



Ethical Standards Commissioner

CONSULTATION DOCUMENT

A consultation on the Investigations Manual of the
Ethical Standards Commissioner's office

28 September 2022

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CONSULTATION ON THE INVESTIGATIONS MANUAL OF THE ETHICAL STANDARDS COMMISSIONER'S OFFICE

1.0 Introduction and Statutory Provisions

1.1 One of the core functions of the Ethical Standards Commissioner (the “Commissioner”) is to investigate complaints about the conduct of MSPs, local authority councillors, board members of public bodies (including conduct comprising of bullying, harassment and sexual harassment) and lobbyists. The Commissioner may also conduct investigations into allegations of breaches of the Code of Practice for Ministerial Appointments to Public Bodies in Scotland as well as more generally examining the appointments practices of the Scottish Ministers. The Commissioner’s functions in relation to conduct are set out in various pieces of legislation as follows:

- a. the Ethical Standards in Public Life etc. (Scotland) Act (2000) (the “2000 Act”). The list of public bodies covered by the 2000 Act is set out in Schedule 3 to the 2000 Act;
- b. the Scottish Parliamentary Standards Commissioner Act (2002) (the “2002 Act”);
- c. the Public Appointments and Public Bodies etc. (Scotland) Act 2003 (the “2003 Act”).
The list of public bodies covered by the 2003 Act is set out in Schedule 2 to the 2003 Act
- d. the Interests of Members of the Scottish Parliament Act (2006) (the “2006 Act”);
- e. the Lobbying (Scotland) Act (2016) (the “2016 Act”); and
- f. the Scottish Parliamentary Standards (Sexual Harassment and Complaints Process) Act 2021 (the “2021 Act”).

1.2 The 2000 Act assigns specific investigatory and reporting functions to the Chief Investigating Officer.

1.3 The 2002 Act assigns specific investigatory and reporting functions to the Scottish Parliamentary Standards Commissioner.

1.4 The 2003 Act assigns specific investigatory and reporting functions to the Commissioner for Public Appointments in Scotland.

1.5 The [Scottish Parliamentary Commissions and Commissioners Etc. Act 2010](#) establishes the Commission for Ethical Standards in Public Life in Scotland (the Commission) and brings these functions together as follows:-

- a. the Public Standards Commissioner for Scotland who is responsible for the functions previously undertaken by the Chief Investigating Officer and the Scottish Parliamentary Standards Commissioner and
- b. the Public Appointments Commissioner for Scotland who is responsible for the functions previously undertaken by the Commissioner for Public Appointments in Scotland.

1.6 The [Public Services Reform \(Commissioner for Ethical Standards in Public Life in Scotland etc.\) Order 2013](#) (Scottish Statutory Instrument 2013/197)

- a. abolishes the post of Public Standards Commissioner for Scotland
- b. abolishes the post of Public Appointments Commissioner for Scotland
- c. dissolves the Commission for Ethical Standards in Public Life in Scotland and
- d. creates the post of Commissioner for Ethical Standards in Public Life in Scotland.

The functions of the Commission for Ethical Standards, Public Standards Commissioner and Public Appointments Commissioner are transferred to the Commissioner for Ethical Standards or the Commissioner (as defined above).

1.7 The 2016 Act assigns specific investigatory and reporting functions to the Commissioner for Ethical Standards.

1.8 The Commissioner is independent of the Scottish Parliament and the Scottish Government.

2.0 Why an Investigations Manual is Considered Necessary

2.1 To assist in the exercise of the Commissioner's function to investigate and report on complaints as described above, the Commissioner's office has compiled an Investigations Manual (the Manual) to codify the Commissioner's complaint handling processes. This is not the first guidance on investigations used by the Commissioner's office – previous editions were available for internal use. The previous investigations guidance and the Manual outlines the steps which the Commissioner, their team or any appointed staff will normally take in conducting an investigation, and the legislative and policy context for so doing. The Manual goes a step further, by consolidating the complaint handling, investigatory and reporting processes of all the different types of complaints which the Commissioner can investigate and report on. The Manual also sets out target timescales for the completion of complaint assessments and investigations and the production of reports. These targets were prepared taking account of the results of a benchmarking exercise with comparable investigatory bodies and the historical performance of the Commissioner's investigatory team.

2.2 The Manual is the first of its kind to be shared publicly by the Commissioner's office for consultation and, in its final form, made publicly available. The purpose of sharing the Manual publicly is to align with our commitment to accountability, honesty and transparency. Our decision to consult publicly on its provisions goes further than a recommendation included in our External Auditor's Report for 2020/21 (link available [here](#)). This consultation paper invites comments on the Manual and, in particular, asks those with a role or otherwise having an interest in the complaints handling process whether the procedures, targets and aims set out in the Manual aligns with public expectations. Comments are invited by **28 November 2022**.

3.0 Consultation

3.1 It is the Commissioner's view that the Manual assists in the exercise of the Commissioner's statutory functions, and aligns the exercise of those functions with the values of the office as set out in the revised [Strategic Plan](#).

3.2 The issues that seem to be most appropriate for consideration are set out below. Having considered the results of this consultation exercise, changes to the Manual are to be made with an intention to implement these by Autumn / Winter of 2022. In the interim period, the procedures set out in the draft Manual are being applied by the Commissioner and the office.

4.0 Issues on which Views are Invited

Complaints about Councillors and Members

4.1 A complaint is usually handled in two stages when it is received by the Commissioner's office. The first stage (Stage One) comprises of assessing if a complaint can be accepted for investigation. This is also referred to as the 'admissibility stage' or 'screening'. This stage comprises the use of a complaint assessment form in order to assess each complaint as consistently as possible. This includes checks to confirm if a complaint is about a Councillor or a Member, if the alleged conduct is covered by an applicable Code of Conduct, if the complaint is made within one year of the alleged conduct and if the alleged conduct indicates, on its face, that a breach of an applicable Code has taken place. If a complaint is assessed to be inadmissible, it means that it does not meet the criteria for a complaint to be admissible for investigation, or those set out in the Standards Commission's Direction on Eligibility of Complaints (dated March 2021). If it does meet the criteria, the complaint is then accepted for investigation. This is also known as the second stage (Stage Two). Where the complaint is dismissed, the complainer receives a dismissal letter setting out the reasons why the complaint is not admissible and as such, why it is not accepted for investigation. However, the respondent has not always received any letter and, in most circumstances, will not have been aware that a complaint has been made about them and that it had been dismissed. In recent years, the question arose as to whether respondents should be made aware of the complaint, that it had been dismissed, and the reasons why. The Manual sets out our intention to ensure that this is done on a consistent basis. The aim of sharing these with the respondent is to afford them an opportunity to understand the type of conduct that led to a complaint being made to the Commissioner's office. It also accords with our commitment to transparency. As such, the Manual has included the sharing of a dismissal letter with not only the complainer but also with the respondent (redacted appropriately to

protect the complainer's personal data). This also aligns with the Commissioner's office process in handling Stage One dismissals in MSP complaints, which in turn aligns with the provisions of the 2002 Act. As such, the Commissioner would invite views on the following:

Q1 – When a complaint is received by the Commissioner's office, the complaint is assessed against certain criteria for admissibility. If a complaint is assessed and considered inadmissible, a dismissal letter is prepared setting out the reasons why and sent to the Complainer. Should Councillors and Members also be notified when a complaint against them is dismissed because it has been assessed and considered inadmissible?

Q2 – If so, would a copy of the dismissal letter sent to the Complainer (with contact details redacted in accordance with data privacy protection rules) be sufficient notification?

Q3 – Please provide reasons for your responses to Q1 and Q2.

4.2 At times, at either Stage One or Stage Two of the complaint handling process, a complainer may decide to withdraw their complaint. The process for how to do this is set out in the Manual and a short summary is available on our [website](#). The considerations that the Commissioner takes account of before deciding to accept a request to withdraw a complaint is also set out in the Manual. Where the complainer does not wish to proceed and the withdrawal is accepted, that is the end of the complaint process. However, there may be instances where it is in the public interest to continue investigation and report on the complaint, even where a complaint has been withdrawn. If so, it is proposed that the Commissioner may take forward a complaint in their own capacity and complete the investigation and report on it to the Standards Commission for Scotland. Currently, there is no practice of doing so. However, there may be great value in having a process in place to allow this, as it could be inappropriate and incompatible with what is in the public interest for a complaint of a very serious nature not to be investigated and reported on due to the views of a complainer.

As such, the Commissioner would invite views on the following:

Q4 – At times, the Commissioner’s office may receive a complaint which the complainer subsequently requests to withdraw. Should the Commissioner take forward complaints which are withdrawn, if there is a public interest in investigating and reporting on the complaint?

Q5 – If so, what considerations should the Commissioner account for when deciding a complaint is in the public interest to investigate and report, even where that complaint has been withdrawn?

Q6 – Please give reasons for your responses to Q4 and Q5.

4.3 Investigations necessarily take time and almost always requires cooperation from the complainer, the respondent, the local authority/public body, and any witnesses. At Stage Two, the Commissioner’s investigative team will contact parties to advise that a complaint has been accepted for investigation and to request witness details (if any and if required). Where witness testimony is sought, the team will contact the witnesses for their input. The standard timescale for providing a response to the investigative team’s queries is normally 2 weeks, but the template correspondence always provides for requests for extensions of time for a response. These are considered in line with the [Guidance](#) on how we consider requests for extensions of time. The Commissioner and their investigative team are conscious of the impacts of an investigation on any parties’ well-being and, as such, is always keen to be as efficient as possible in concluding an investigation and reporting. However, the Commissioner and their investigative team is also conscious of fairness of process. Parties should be provided with as much support and time as appropriate for them to consider their response to investigative queries. The Commissioner and the investigative team is also statutorily required and under directions (from the Standards Commission for Scotland’s Direction on progress of investigations) to provide an update every 3 months into the progress of an investigation from the date of its acceptance. However, the Commissioner and the investigative team would welcome any feedback on whether stakeholders would prefer to have this happen at more frequent intervals.

As such, the Commissioner would invite views on the following:

Q7 – Investigations take time and require cooperation from the Complainer, Respondent and any witnesses. The Commissioner’s investigative team will contact parties for information to progress with the investigation and will provide an update, currently every 3 months, on the progress of the investigation.

(a) How often should the investigative team be in touch with parties to update on the progress of investigation?

(b) How much time should the investigative team provide for parties to respond to the investigative team’s requests for documentary or other relevant evidence?

(c) At times, no response is received despite repeated requests. Where no response is received for a prolonged period of time and after repeated requests for information, should the Commissioner’s office proceed to conclude the investigation without the requested input?

Q8 – Please give reasons for your responses to Q7(a), (b) and (c).

4.4 The Commissioner’s investigative team conducts interviews, where required, in order to make progress with their investigation. The Commissioner’s office previously conducted interviews and an interview record is written and kept for internal use, such as for report writing. The Manual proposes to take this a step further, so that an interviewee may be contacted in writing by the Investigating Officer in certain cases in order to confirm any substantive statements shared during the interview or to agree a witness statement prepared from what is discussed at the interview. The interviewee will be invited to respond to the investigative team to confirm or correct the accuracy of such substantive interview statements or witness statements. The interviewee may also be invited to review an interview or witness statement based on the interview, and to sign it to confirm that it is a true reflection of what was said during the interview. The aim of this development is to ensure that the information gathered by the investigative team is correct and assists the Commissioner and their team to reach trusted outcomes. It is anticipated that these steps would only be taken in serious cases involving, for example, bullying or harassment, and given the potential importance of agreed witness testimony in such cases.

As such, the Commissioner would invite views on the following:

Q9 – Interviews can be an integral part of the investigative process. The Manual proposes that an interviewee may be contacted in writing by the Investigating Officer in order to confirm any substantive statements shared during the interview or a witness statement prepared from what is discussed at the interview. The interviewee will be invited to respond to the Investigating Officer to confirm or correct the accuracy of such substantive interview statements or witness statements. The interviewee may also be invited to review an interview or witness statement based on the interview, and to sign it to confirm that it is a true reflection of what was said during the interview. Should this proposed approach form a part of the investigative process and are there circumstances in which it should be essential, rather than optional?

Q10 – If so, should all other witnesses be provided with a copy of the interview or witness statement?

Q11 – Please give reasons for your responses to Q9 and Q10.

4.5 At the end of Stage Two, the Commissioner's investigative team will produce a report (the Report) setting out the background to a complaint, the investigation, the investigative outcomes and an explanation of the Commissioner's views as to whether a breach of the Code has taken place. The Commissioner is statutorily required to share a copy of a Report (where the Commissioner views a breach has taken place) with the respondent for their representations prior to finalising the Report. The Commissioner is also required to share a Report (where the Commissioner views a breach has taken place) with the Standards Commission for Scotland. In addition, the Commissioner is under direction (from the Standards Commission for Scotland's Direction on the outcomes of an investigation dated November 2020) to share all Reports, whether with a view that a breach has taken place or not, with the Standards Commission for Scotland. As such, all Reports are being shared with the Standards Commission for Scotland. However, not all parties receive a copy of the Report due to the previous process not accounting for the Direction – the only parties which receive a copy of the Report is where the Report considers a breach has taken place. In such cases, it is shared with

the respondent and the local authority/public body for representations. Going forward, in the interests of openness, accountability and transparency, it is envisaged that the complainer, the respondent, and the local authority/public body will always receive a Report at the end of Stage Two. This will assist the complainer, the respondent and the local authority/public body to understand the investigative steps taken, the outcome of the investigation and the reasons for why a view is taken.

As such, the Commissioner would invite views on the following:

Q12 – At the end of an investigation, the Commissioner’s office will produce an investigative report (the Report) setting out the background to a complaint, the investigation, the investigative outcomes and an explanation of the Commissioner’s views as to whether a breach of the Code has taken place. The Manual proposes that all Reports, either breach or no breach, are shared with all parties to a complaint (specifically, the complainer, the respondent and the local authority/public body). Should this proposed approach be taken?

Q13– Please give reasons for your views.

4.6 The Commissioner and their investigative team is conscious that a long-standing complaint about the office’s processes is the time taken to complete Stage One and Stage Two. The Commissioner plans to report transparently on the timescales for investigation and to set targets for such investigations. The Manual includes stretching targets for completing Stage One and Stage Two work. These are set out in section **C.13** of the Manual. We will publish the extent to which we meet these targets at least annually. By openly assessing our performance in this way, our intention is to improve on investigation timescales.

As such, the Commissioner would invite views on the following:

Q14 – The Manual proposes a set of proposed timescales and targets for each stage of complaint handling. Should these proposed timescales and targets be adopted or do you feel that others are more appropriate for consideration?

Q15– Please give reasons for your views.

4.7 Given that this is the first Manual for public consultation, the Commissioner and their investigative team is mindful to capture any other views about the office's complaint handling process. As such, we have included a broad question to capture those views.

Q16 – Are there any other issues relating to Councillors / Members' complaints handling processes which you wish to raise?

Complaints about MSPs

4.8 As with complaints about Councillors and Members, the Commissioner and their investigative team is conscious that a long-standing complaint about the office's processes is the time taken to complete Stage One and Stage Two in complaints about MSPs. The Commissioner plans to report transparently on the timescales for investigation and to set targets for such investigations. The Manual includes stretching targets for completing Stage One and Stage Two work. These are set out in section **D.11** of the Manual. We will publish the extent to which we meet these targets at least annually. By openly assessing our performance in this way, our intention is to improve on investigation timescales.

As such, the Commissioner would invite views on the following:

Q17 – The Manual proposes a set of proposed timescales and targets for each stage of complaint handling. Should these proposed timescales and targets be adopted or do you feel that others are more appropriate for consideration?

Q18– Please give reasons for your views.

Q19 – Are there any other issues relating to MSP complaints handling processes which you wish to raise?

Q20 – Are there any other issues relating to the Manual you wish to raise?

5.0 Responses

5.1 Responses should be submitted by **28 November 2022**.

5.2 We have produced a separate questionnaire document for responders to complete and return.

The questionnaire is available on our website at this address:

<https://www.ethicalstandards.org.uk/publication/consultation-questionnaire-investigations-manual>

Completed questionnaires should be sent, ideally by email, to:

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