect that they would not get to meet up for

that coffee which they had spoken about. He said hello. She asked how he was getting on, whether he was busy with ministerial stuff and the debate coming up that week. Then he went on his way to the parliament bar across the garden lobby, to see if any of his back bench colleagues were in. He didn't find any colleagues there so walked back through the garden lobby towards the Canongate exit and went back to his flat.

Mr McDonald said that he neither saw nor spoke to Mr Dornan that evening, except for a social media exchange. Mr McDonald produced a screenshot of a public message from Mr Dornan at 11.37 that evening which, he said, showed a light hearted response by Mr Dornan to a comment made by Mr McDonald in the context of a twitter exchange involving them both and Witness A. Mr McDonald denied that he had hung around at the foot of the stairs for a period of time. He could not recall a conversation with James Dornan. Mr McDonald made the point that, except in relation to the messages which prompted his resignation as a minister in November 2017, no question was raised with him about his behaviour that evening until the SNP investigation in January 2018. At that point, it was alleged to have happened in relation to a different event on a different date.

Mr McDonald referred to the SNP Conference in March 2017 when he and Witness A spoke on the platform together on a resolution in relation to child care, on which he was leading and in which she had an interest. He said that Witness A later messaged him on an open social media channel to ask about the policy of the SNP government on a child care issue, as an example of Witness A's willingness to engage with him some months after the events alleged to have taken place in September 2016.

Mr McDonald also referred again to the debate in the Parliament in which he was leading and said that he sent messages to James Dornan and all the other contributors to the debate, congratulating them on their good speeches. He said that Mr Dornan responded in a friendly manner, and continued to behave towards him in a friendly manner afterwards.

In May 2017, Mr McDonald travelled to Glasgow for the Scottish Cup final match between Aberdeen and Celtic. Prior to the game, he went out campaigning in the Westminster election. He said that Mr Dornan collected him from his Glasgow hotel in Glasgow and drove him out to East Renfrewshire, where they campaigned together, then drove Mr McDonald back to Hampden for the match. He said that they were on friendly terms throughout, and that Mr Dornan made no mention of any problem or issue. Mr McDonald supplied photographs from the day.

Mr McDonald expressed surprise that there appeared to have been no prior attempt to do anything in relation to the serious allegations set out in Mr Dornan's letter of complaint despite there being procedures set out in the Code of Conduct for MSPs involving an approach to business managers or to the



Parliament's HR department to raise concerns about the treatment of staff. He found it really upsetting that no-one had thought to take it up with him at the time, which might have provided an opportunity to rectify matters.

Mr McDonald accepted that he had sent a private message on twitter to Witness A and that it had been inappropriate for him to do so. He said that it was a poor attempt at humour referring to a couple of attempts to meet up. There was no malice, nor any attempt to engage in any form of innuendo. However, he accepted that it had been received in a way which did not match his intention in sending it.

Mr McDonald was first shown the message in November 2016. He was told that it had upset the individual to whom it had been sent. At that point, given the current focus on behaviour and the difference between intention and interpretation, he took the decision to step down and to issue an apology.

As to the timing of the message being sent, Mr McDonald could not confirm with certainty that he had sent it on the evening of 27 September 2016. Although there was a time on the screenshot, there was no date stamp. During the SNP investigation, the allegation was that he had sent it in November 2016. However, he had a recollection of a discussion between him and Witness A, through private message on social media, about the possibility of meeting up in Glasgow the following weekend, when he was due to be speaking at an early years conference on Saturday, 1 October. He thought that it would have been in that week, when his plans were being made for the conferences in Inverness and Glasgow. After speaking at a conference in Inverness on Friday, 30 September, Mr McDonald anticipated travelling by train and staying overnight in Glasgow. He would have had a bit of free time before speaking at the conference early on the Saturday morning. He had said that they could meet up for a drink in Glasgow, after work. She had declined because she had a fund raising event in her local area.

Mr McDonald again referred to the later message of a non-hostile nature from Mr Dornan to him at 11.37pm, some three and a half hours after the time on the message referred to in the complaint.

On the question of when Mr McDonald might have previously attempted to make arrangements to meet, he could not be specific. However, he said that Witness A had never indicated that she did not want to speak to him, but rather that she could not meet at particular points in time. Mr McDonald said that he had not made any approach with nefarious intent. There had been exchanges between him and Witness A both in private messages and on public social media.

Mr McDonald confirmed that he had made an apology in November expressing his regret about the upset caused by the message sent to Witness A. In March 2018, he apologised to two women. In one case, he was re-iterating the apology made in November in relation to the message, albeit that he did not, and does

not, accept that he had done anything else which was in appropriate in relation to that person. Mr McDonald also expressed an apology to another woman who was part of the SNP investigation. He accepted that he had let his standards fall in relation to his relationship with her, which he regretted. He also issued a written apology to her, as that was what she had requested when making her complaint to the SNP. Mr McDonald explained that he was seeking to apologise for any upset and hurt which had arisen as a result of his behaviour, and also to say that his intention was to demonstrate through his future conduct that he had changed as a result. He added that, until very recently, he had thought that these were people with whom he had positive relationships on a personal level. The realisation of how he was perceived had been hurtful and had forced a period of reflection on what he could do to change that perception.

Mr McDonald also produced copies of what he described as a humorous exchange on social media in public between him and Mr Dornan on 23 July 2017 and a thank you to him from Dornan for Mr McDonald standing in for him at an event at the SNP conference in October 2017. He also referred to items on social media in June 2017 which confirmed that Witness A had not, in fact, suffered a stroke, to material allocating blame for her condition to three other causes, and in September 2017 showing her return to work at the Parliament. He drew attention to reports in the Daily Record and the Daily Telegraph on 9 November 2017, following his ministerial resignation, in which Witness A was quoted as commenting on people's behaviour changing but made no reference to his behaviour towards her going beyond the messages nor to his behaviour contributing towards the health episode as now alleged. Whilst he was not seeking to diminish the health issues, nor to avoid responsibility for his actions, Mr McDonald did not consider that he should have to take responsibility for matters in which he had no involvement.

  @ · 23 May 2016 

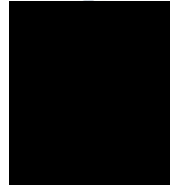

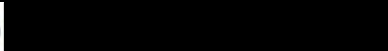
so I tell myself! Oh and congrats on the promotion. You will be amazing. 🍷



**Mark McDonald** @mark... · 23 May 2016 

thanks. Still finding my feet



   
@

Replying to @markmcdindy

I'll see you in Edinburgh, and help you look. Look forward to seeing you.

8:39 pm · 23 May 2016



**Mark McDonald**

@markmcdindy



Replying to @ [REDACTED]

if you're at a loose end give me a shout,  
might be able to meet for a cuppa if  
time allows

10:17 pm · 13 Jul 2016

1 Like



[REDACTED]



@ [REDACTED] ...

· 13 Jul 2016



Replying to @markmcdindy

will do





JUNE 2016

▶ JUN 6 [REDACTED]

▶ JUN 4 [REDACTED]

▶ JUN 4 [REDACTED]

▶ JUN 3 [REDACTED]

▶ JUN 2 [REDACTED]

▶ JUN 2 [REDACTED]



MAY 2016

▶ MAY 28

BRAEMORE PROPERTY MANA

-£476.14

DETAILS

SEND DETAILS

SPLIT THE BILL

CARD PAYMENT TO BRAEMORE PROPERTY MANA,  
476.14 GBP, RATE 1.00/GBP ON 26-05-2016

▶ MAY 28 [REDACTED]

▶ MAY 27 [REDACTED]

▶ MAY 27 [REDACTED]

▶ MAY 26 [REDACTED]

▶ MAY 25 [REDACTED]

▶ MAY [REDACTED]



£32.00

AUGUST 2016

▶ AUG 9 [REDACTED]

▶ AUG 8 Transfer from [REDACTED]

▶ AUG 6 FP FROM [REDACTED]

JULY 2016

▶ JUL 30 Transfer from [REDACTED]

▶ JUL 14 Transfer from [REDACTED]

▶ JUL 14 FP FROM [REDACTED]

JUNE 2016

▶ JUN 21 FP MARK FROM MR MARK MCDO... £476.14

DETAILS

SEND DETAILS

SPLIT THE BILL

FASTER PAYMENTS RECEIPT REF.MARK FROM MR MARK MCDONALD

▶ JUN 8 [REDACTED]

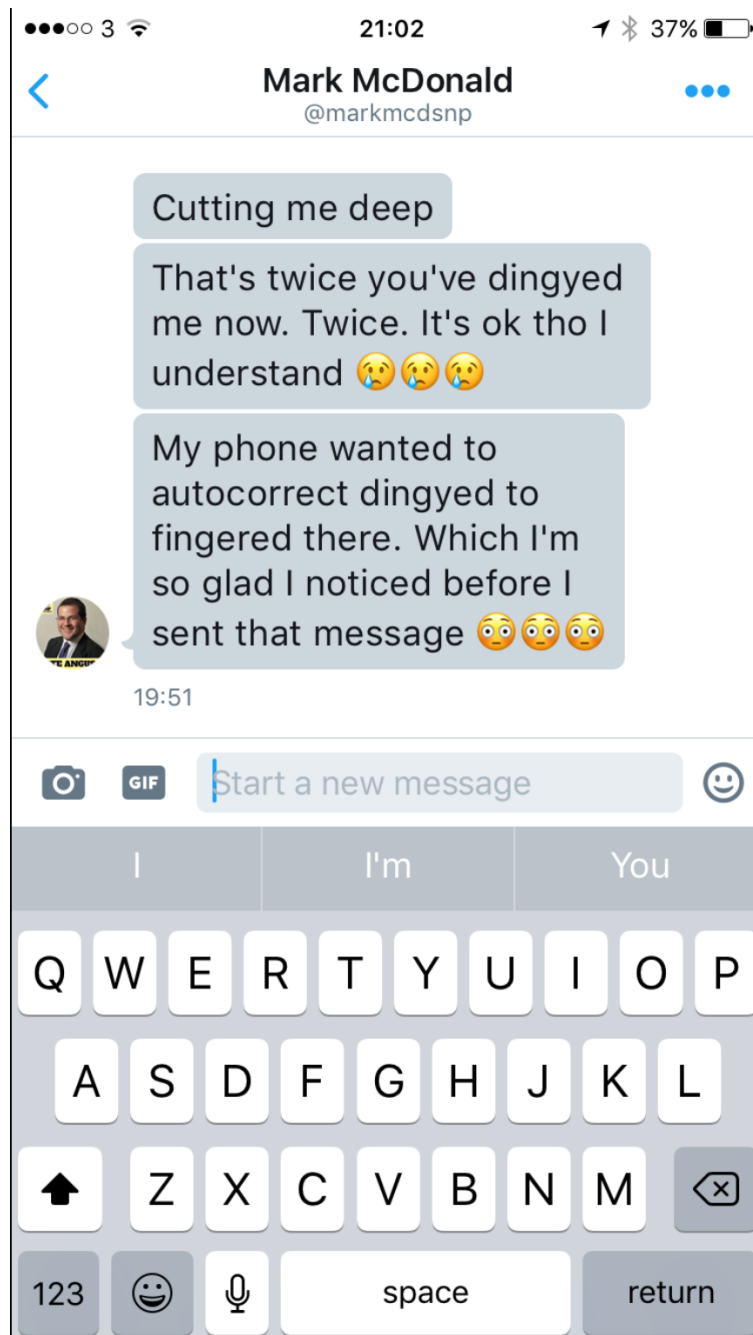
▶ JUN 7 FP FROM [REDACTED]

MAY 2016

▶ MAY 26 Transfer from [REDACTED]

▶ MAY 13 [REDACTED]

APRIL 2016







Follow

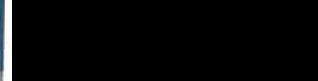
To Maria who always makes my chai's with love... I love you too 🍷❤️💚💙💜💖



10:00 AM - 27 Sep 2016

3 Likes 🍷🇧🇪🇩🇪

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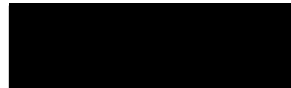


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spotted at the Scottish parliament looking very floral.... 🌹

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My bed....  
Oh my lovely, lovely bed 😬

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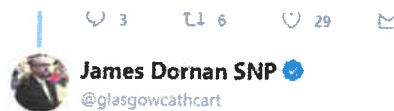


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@davidwalliams on countdown 😂 and handsome too 😍

11:20 PM - 27 Sep 2016

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James Dornan SNP

@glasgowcathcart

Following

Replying to

you even have that hat and cane in the office too 😬😬. It's not easy being me 😬

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Replying to @glasgowcathcart

eh people will think I'm a bit odd having a cane in my work 😬

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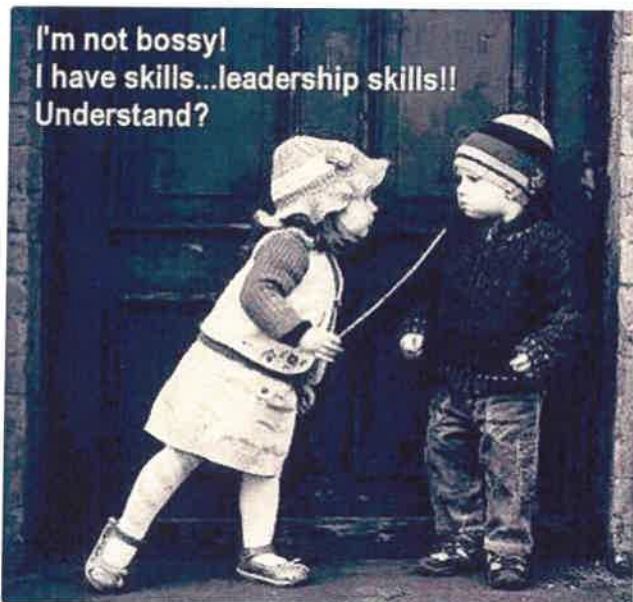
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I'm always telling you this @glasgowcathcart



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**James Dornan SNP** ✓

@glasgowcathcart



Replying to @markmcdindy and [REDACTED]  
**that does tend to be the way of it Mark.**

11:37 pm · 27 Sep 2016

**2 Likes**





The Scottish Parliament  
Pàrlamaid na h-Alba

Bill Thomson  
Commissioner for Ethical Standards in Public Life in Scotland  
Thistle House  
91 Haymarket Place  
Edinburgh  
EH12 5HE

Your Ref: MSP/2119/17-18/23

23<sup>rd</sup> May 2018

Dear Mr Thomson

Thank you for sharing with me your draft report, and affording me the opportunity to respond to its content and findings. I would highlight firstly that, in respect of my summary of evidence, the minor factual amendments which I had suggested, and which you had accepted, have not been incorporated in the version as appended to the report. I have appended these again, for ease of reference.

I also note that, while the summary of evidence references the open and public social media exchanges between myself and Witness A being appended, there is no sign of them anywhere, again, I have also appended these for ease of reference.

Turning now to the report, I will first ask for a number of factual corrections to be made. I will then turn to some of the considerations I feel are necessary in terms of the content and conclusions of the report itself. I hope that you will be able to incorporate these, and set them out as follows:

***Para 2.4 – there was no SNP investigation prior to November 2017. I was informed of the complaint regarding the messages I had sent on 3<sup>rd</sup> November 2017, and as a consequence of this complaint I chose to resign my ministerial position on 4<sup>th</sup> November 2017, issuing a public apology to Witness A. I apologised further on 13<sup>th</sup> November 2017 as part of a wider statement indicating the steps I was taking in respect of my future conduct.***

*On 16<sup>th</sup> November 2017, I was subject to suspension from the SNP parliamentary group, and the party itself, following a further complaint from the individual identified in your report as Witness B. This suspension, and the subsequent investigation, lasted until March 2018, at which point I chose to resign from the SNP as a result of what I considered to be an absence of due process, and no indication of when the matter would conclude. At that stage I issued a public apology to Witness A & Witness B, as well as a written apology to Witness B, which had been requested by her at the point of her complaint, but not communicated to me by the SNP until 5<sup>th</sup> March 2018.*



***Para 3.6 – The ‘concurrent family health issues’ were, as I said during my evidence, an explanation around the delay in making repayment. This was not, I must emphasise, an excuse for the delay, and played no part in the initial request, which I accept was not an appropriate request for me to have made of a staff member.***

***Para 3.7 – In my evidence, I was clear that there had been interaction in late 2015, again this was public and friendly in nature, and a search of social media will reveal this to have been the case, albeit my own social media timelines prior to 2016 are no longer available.***

***Para 3.9 – The conference in Inverness which I was scheduled to attend was in the morning, not the evening as referenced in the report, and I had been planning to then travel to Glasgow by train with an arrival that evening.***

***Para 3.31 – In my evidence, I made clear that the date of the messages cannot be accurately determined and that two separate dates have been put to me over the course of two separate investigations. The SNP investigation, of which you have had sight, suggested the messages were sent in November 2016, while it has been put to you, and thus to me, as part of your investigation that the messages were sent on 27<sup>th</sup> September 2016. I have never denied that the messages were sent, but would suggest that the statement that I have ‘not sought to challenge the date’ is inaccurate in the sense that the dates put to me in these investigations has not been consistent.***

***Para 3.39 – Mr Dornan collected me from my hotel, not the train station.***

Turning now to the wider considerations which I would like you to take into account, I consider that the conclusions you have drawn in terms of my breaching the code at 7.2.3 in terms of courtesy and respect are correct, and I have no intention to challenge those. I have always accepted that the message I sent was inappropriate, and caused upset. I have publicly apologised for this on three separate occasions, and resigned my ministerial position as a result. I have also accepted that my conduct in terms of the deposit fell below the standards that should be expected of me as a MSP, again I have publicly apologised, and also written directly to Witness B, in order to apologise.

I do not consider that I am legally qualified to address your conclusions in terms of the finding of sexual harassment, and have therefore asked my solicitor to prepare an analysis in this regard. I have appended their analysis for your consideration and make no further comment on this matter other than that I will await your response to it.

I believe that there is a further consideration that is required, and that is the obvious attention that will be paid to the conclusions of this investigation. I consider that, in terms of fairness and natural justice, it is incumbent upon you to go through the complaint made by Mr Dornan and state your findings in relation to the allegations made by him. I have set out my own position and perspective on these, based upon the content of your report, the summary of evidence provided, and public comments made by Mr Dornan or by Witness A (these comments were made as an unnamed source, and therefore do not in any way identify Witness A).

The sections from Mr Dornan’s letter are in bold italics, and my comments in respect of them are contained below.

***I have a staff member who was a targeted victim of harassment and sexual innuendo at the hands of this member.***

While I have accepted that the content of the messages was inappropriate, I believe that the accusation of ‘targeted harassment’ is one which should be clearly rejected. I sent a



message which was a misguided and inappropriate attempt at humour. The phrase 'targeted harassment' implies sustained, deliberate, behaviour with aggravated intent. I do not see how this can be supported by the evidence provided.

***My staff member first approached me to tell me of her distress at the end of 2016.***

This line is important, because there are clear contradictions in the timelines being suggested both between this investigation and the SNP investigation, Mr Dornan's use of 'the end of 2016' is a fairly loose terminology. He states at the beginning of his evidence that he first became aware of an issue in 'September or October 2016', and as previously stated the SNP investigation was predicated on the issues raised by Mr Dornan and Witness A having occurred in November 2016. I suggest that, given the conclusions you have drawn in respect of Mr Dornan's later complaints, there are question marks over the credibility of much of the timelines put to you.

***Mr McDonald sent her highly inappropriate messages on social media, which my staff member immediately showed me.***

I have accepted that a message I sent was inappropriate. I note, however, in para 3.36 that the suggestion is made regarding my having challenged the suggestion that Mr Dornan had been sent the messages. I did not suggest he had not seen or been sent the messages, but questioned the timing as alleged. This is based upon a clear continuation of friendly interaction between myself and Mr Dornan later that evening, later that week, and into the following year, as evidenced by the social media interactions, the emails, and the social interactions around political campaigning and football.

I also would add that my challenge to this is supported further by the investigation conducted on behalf of the SNP identifying the message as having been sent in November 2016. I suggest there is enough circumstantial and physical evidence to cast doubt on this statement.

I have made clear the intention behind it was one of misguided humour. You state at point 3.34 that 'the reference in the second of the three messages to being "dingyed" supports Witness A's evidence that she had rejected the respondent's attempts to arrange a meeting, and that she found them unwelcome.'

I do not consider that the evidence supports this. I have made clear in my own evidence that the response to my request to meet up when I was going to be in Glasgow was not rejected out of hand, but that Witness A advised she was not available as she had another event. I also have no record of a request to meet for coffee on 27<sup>th</sup> September 2016, and no evidence that it was rejected has been presented. Indeed, the only request to meet for a coffee is a suggestion in a public twitter exchange from July 2016, which is responded to in a positive manner, and which you have appended to my summary of evidence.

As I stated in my evidence, the intention behind the messages was one of misguided humour. The term "dingyed" is used in this sense. It is a phrase which has widely accepted connotations with comedic use, and was intended as tongue-in-cheek. That it was not received in that manner is something I have accepted, but I do not accept that my use of it implies either an acknowledgement or acceptance on my behalf that previous attempts to meet had been considered unwanted, and no evidence has been presented to this effect.

I also note that in terms of the third element of the message, Witness A's summary of evidence includes her providing a quote of what she claims the message said. It does not



say that, and was never intended to be taken in that context. I accept the difference between intention and interpretation, but it is clear that the text of the message does not say what Witness A recalls it saying. This can be seen by comparing the quotes in Witness A's summary of evidence to the screengrab of the message which you have included as an appendix.

***I also witnessed him show unwanted attention within the Parliament grounds on a number of occasions***

No evidence has been provided to support this allegation, beyond an assertion of one invitation to go for a coffee during the daytime, with no evidence to support this, and a suggestion of meeting up after work when I was going to be in Glasgow, which I brought up in my own evidence and which Mr Dornan even refers to in his evidence as "fairly innocent stuff".

***On one occasion I had to leave an event I was hosting to escort my staff member to a waiting car as she was sure Mr McDonald was waiting for her. As we left the building he was standing close to the exit and I have no doubt he was indeed waiting for her.***

Your report is clear that you do not support the assertion by Witness A that I was 'skulking' in the Garden Lobby, and you make clear that the evidence regarding any interaction that evening is contradictory, and that you prefer my version of events as an accurate representation of what was a brief, and friendly, encounter as I passed through the Garden Lobby.

I further note that you draw no conclusion on the above interpretation, but that the evidence provided by Mr Dornan and Witness A is contradictory, and I suggest this lends itself to my position that I did not encounter Mr Dornan that evening. I further suggest that his allegation is fundamentally undermined by the open, and friendly, social media exchange which took place later that evening between myself and Mr Dornan and by the friendly e-mail exchange which took place between us later that week.

***In July 2017 my staff member became so unwell due to stress she was admitted to Wishaw General Hospital with a stroke, she then spent several months rehabilitating and six months off of her work, which had a massive impact on my office and on her life. It would be wrong of me not to mention that she was under other extreme pressure, but this was compounded by a Member who should have known better and who, in my opinion, used his position to harass her.***

It is clear that Mr Dornan would have been aware of public statements to the effect that Witness A's health episode was not a stroke, and yet he makes explicit reference to a stroke in his correspondence, which he made public.

The summary of Mr Dornan's evidence in relation to the health episode states:

'He emphasised that he had never claimed that the respondent's conduct had been the sole reason for it.'

This is flatly contradicted by Mr Dornan's public comments on the matter in the Sunday Mail of 11<sup>th</sup> March 2018 where he states:

"I saw my member of staff end up in hospital and off work for six months because of the pressure of having to deal with his behaviour and the aftermath."

(<https://www.dailyrecord.co.uk/news/scottish-news/enough-enough-victim-sex-shame-12165509>)

I note that you have concluded that you are not able to provide any comment on this allegation, and I respect that you are not medically qualified to do so. Neither is Mr Dornan, and yet his allegation draws a direct link between the conduct he has alleged (and which has mostly been disproved) and the health issue which affected Witness A.

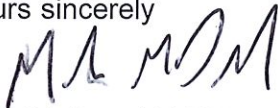
Furthermore, following my resignation from ministerial office on 4<sup>th</sup> November 2017, Witness A commented to the Press & Journal, comments which were carried by both the Daily Record & Daily Telegraph on 9<sup>th</sup> November and which are publicly available, to say the important thing was for people's behaviour to change. At no point did she allege that my conduct had materially impacted upon her health in the manner alleged by Mr Dornan, despite my having publicly resigned and apologised for any hurt or offence I had caused.

That Mr Dornan made these allegations publicly resulted in significant, negative, media coverage which has had a serious and lasting impact upon my mental health and wellbeing, and has caused significant distress to my family as a result.

I would therefore ask that you give consideration – given the nature of Mr Dornan's accusations and the manner in which he chose to level them – that the report should draw appropriate attention to the findings in respect of each element of Mr Dornan's complaint so that those who read it, and who will inevitably be drawn to its conclusions, will be able to understand clearly and readily those aspects of his complaint you have been able to support and those which you have not.

I look forward to hearing from you in respect of the points I have made, and the analysis provided by my solicitor.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'MA MDM', is written over the typed name.

Mark McDonald MSP  
Aberdeen Donside Constituency

Enc.

## CORRECTIONS TO SUMMARY OF EVIDENCE

The only factual corrections I would note are that my phone call inviting me to attend Bute House was on 17th May with my appointment on the 18<sup>th</sup>.

The date I was first shown the messages was November 2017 not 2016.

I feel the presentation of my comments regarding members' staff being asked to do things outside their normal duties could be interpreted as a suggestion other members ask staff to do things like get their staff to be present for broadband being installed. I wonder if simply leaving it as being asked to do things outside normal duties would be sufficient without the example which was isolated and referred to my own circumstances, not something more general.

**PUBLIC STANDARDS**  
**CODE OF CONDUCT FOR MEMBERS OF THE SCOTTISH PARLIAMENT**  
**COMPLAINT AGAINST MR. MARK MCDONALD, MSP**

**Introduction**

We are asked by our client, Mr. Mark McDonald (the “**Respondent**”), to provide a legal analysis covering:

- (1) the basis for any finding of sexual harassment in terms of the Equality Act 2010 s26(2);
- (2) whether in our view on the evidence available to the Commissioner there should have been a finding that the single social media message (the “**Message**”) amounted to sexual harassment in terms of the EQA; and
- (3) what in our experience we would ordinarily expect to see an employer do when presented with such findings.

**S26(2) EQA**

Sexual harassment occurs where:

- (1) A engaged in unwanted conduct of a sexual nature; *and*
- (2) The conduct has the purpose or effect of violating B’s dignity or creating an intimidating, hostile, degrading or humiliating environment for B.

Any judicial or as here quasi judicial body requires to have regard to reported cases and to the Code of Practice issued by the Equality and Human Rights Commission (the “**Code**”).

The Code deals with sexual harassment at paragraph 7.13 which provides that “conduct of a sexual nature” includes “sending e-mails with material of a sexual nature”. A single email of a sexual nature which is unwanted is sufficient to meet the first part of the test.

The Code deal with “purpose or effect” at paragraph 7.16 and onwards. In this case the Commissioner appears to accept that has been found that the Respondent did not intend to create a para (b) environment so we have focused on the question of effect. In deciding whether conduct had “that effect” the decision taker must per the Code consider (a) the perception of the recipient, (b) the other circumstances of the case, and (c) whether it is reasonable for the conduct to have that effect this latter being an objective test.



Not every remark that is both unwanted and of a sexual nature will result in a finding of harassment. The remarks of Justice Underhill in the case of *Richmond Pharmacology v. Dhaliwal* are relevant albeit that was in the context of a race case. At para 22 of that case the Judge noted that:

*“...dignity is not necessarily violated by things said or done which are trivial or transitory particularly if it should have been clear that any offence was unintended .... It is important not to impose legal liability in respect of every unfortunate phrase.”*

This is not to diminish the potential effect of a single act which as a matter of law can clearly meet both limbs of the test but to emphasise that not all single acts will meet the statutory requirements.

The decision taker requires to apply these tests to the alleged act at the point at which the alleged act took place. Thus the question is whether, at that time, not considered with hindsight the test of “effect” is met.

The final and important point we would make in this section which is relevant in this case is that an individual is not found “guilty” of “sexual harassment” in isolation. There cannot be a finding of sexual harassment without identifying the act or acts to which the legal test of sexual harassment has been applied.

#### **As a matter of law does the sending of the Message amount to an act of sexual harassment?**

We are of the view that, it is more likely than not that the content of the Message would be held by any competent court to meet limb (a) of the test, that is to say that it can be construed as “conduct of a sexual nature”. We are of the view further that Commissioner was entitled to find that the Message was unwanted. The issue we suggest is limb (b) and the application of the test of “effect”.

We summarize first the evidence which according to the EQA and Code must be considered by the Commissioner relative to the Message:

- (a) There was a consensual exchange of unexceptional material between Witness A and the Respondent in the months prior to the Message (Report para 3.7).
- (b) The allegations advanced by the Complainer relative to events in the Parliament on the date of the Colleges Scotland event have been rejected (Report para 3.29).
- (c) It was originally suggested in the investigation undertaken on behalf of the Scottish National Party that the Message was sent in November 2016. The date of 27 September was subsequently identified by the Complainer and Witness A.
- (d) There was a light hearted exchange after the time of the Message between the Complainer and the Respondent (Report para 3.39).
- (e) The Letter from the Complainer dated 12<sup>th</sup> March 2018 references becoming aware of the “distress of Witness A” at the end of 2016.

(f) In his evidence to the Commissioner the Complainer does not date his receipt of the Message but notes that he “first became aware of an issue involving Witness A and the Respondents in September or October 2016”.

(g) There were friendly and professional interactions between the Complainer and the Respondents during 2017 (Report 3.39).

(h) No evidence has been produced to support a connection between the ill health of Witness A and the Message [Report para 3.38].

(i) No phone or other records have been produced which might verify the date on which the Message was forwarded by Witness A to the Complainer. Witness A explained that the Message had been deleted. The Complainer did not comment. It is clear that at some point the Complainer came to have the Message.

(j) No note or other record has been produced from the lawyer with whom Witness A discussed matters.

(k) No complaint was made to the Respondent until November 2017.

(l) The Respondent at that point tendered an apology and resigned from ministerial office.

(m) The Message was, viewed from the perspective of the Respondent a clumsy attempt at humour. There was no intention to offend.

We do not believe that the above facts are controversial. They are not intended to be.

### **When did the Complainer receive the Message?**

The evidence before the Commissioner is clearly inconsistent. The letter of 12 March 2018 places receipt by the Complainer as “the end of 2016” while the Complainer’s evidence to the Commissioner suggests he received it sometime in either “September or October”. Witness A describes sending it on the evening it was received. There is, of course, also a lack of clarity about the date of the Message, ie. whether it was sent on 27 September 2016 or later. There is no argument that the message was sent.

It is always difficult for witnesses to recall exactly when events took place where, as here, they are giving evidence a long time after the events in question.

In our view given the inconsistencies there is insufficient evidence to allow the Commissioner to determine that the Message, whether sent in September or November 2016, was sent to the Complainer on the same evening that it was received by Witness A. The evidence in our view allows a finding only that the Message was copied to the Complainer at some point in 2016.

### **What – legally – was the effect of the Message on 27 September 2016**

We suggest that the required “effect” was not created. The context, the evidence and all the surrounding circumstances require to be considered. This includes all the facts set out above. Of particular importance is the acceptance that there was no intention to offend and the absence of evidence that Witness A raised the Message with any third party on the evening it was received.

We are further of the view that if, in fact, Witness A believed on 27 September that a limb (b) atmosphere had been created that view was not reasonable. Once again the absence of evidence of a complaint to a third party, the absence (as found by the Commissioner) of any previous untoward conduct and the fact of an active social media exchange at that point suggests that viewed objectively Witness A should have accepted that the Message was in the words of Justice Underhill, and as admitted by the Respondent “an unfortunate phrase”.

We are conscious that there is a natural reluctance to report matters and that historic allegations should not be rejected on that basis. The question is however one of balancing the interests of Witness A and the Respondent. In our view taking into account “all the circumstances” there is no legal basis for a finding that the Respondents is guilty of sexual harassment by the sending of the Message.

We note that none of the other wide ranging and very serious allegations have been upheld.

### **The question of penalty**

In the event that a decision is taken that the Message amounts to s26 (2) harassment it is important to remember that sexual harassment covers a wide spectrum of behaviour from the less to the more serious. In an Employment Tribunal context this is dealt with when determining the appropriate award for injury to feelings.

A tribunal will apply the so called Vento guidelines (*Vento v Chief Constable of West Yorkshire (no 2)* [2003] IRLR 102 as uprated. There are three bands – an award in the lower band is for “*less serious cases, such as where the act of discrimination is an isolated or one off occurrence*”. In our opinion it is clear that if found to be sexual harassment the sending of the Message falls into the lower band and in our view at the lower end of that lower band

An employer who has determined there has been an act of sexual harassment must also consider penalty again with reference to the seriousness of the conduct taking. An employer has a range of sanctions available from warning through to dismissal. Generally speaking an employer can only dismiss fairly for a first offense where the misconduct is “gross”. The term “gross misconduct” connotes the most serious types of misconduct, such as theft or violence, warranting instant dismissal. There needs to be a breakdown of trust and case law sets out that the conduct will usually be deliberate and wilful or amount to gross negligence.

In our professional view if the Respondent had sent this Message in an employment context there is no reasonable basis that would justify an employer dismissing and if they did so we consider an unfair dismissal finding would follow.

In our view the correct approach would be a warning making clear that no future messages of that nature would be tolerated and we would expect a request to tender an apology.

### **Sanctions already suffered by Mr McDonald**

We note that Mr McDonald has lost his ministerial post, been suspended from the SNP Parliamentary Party for many months, been publicly encouraged to resign, and been the subject of extensive and hostile media comment.

In our view, given what has already occurred, approached from the standpoint of the reasonable employer no further sanction would be appropriate if there is a sexual harassment finding. An employer would need to take into account the actual act forming the basis of any complaint upheld (here the Message) and the fact that an apology has already been tendered. An employer would also need to take care to ensure they took into account only the complained of behaviour. It would be easy, in the present climate, for an employer to be influenced by the media attention given to the issue of sexual harassment generally.

We note finally that the First Minister commented after the Message was reported that, in her view, it was not a matter that she felt merited resignation as an MSP.

.....

Burness Paull

23 May 2018

**The Commissioner's comments on representations submitted by the respondent in a letter received by email on 23 May 2018.**

1	<p>Thank you for sharing with me your draft report, and affording me the opportunity to respond to its content and findings. I would highlight firstly that, in respect of my summary of evidence, the minor factual amendments which I had suggested, and which you had accepted, have not been incorporated in the version as appended to the report. I have appended these again, for ease of reference.</p> <p>I also note that, while the summary of evidence references the open and public social media exchanges between myself and Witness A being appended, there is no sign of them anywhere, again, I have also appended these for ease of reference.</p>	Text of Appendix 5 adjusted and screen shots added.
2	<p>Turning now to the report, I will first ask for a number of factual corrections to be made. I will then turn to some of the considerations I feel are necessary in terms of the content and conclusions of the report itself. I hope that you will be able to incorporate these, and set them out as follows:</p>	Noted.
3	<p><b><i>Para 2.4 - there was no SNP investigation prior to November 2017. I was informed of the complaint regarding the messages I had sent on 3rd November 2017, and as a consequence of this complaint I chose to resign my ministerial position on 4th November 2017, issuing a public apology to Witness A. I apologised further on 13th November 2017 as part of a wider statement indicating the steps I was taking in respect of my future conduct.</i></b></p>	Paragraph 2.4 adjusted to read: "I was aware of media reports of a number of other allegations involving the respondent and the fact that an investigation into various allegations against him had been conducted on behalf of the SNP. I understand that the respondent was informed of a complaint on 3 November 2017. As a consequence, the respondent chose to resign from his ministerial post on 4 November."
4	<p><i>On 16th November 2017, I was subject to suspension from the SNP parliamentary group, and the party itself, following a further complaint</i></p>	New text added to paragraph 2.4 of the report:

	<i>from the individual identified in your report as Witness B. This suspension, and the subsequent investigation, lasted until March 2018, at which point I chose to resign from the SNP as a result of what I considered to be an absence of due process, and no indication of when the matter would conclude. At that stage I issued a public apology to Witness A &amp; Witness B, as well as a written apology to Witness B, which had been requested by her at the point of her complaint, but not communicated to me by the SNP until 5th March 2018.</i>	"The respondent was suspended from the SNP parliamentary group on 16 November 2017, after a further complaint had been made. He was advised of the outcome of the SNP investigation on 5 March 2018."
5	<b>Para 3.6</b> - <i>The 'concurrent family health issues' were, as I said during my evidence, an explanation around the delay in making repayment. This was not, I must emphasise, an excuse for the delay, and played no part in the initial request, which I accept was not an appropriate request for me to have made of a staff member.</i>	The words "in respect of the delay in making payment" added at the end of the second sentence in paragraph 3.6.
6	<b>Para 3.7</b> - <i>In my evidence, I was clear that there had been interaction in late 2015, again this was public and friendly in nature, and a search of social media will reveal this to have been the case, albeit my own social media timelines prior to 2016 are no longer available.</i>	The following text added after the first sentence of paragraph 3.7: "The respondent thought that the contact began in late 2015."
7	<b>Para 3.9</b> - <i>The conference in Inverness which I was scheduled to attend was in the morning, not the evening as referenced in the report, and I had been planning to then travel to Glasgow by train with an arrival that evening.</i>	The detail in paragraph 3.9 has been corrected.
8	<b>Para 3.31</b> - <i>In my evidence, I made clear that the date of the messages cannot be accurately determined and that two separate dates have been put to me over the course of two separate investigations. The SNP investigation, of which you have had sight, suggested the messages were</i>	The phrase "and he has not sought to challenge the date" has been deleted from the third sentence in paragraph 3.31. A new sentence has been added at the end of the para: "In the absence of any contrary evidence, I have concluded on the balance of

	<i>sent in November 2016, while it has been put to you, and thus to me, as part of your investigation that the messages were sent on 2th September 2016. I have never denied that the messages were sent, but would suggest that the statement that I have 'not sought to challenge the date' is inaccurate in the sense that the dates put to me in these investigations has not been consistent.</i>	probabilities that the messages were sent on the evening of 27 September 2016."
9	<b>Para 3.39</b> - <i>Mr Dornan collected me from my hotel, not the train station.</i>	The detail in paragraph 3.39 has been corrected.
10	Turning now to the wider considerations which I would like you to take into account, I consider that the conclusions you have drawn in terms of my breaching the code at 7.2.3 in terms of courtesy and respect are correct, and I have no intention to challenge those. I have always accepted that the message I sent was inappropriate, and caused upset. I have publicly apologised for this on three separate occasions, and resigned my ministerial position as a result. I have also accepted that my conduct in terms of the deposit fell below the standards that should be expected of me as a MSP, again I have publicly apologised, and also written directly to Witness B, in order to apologise.	Noted.
11	I do not consider that I am legally qualified to address your conclusions in terms of the finding of sexual harassment, and have therefore asked my solicitor to prepare an analysis in this regard. I have appended their analysis for your consideration and make no further comment on this matter other than that I will await your response to it.	The respondent's solicitor's analysis has been appended to the report in Appendix 9.
12	I believe that there is a further consideration that is required, and that is the obvious attention that will	The findings of the investigation by the Commissioner for Ethical Standards are summarised in

	<p>be paid to the conclusions of this investigation. I consider that, in terms of fairness and natural justice, it is incumbent upon you to go through the complaint made by Mr Dornan and state your findings in relation to the allegations made by him. I have set out my own position and perspective on these, based upon the content of your report, the summary of evidence provided, and public comments made by Mr Dornan or by Witness A (these comments were made as an unnamed source, and therefore do not in any way identify Witness A).</p> <p>The sections from Mr Dornan's letter are in bold italics, and my comments in respect of them are contained below.</p>	<p>paragraph 4.1 of the report. These are separated into facts which are not in dispute and facts which the Commissioner has found to be established on the balance of probabilities. No further findings of fact have been added to the report.</p>
13	<p><b><i>I have a staff member who was a targeted victim of harassment and sexual innuendo at the hands of this member.</i></b></p> <p>While I have accepted that the content of the messages was inappropriate, I believe that the accusation of 'targeted harassment' is one which should be clearly rejected. I sent a message which was a misguided and inappropriate attempt at humour. The phrase 'targeted harassment' implies sustained, deliberate, behaviour with aggravated intent. I do not see how this can be supported by the evidence provided.</p>	<p>The findings set out in paragraph 4.1 of the report make no reference to "targeted harassment". No change has been made.</p>
14	<p><b><i>My staff member first approached me to tell me of her distress at the end of 2016.</i></b></p> <p>This line is important, because there are clear contradictions in the timelines being suggested both between this investigation and the SNP investigation, Mr Dornan's use of 'the end of 2016' is a fairly loose terminology. He states at the beginning of his evidence that he first became aware of an issue in</p>	<p>The facts set out in paragraph 4.1 are consistent with awareness in "September or October 2016". No change has been made to the report.</p>



	<p>'September or October 2016', and as previously stated the SNP investigation was predicated on the issues raised by Mr Dornan and Witness A having occurred in November 2016. I suggest that, given the conclusions you have drawn in respect of Mr Dornan's later complaints, there are question marks over the credibility of much of the timelines put to you.</p>	
15	<p><b><i>Mr McDonald sent her highly inappropriate messages on social media, which my staff member immediately showed me.</i></b></p> <p>I have accepted that a message I sent was inappropriate. I note, however, in para 3.36 that the suggestion is made regarding my having challenged the suggestion that Mr Dornan had been sent the messages. I did not suggest he had not seen or been sent the messages, but questioned the timing as alleged. This is based upon a clear continuation of friendly interaction between myself and Mr Dornan later that evening, later that week, and into the following year, as evidenced by the social media interactions, the emails, and the social interactions around political campaigning and football.</p>	<p>The respondent's position is set out in paragraph 3.39 of the report. No change has been made.</p>
16	<p>I also would add that my challenge to this is supported further by the investigation conducted on behalf of the SNP identifying the message as having been sent in November 2016. I suggest there is enough circumstantial and physical evidence to cast doubt on this statement.</p>	<p>Noted. No change has been made to the report.</p>
17	<p>I have made clear the intention behind it was one of misguided humour. You state at point 3.34 that 'the reference in the second of the three messages to being "dingyed" supports Witness A's evidence that she had rejected the respondent's</p>	<p>The respondent's position is noted in paragraph 3.9 of the report. No change has been made. The agreed summary of the respondent's evidence in Appendix 5 includes his recollection of a conversation with Witness A on the evening of 27 September 2016 in</p>

	<p>attempts to arrange a meeting, and that she found them 'unwelcome.'</p> <p>I do not consider that the evidence supports this. I have made clear in my own evidence that the response to my request to meet up when I was going to be in Glasgow was not rejected out of hand, but that Witness A advised she was not available as she had another event. I also have no record of a request to meet for coffee on 27th September 2016, and no evidence that it was rejected has been presented. Indeed, the only request to meet for a coffee is a suggestion in a public twitter exchange from July 2016, which is responded to in a positive manner, and which you have appended to my summary of evidence.</p>	<p>which reference was made to "the coffee which they had spoken about". No change has been made to the report.</p>
18	<p>As I stated in my evidence, the intention behind the messages was one of misguided humour. The term "dingyed" is used in this sense. It is a phrase which has widely accepted connotations with comedic use, and was intended as tongue-in-cheek. That it was not received in that manner is something I have accepted, but I do not accept that my use of it implies either an acknowledgement or acceptance on my behalf that previous attempts to meet had been considered unwanted, and no evidence has been presented to this effect.</p>	<p>Noted. No change has been made to the report.</p>
19	<p>I also note that in terms of the third element of the message, Witness A's summary of evidence includes her providing a quote of what she claims the message said. It does not say that, and was never intended to be taken in that context. I accept the difference between intention and interpretation, but it is clear that the text of the message does not say what Witness A recalls it saying. This can be seen by comparing the quotes in Witness A's summary of evidence</p>	<p>This is a question of interpretation. No change has been made to the report.</p>

	to the screengrab of the message which you have included as an appendix.	
20	<p><b><i>I also witnessed him show unwanted attention within the Parliament grounds on a number of occasions</i></b></p> <p>No evidence has been provided to support this allegation, beyond an assertion of one invitation to go for a coffee during the daytime, with no evidence to support this, and a suggestion of meeting up after work when I was going to be in Glasgow, which I brought up in my own evidence and which Mr Dornan even refers to in his evidence as "fairly innocent stuff".</p>	Paragraph 3.10 of the report indicates that no weight has been given to this aspect of the complaint. No change has been made.
21	<p><b><i>On one occasion I had to leave an event I was hosting to escort my staff member to a waiting car as she was sure Mr McDonald was waiting for her. As we left the building he was standing close to the exit and I have no doubt he was indeed waiting for her.</i></b></p> <p>Your report is clear that you do not support the assertion by Witness A that I was 'skulking' in the Garden Lobby, and you make clear that the evidence regarding any interaction that evening is contradictory, and that you prefer my version of events as an accurate representation of what was a brief, and friendly, encounter as I passed through the Garden Lobby.</p> <p>I further note that you draw no conclusion on the above interpretation, but that the evidence provided by Mr Dornan and Witness A is contradictory, and I suggest this lends itself to my position that I did not encounter Mr Dornan that evening. I further suggest that his allegation is fundamentally undermined by the open, and friendly, social media exchange which</p>	The issue of contacts between the respondent and Witness A is addressed in paragraphs 3.29 and 3.39. No change has been made.

	<p>took place later that evening between myself and Mr Dornan and by the friendly e-mail exchange which took place between us later that week.</p>	
22	<p><b><i>In July 2017 my staff member became so unwell due to stress she was admitted to Wishaw General Hospital with a stroke, she then spent several months rehabilitating and six months off of her work, which had a massive impact on my office and on her life. It would be wrong of me not to mention that she was under other extreme pressure, but this was compounded by a Member who should have known better and who, in my opinion, used his position to harass her.</i></b></p> <p>It is clear that Mr Dornan would have been aware of public statements to the effect that Witness A's health episode was not a stroke, and yet he makes explicit reference to a stroke in his correspondence, which he made public.</p> <p>The summary of Mr Dornan's evidence in relation to the health episode states:</p> <p>'He emphasised that he had never claimed that the respondent's conduct had been the sole reason for it.'</p> <p>This is flatly contradicted by Mr Dornan's public comments on the matter in the Sunday Mail of 11th March 2018 where he states:</p> <p>"I saw my member of staff end up in hospital and off work for six months because of the pressure of having to deal with his behaviour and the aftermath."</p> <p>(<a href="https://www.dailyrecord.co.uk/news/scottish-news/enough-enough-victim-sex-shame-12165509">https://www.dailyrecord.co.uk/news/scottish-news/enough-enough-victim-sex-shame-12165509</a>)</p>	<p>Noted. No change has been made to the report.</p>

	<p>I note that you have concluded that you are not able to provide any comment on this allegation, and I respect that you are not medically qualified to do so. Neither is Mr Dornan, and yet his allegation draws a direct link between the conduct he has alleged (and which has mostly been disproved) and the health issue which affected Witness A.</p> <p>Furthermore, following my resignation from ministerial office on 4th November 2017, Witness A commented to the Press &amp; Journal, comments which were carried by both the Daily Record &amp; Daily Telegraph on 9th November and which are publicly available, to say the important thing was for people's behaviour to change. At no point did she allege that my conduct had materially impacted upon her health in the manner alleged by Mr Dornan, despite my having publicly resigned and apologised for any hurt or offence I had caused.</p> <p>That Mr Dornan made these allegations publicly resulted in significant, negative, media coverage which has had a serious and lasting impact upon my mental health and wellbeing, and has caused significant distress to my family as a result.</p>	
23	<p>I would therefore ask that you give consideration - given the nature of Mr Dornan's accusations and the manner in which he chose to level them - that the report should draw appropriate attention to the findings in respect of each element of Mr Dornan's complaint so that those who read it, and who will inevitably be drawn to its conclusions, will be able to understand clearly and readily those aspects of his complaint you have been able to support and those which you have not.</p>	<p>The findings are summarised in paragraph 4.1 of the report. No change has been made.</p>

24	I look forward to hearing from you in respect of the points I have made, and the analysis provided by my solicitor.	The analysis has been appended to the report. No change has been made to the text.
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MARK McDONALD MSP  
ABERDEEN DONSIDE

The Scottish Parliament  
Pàrlamaid na h-Alba

Joanna Hardy  
Senior Assistant Clerk  
Standards Procedures & Public Appointments Committee

By email

5 June 2018

**Commissioner Report**

Thank you for your correspondence and the opportunity to respond to the report by the Commissioner for Ethical Standards in Public Life.

I accept the Commissioner's findings in relation to the two breaches of the code regarding courtesy and respect. I have always accepted that the social media message, and the arrangements in relation to my flat deposit, were actions which fell below the standards which should have been expected of me, and this is why I have publicly apologised for them and taken steps to reflect my understanding of this in my future conduct.

I do not accept the Commissioner's finding that the social media message constituted sexual harassment, based upon the analysis provided by my solicitor.

Given that I have issued a comprehensive response to the Commissioner, and my solicitor has provided detailed analysis, which are both available to the Committee, I do not wish to request an appearance before the Committee. However, if the Committee members feel that there may be benefit in asking any questions of myself or my solicitor in respect of our submissions, we will be happy to attend.

I would also ask, in light of the significant media coverage that this complaint has attracted, that the Committee give consideration to the manner in which any decision is communicated. Given that media coverage has focused almost exclusively on elements of Mr Dornan's complaint which have been either disproved or disregarded, I feel it is important that when the decision is communicated it clearly sets out the elements of the complaint which have been disproved or disregarded as well as that which has been upheld.

I hope the Committee will consider this request as part of their deliberations.

Yours sincerely

Mark McDonald MSP