

# INVESTIGATIONS MANUAL

## Complaint Handling Processes and Procedures

For complaints about Councillors, Board Members, MSPs, Appointments and Lobbying

April 2025

## CONTENTS

A. ABBREVIATED TERMS.....	6
B. INTRODUCTION.....	10
B.1 Legal Powers.....	11
B.2 The Applicable Codes.....	12
B.2.a Councillors and Members - The 2000 Act.....	12
B.2.b MSPs - The 2002 Act.....	12
B.2.c Lobbyists - The 2016 Act.....	13
B.2.d Public Appointments – Code of Practice.....	13
B.3 General Approach to Investigations and Directions.....	13
A.4 Purpose of the Manual.....	15
C. COUNCILLOR AND MEMBERS COMPLAINTS.....	17
C.1 What we can and cannot investigate.....	17
C.1.a Complaints about service or performance.....	17
C.1.b Admissibility criteria.....	18
C.2 Overall Investigation Process.....	19
C.3 What happens when we receive a complaint.....	20
C.3.a Recording a complaint.....	20
C.3.b Complaints Checklist.....	21
C.3.c Whistleblower complaints.....	22
C.3.d Anonymous complaints.....	24
C.3.e Complaints that are out of time (12 months or more).....	25
C.3.f Complaint not about a Councillor or Member.....	25
C.3.g Complaint not within the remit of an applicable Code.....	25
C.3.f Self-Referred Complaints.....	26
C.4 Allocating or self-allocating a case.....	26
C.5 Assessment process.....	28
C.6 Inadmissibility of a Complaint and File Closure.....	31
C.7 Accepting a Complaint for Investigation.....	34
C.8 Withdrawing a Complaint.....	36
C.9 Additional steps for Members' complaints.....	39
C.10 Conducting the Investigation.....	39
C.10.a The Investigation Plan.....	40
C.10.b Requests for information.....	41

C.10.c Process on receipt of information .....	43
C.10.d Documentary evidence .....	43
C.10.e Electronic evidence .....	43
C.10.f Witnesses and other parties to an investigation .....	44
C.10.g Conducting interviews .....	45
C.10.h Record of interviews .....	48
C.10.i Requests for further information .....	49
C.10.j Adding new issues of complaint to an open investigation .....	49
C.10.k Three Month Interim Reports to the SCS .....	50
C.11 Reporting .....	51
C.11.a Report structure, format and style .....	52
C.11.b Tone of voice .....	53
C.11.c Report review .....	53
C.11.d Report approval .....	53
C.11.e No Breach: process of sending and referring a No-Breach Report .....	54
C.11.f Breach: process of sending a Proposed Breach Report .....	54
C.11.g Breach Report: receipt of responses from the local authority / Body .....	55
C.11.h Breach Report: receipt of representations from the respondent .....	56
C.11.i Finalising the Proposed Breach Report .....	57
C.11.j Process of sending and referring a Breach Report .....	57
C.12 Interim Reports .....	58
C.13 Timescales and KPIs for Assessment, Investigation and Reporting .....	59
C.14 Further Investigation .....	62
C.15 Post-Investigation: SCS Hearings .....	63
C.15.a Notification of Hearing, the Pre-Hearing Meeting, and Joint Statement of Facts .....	63
C.15.b Process of collating a Hearing Bundle .....	66
C.15.c Sending the Hearing Bundle .....	66
C.15.d Contacting ESC Witnesses, Witness Policy and Witness care .....	66
C.15.e SCS Hearings .....	68
C.15.f Post Hearing Process .....	68
C.16 Guidance on handling complaints backlogs .....	68
C.17 Criminal proceedings .....	70
D.MSP COMPLAINTS .....	70
D.1 What we can and cannot investigate .....	71

D.2 General approach to MSP Complaint investigations .....	72
D.3 What happens when we receive certain types of MSP complaints.....	73
D.3.a. Anonymous complaints.....	73
D.3.b Complaint not about an MSP .....	73
D.3.c Complaint not within the Commissioner's remit.....	74
D.4 MSP complaint handling process .....	74
D.5 Dismissing an MSP complaint and closure.....	75
D.6 Accepting a complaint for investigation .....	76
D.7 Withdrawing a Complaint.....	77
D.8 Conducting an investigation into an MSP Complaint.....	77
D.8.a Conducting Interviews.....	78
D.8.b Documents and records .....	78
D.8.c Criminal offences .....	79
D.10 Reporting .....	79
D.10.a Report structure, format and style.....	79
D.10.b Tone of voice .....	81
D.10.c Report review .....	81
D.10.d Report approval .....	81
D.10.e No Breach: process of issuing and sending a finalised No Breach Report .....	81
D.10.f Breach: process of issuing a Proposed Breach Report.....	81
D.10.g Breach: Receipt of representations from the Respondent .....	82
D.10.h Process of sending and referring the finalised Report .....	83
D.11 Timescales and KPIs for investigating and reporting.....	83
D.12 SPPAC Hearings .....	83
E. PUBLIC APPOINTMENTS .....	84
E.1 Dealing with Complaints about Public Appointments and Conducting Examinations	85
E.1.a Methodology for Investigations and Examinations of Public Appointments Processes and Complaints about these and/or the Commissioner, their staff or their representatives.....	85
F. LOBBYING COMPLAINTS.....	87
G. SEXUAL HARRASSMENT COMPLAINTS .....	90
H. HANDLING "SUPER-COMPLAINTS" .....	93
I. OTHER COMMUNICATIONS.....	94
I.1 Press enquiries .....	94
I.2 Freedom of Information Requests (FOI) and Subject Access Requests (SAR) .....	94

I.3 Deciding whether a communication is Post-Decision Correspondence ( <b>PDC</b> ) or Service Complaint About Us ( <b>CAU</b> ) .....	95
I.4 Handling PDC .....	95
I.5 Handling CAU .....	96
I.6 Unacceptable Behaviour Policy (UBP).....	97
J. OFFICE PROCESSES .....	98
J.1 Standards Team meetings and notes.....	98
J.2 Standards Team weekly updates to the Commissioner .....	98
J.3 Standards team process of issuing communications.....	99
J.4 Operating the CMS.....	99
J.5 SharePoint .....	99
K. CONCLUDING REMARKS .....	100

## A. ABBREVIATED TERMS

<b>2000 Act</b>	<a href="#">The Ethical Standards in Public Life etc. (Scotland) Act 2000</a>
<b>2002 Act</b>	<a href="#">Scottish Parliamentary Standards Commissioner Act 2002</a>
<b>2003 Act</b>	<a href="#">Public Appointments and Public Bodies etc. (Scotland) Act 2003</a>
<b>2010 Act</b>	<a href="#">Scottish Parliamentary Commissions and Commissioners etc. Act 2010</a>
<b>2013 Order</b>	<a href="#">The Public Services Reform (Commissioner for Ethical Standards in Public Life in Scotland etc.) Order 2013</a>
<b>2016 Act</b>	<a href="#">Lobbying (Scotland) Act 2016</a>
<b>Appointments Team</b>	The ESC's public appointments team
<b>Assessment</b>	Assessment refers to the consideration of a complaint as to whether it can be accepted for investigation. This is also referred to as the ' <b>admissibility stage</b> ' or ' <b>screening</b> '. More information about this stage is available <a href="#">here</a> . For consistency, 'assessment' is used in this Manual.
<b>Body</b>	A public body set out in Schedule 3 to the 2000 Act or in Schedule 2 to the 2003 Act
<b>Breach</b>	When a respondent has been found to have contravened one or more requirements of a relevant code of conduct or code of practice
<b>CAU</b>	Complaints About Us – a complaint about the ESC that requires to be resolved following the CHP
<b>CAP</b>	Complaint Allocation Plan, an internal plan to actively manage case queues
<b>CAP Guidance</b>	Internal guidance about the CAP, RAG rating and Workplan
<b>CHP</b>	Complaint Handling Procedures (available <a href="#">here</a> ) for handling CAU
<b>Case</b>	The reference number assigned to a complaint or set of complaints about the same or a similar course of conduct
<b>Code of Practice</b>	Code of Practice for Ministerial Appointments to Public Bodies in Scotland (available <a href="#">here</a> )

<b>Commissioner</b>	The Commissioner for Ethical Standards in Public Life in Scotland as appointed by the Scottish Parliament
<b>complainer</b>	Any person who has submitted a complaint or who has a complaint submitted on their behalf, with their consent
<b>complaint</b>	An allegation that a Councillor or Member has breached a provision(s) of the Councillors' Code or Model Code (which may be in the <a href="#">Complaint Form</a> or another written format); an allegation that a MSP has breached an applicable provision covering MSP conduct; an allegation of failure to comply with the Code of Practice; an allegation of misconduct in breach of the Lobbying (Scotland) Act 2016.
<b>Complaints Checklist</b>	A checklist used internally to ensure that information provided with a complaint is clear and can be used for assessment
<b>Council</b>	The local authority to which a councillor has been elected
<b>Councillor</b>	A local authority elected member
<b>Councillors' Code</b>	The Councillors' Code of Conduct pursuant to the 2000 Act and approved by the Scottish Ministers
<b>CMS</b>	The ESC's internal Case Management System
<b>CST</b>	The ESC's internal corporate services team
<b>CSO</b>	The ESC's Corporate Services Officer
<b>Duty IO</b>	The Duty Investigating Officer, who is a member of the Standards Team 'on duty' for a designated week to assist with complaint intake
<b>ESC</b>	The Commissioner's administrative office
<b>Examination</b>	The course of formal or systematic examination of the appointments practices of the Scottish Ministers in relation to one or more public appointments
<b>Executive Director</b>	The Executive Director appointed by the SCS
<b>FOI</b>	Freedom of Information request pursuant to the Freedom of Information (Scotland) Act 2002
<b>Hearing</b>	A (usually public) formal meeting arranged by the Standards Commission for a Panel to consider a report by the Commissioner

<b>HIO</b>	Hearings and Investigations Officer of the Commissioner's office
<b>Interim Report</b>	A report pursuant to s 21 of the 2000 Act
<b>Investigation</b>	The course of formal or systematic examination or research into a complaint
<b>IO</b>	Investigating Officer of the Commissioner's office
<b>ISO</b>	Investigations Support Officer of the Commissioner's office
<b>JSF</b>	Joint Statement of Facts prepared in advance of a Hearing
<b>MSP</b>	Member of Scottish Parliament
<b>Member</b>	A member of the board of a public body
<b>Model Code</b>	The Model Code of Conduct for Members of Devolved Public Bodies pursuant to the 2000 Act and approved by Scottish Ministers
<b>Monitoring Officer or MO</b>	The officer designated by the Council in terms of section 5 of the <a href="#">Local Government and Housing Act 1989</a>
<b>Peer Review or PR</b>	A part of the ESC's internal Quality Assurance Framework to ensure that all assessments and investigation reports are checked at least twice before approval and issue
<b>Peer Reviewer</b>	The Standards Team member who conducts the Peer Review
<b>Peer Review Checklist or PR Checklist</b>	An internal template checklist setting out the items that need to be checked to complete Peer Review
<b>Peer Review Guidance or PR Guidance</b>	Guidance appended to the PR Checklist setting out the expectations of how to conduct a Peer Review exercise
<b>PHM</b>	Pre-Hearing Meeting held by the SCS
<b>RAG rating</b>	A 'Red, Amber, Green' complaint rating system to ensure comparable case mix across the Standards Team
<b>Report</b>	A document setting out the investigation into a complaint and its outcome, at the end of Stage 2 (for investigations into Complaints about Councillors / Members / MSPs).
<b>respondent</b>	Any person against whom a complaint has been made.

<b>Scheme of Delegation or SoD</b>	An internal document setting out how the Commissioner can delegate powers and functions such as the complaint handling function of the ESC
<b>Section 4 Direction</b>	A direction issued by the Scottish Parliament to the Commissioner in terms of section 4 of the 2002 Act.
<b>Section 10 Direction</b>	A direction issued by the SCS to the Commissioner in terms of section 10 (1) of the 2000 Act (such as the July, November and March Directions set out above)
<b>Section 16 Direction</b>	A direction issued by the SCS to the Commissioner in terms of section 16 of the 2000 Act.
<b>Section 14 Report</b>	A report on the outcome of an investigation submitted by the Commissioner to the SCS in terms of section 14 of the 2000 Act.
<b>SIO</b>	Senior Investigating Officer of the Commissioner's office.
<b>SISO</b>	Senior Investigations Support Officer of the Commissioner's office
<b>Stage 1</b>	The assessment stage for a complaint to help decide if the complaint matches admissibility criteria
<b>Stage 2</b>	The investigation stage for a complaint to gather information or evidence to take a view on the likely facts and if there is a breach of an applicable Code
<b>Standards Team</b>	The ESC's complaint handling team which includes the SIO, HIO, IOs, SISO and ISO
<b>SCS</b>	<a href="http://www.ethicalstandards.org.uk">The Standards Commission for Scotland</a>
<b>Standards Officer or SO</b>	An officer in a public body with functions roughly equivalent to those of the Monitoring Officer in a council.
<b>SPPAC</b>	Standards, Procedures and Public Appointments Committee
<b>Template</b>	An agreed template. Refer to Appendices containing templates.
<b>Workplan</b>	An internal template showing the caseload of a Standards Team member
<b>Whistleblower</b>	A whistleblower is a person, often an employee, who reports misconduct or unethical behaviour to someone in authority. They typically act to expose wrongdoing that could harm others or violate laws or regulations.

## B. INTRODUCTION

1. The Ethical Standards Commissioner (**Commissioner**) is an independent office holder with a broad range of statutory functions which can be summarised as:
  - complaints handling
  - regulation of ministerial appointments to public bodies.
2. The Commissioner and their staff can assist with queries about our processes of complaint handling and regulation of ministerial appointments. We are unable to provide any support or advice beyond these statutory objectives, including mental health support or legal advice.
3. The Commissioner can investigate complaints alleging a breach of an applicable Code of Conduct relative to:
  - Members of Scottish Parliament (**MSPs**)
  - Local authority councillors (**Councillors**)
  - Public body board members (**Members**)
  - Complaints that Lobbyists have not adhered to legislation which governs their activities (**Lobbyists**).
4. One of the fundamental purposes of the Ethical Standards Commissioner's office (**ESC**) is to support the Commissioner's consideration of those complaints. The Commissioner and the ESC will assess complaints, investigate them when a breach of the rules may have occurred and report on the outcome of the investigation, without fear or favour, about the conduct of individuals in public life in Scotland.
5. Our values matter to us. All our activities are conducted in line with our purpose, values and strategic objectives as set out in our [Strategic Plan \(2024-2028\)](#).
6. This Investigations Manual sets out our investigations processes across all aspects of the office's work. This includes the work of the Standards team (**Standards Team**) and the Appointments team (**Appointments Team**).
7. The Standards Team assesses, investigates and reports on conduct complaints. The Appointments Team investigates complaints relating to public appointments and that examine the appointments practices of the Scottish Ministers.
8. This Investigations Manual (**Manual**) has been finalised in consultation with our stakeholders, including the Scottish Government, the Scottish Parliament, the Standards Commission for Scotland (**SCS**), the Convention of Scottish Local Authorities (COSLA), the Society of Local Authority Lawyers & Administrators in Scotland (SOLAR), the Society of Local Authority Chief Executives (SOLACE), and members of the public via public consultation. The consultation ended on 28 November 2022.

9. This Manual is published on our website in line with the commitment in our values to accountability, honesty and transparency. Unless otherwise indicated, this Manual will be reviewed and usually updated on a quarterly basis or four times a year to ensure it accurately reflects our office's processes. Manual updates take account of any changes to applicable Codes and guidance, legislative amendments and stakeholder suggestions for improvement.
10. Any instructions and template documents included in this Manual are intended as guidelines for staff only, given the significant variation in circumstances that every investigation presents. While we aim to set out general rules and guidance to help staff in the processing of complaints and when conducting investigations, they are not 'hard and fast' rules to be followed. Divergence from them to suit the circumstances in a given case will sometimes be required. Staff who wish to diverge from the Manual but are unclear about whether doing so is appropriate should seek guidance from a member of the Senior Management Team.

## B.1 Legal Powers

11. The Commissioner's functions are set out in statute. The applicable legislation is available to view [on our website](#). As well as investigating conduct breaches, the Commissioner may also conduct investigations into allegations of breaches of the Code of Practice for Ministerial Appointments to Public Bodies in Scotland. He may also more generally examine the public appointments practices of the Scottish Ministers.
12. The Commissioner's functions in relation to conduct are set out in various pieces of legislation referred to throughout this manual:
  - 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**).
13. The Commissioner's functions may be discharged by any other person authorised for those purposes by the Commissioner. Unless the context requires otherwise, references

in this document to the Commissioner should be understood to include anyone so authorised.

## B.2 The Applicable Codes

### B.2.a Councillors and Members - The 2000 Act

14. The 2000 Act provides for the introduction of updated codes of conduct for local authority councillors and members of relevant public bodies.
15. The current version of the Code of Conduct for Councillors is the Councillors' Code of Conduct 2021 (**Councillors' Code**). This was brought into force by the Scottish Ministers on 7 December 2021 following consultation, and with the approval of the Scottish Parliament, as required by the 2000 Act. This superseded a previous version issued in 2018. Copies of both versions of the Councillors' Code are available on the SCS' website: [Codes of Conduct for Councillors](#).
16. The Code of conduct for Members is the Model Code of Conduct for Members of Devolved Public Bodies 2021 (**Model Code**). This was issued by the Scottish Ministers on 7 December 2021 following consultation, and with the approval of the Scottish Parliament. The revisions in the latest version brought the Model Code in line with the relevant parts of the Councillors' Code, as revised. Public bodies have six months from the date of issue to adopt the Model Code, adapted for their own circumstances and subject to the approval of the Scottish Ministers. Copies of both of these Codes are available on the SCS' website: [Codes of Conduct for Members](#).

### B.2.b MSPs - The 2002 Act

17. MSPs are required to abide by the **relevant provisions**<sup>1</sup> set out in the 2002 Act. These include the following (as set out in section 3(3) of the 2002 Act):
  - a. the Scottish Parliament's Code of Conduct for MSPs (as of 6 May 2021);
  - b. the Standing Orders of the Scottish Parliament;
  - c. provisions in the Scotland Act 1998 (Transitory and Transitional Provisions) (Members' Interests) Order 1999; and
  - d. provisions made by or under an Act of the Scottish Parliament pursuant to section 39 (members' interests) of the Scotland Act.

The Scottish Parliament has produced guidance on the Code of Conduct to assist MSPs to comply with its provisions. The 2002 Act also gives the Scottish Parliament

---

<sup>1</sup> A "relevant provision" is defined in s 3(3) of the 2002 Act, which is "any provision in force in the standing orders, in the Code, in the Scotland Act 1998 (Transitory and Transitional Provisions) or made by or under an Act of the Scottish Parliament in pursuance of section 39 (members' interests) of the Scotland Act".

the power to issue Directions to the Commissioner, particularly as to the way in which complaints are to be investigated and reported on.

18. The 2021 Act is an Act of the Scottish Parliament to allow the Commissioner to investigate complaints of past sexual harassment made about MSPs in respect of behaviour towards members of their own staff; to remove the default time limit for making complaints to the Commissioner; and to remove any requirement for the complainer's signature. The 2021 Act received Royal Assent on 21 April 2021. The relevant provisions of the 2021 Act, amending the 2002 Act, came into force at the end of the period of 6 months beginning with the day of Royal Assent.

#### B.2.c Lobbyists - The 2016 Act

19. The Commissioner has a duty to investigate and report on complaints that a person has or might have:
  - failed to comply with section 8(1) of the 2016 Act
  - failed to provide accurate and complete information in an application made under section 9 of the 2016 Act
  - failed to comply with the duty to submit information returns under section 11 of the 2016 Act, or
  - failed to supply accurate and complete information in response to an information notice in accordance with section 17 of the 2016 Act.

#### B.2.d Public Appointments – Code of Practice

20. The Commissioner has a duty under the 2003 Act to prepare a Code of Practice for Ministerial Appointments to Public Bodies in Scotland (the **Code of Practice**) and to promote compliance with its provisions.
21. The Code of Practice includes guidelines on the methods and practices to be employed by the Scottish Ministers in making public appointments. The Scottish Ministers and the Scottish Government directorates on their behalf are expected to follow the Code of Practice to ensure that appointments are made on merit, after fair and open competition. The Code of Practice and the guidance on its application produced by the Commissioner have statutory force. The Commissioner is required to report to the Scottish Parliament on cases in which the Code has been breached and where that breach is material in nature.

### B.3 General Approach to Investigations and Directions

22. The Commissioner is an officeholder appointed by the Scottish Parliament and is expected to act independently. This is set out in section 4 of the Scottish Parliamentary Commissions and Commissioners etc. Act 2010 Act (**2010 Act**), as amended, which specifies that the Commissioner is not subject, in the performance of their functions, to the direction or control of any member of the Parliament, any member of the Scottish Government, or the Parliamentary Corporation. This applies to all complaints received relating to Councillors, Members, MSPs, Lobbyists, or under the Code of Practice.

23. However, the Commissioner may be directed by the SCS as to how any investigation under the Councillors' Code or Model Code is carried out. These are known as **Directions**.
24. Under section 12 (1) of the 2000 Act, it is for the Commissioner to decide whether, when and how to carry out any investigation subject to the requirements of reasonableness in terms of administrative law.
25. The SCS had issued 3 Directions to the Commissioner in respect of complaints about Councillor and Members:
  - A. On 1 July 2020, the SCS issued a Direction directing that the Commissioner submit interim reports to the SCS and update the parties where an investigation takes more than a three-month period (**Progress Direction**). The Progress Direction was renewed on 27 September 2022, expiring on 26 September 2024. The Progress Direction was rescinded by the SCS with effect from 30 May 2024 as, amongst other things, the ESC had committed to updating all parties to an investigation and reflecting that practice in this Manual.
  - B. On 12 November 2020, the SCS issued a Direction directing that the Commissioner report to the Commission the outcome of each investigation undertaken pursuant to sections 9 and 12 of the 2000 Act so that the Commission can make the final decision on the complaint (**Outcome Direction**). The Outcome Direction was renewed for a period of 3 months on 8 November 2022 and renewed on 1 February 2023. It expired without renewal on 31 January 2025 because the Commissioner had committed to maintain this practice and reflect it in this Manual.
  - C. On 1 March 2021, the SCS issued a Direction requiring the Commissioner to carry out an investigation into every complaint about a Councillor and Member except in specific circumstances set out in the Direction (**Eligibility Direction**). The Eligibility Direction was renewed on 27 February 2023 with expiry on 26 August 2023. The Eligibility Direction has not been renewed on the basis that the Commissioner provided wording on his assessment of eligibility for inclusion in this Manual, which the SCS accepted.
26. The 2000 Act at section 12 (2) requires that investigations shall, so far as possible, be conducted confidentially. Whilst this requirement cannot be enforced within the 2000 Act, the Commissioner asks all parties to respect it.
27. As of 7 December 2021, all parties to a complaint that the ESC has accepted for investigation should bear in mind that the Councillors' Code and Model Code's Guidance contains a provision where disclosure of confidential information, inclusive of information deemed confidential by statute, is a breach of the confidentiality requirements under each Code (see paragraph 77 of the [Councillors' Code Guidance](#) and paragraph 87 of the

[Model Code Guidance](#)). This includes information about any ongoing investigation being undertaken by the Commissioner. All parties to a complaint are informed of the confidential nature of the Commissioner's investigations. This is reflected in the Commissioner's template letters included in this Manual's Appendices.

28. The 2002 Act also makes provision at section 4 for the Commissioner to be directed by the Scottish Parliament in the procedures to be followed when conducting investigations. The Scottish Parliament's Directions are issued by the Standards, Procedures and Public Appointments Committee (**SPPAC**) and do not direct the Commissioner as to whether or how any particular investigation is to be carried out. The latest version of the SPPAC's Directions, which are updated from time to time, are available to download from the Scottish Parliament's [website](#). Additionally, the 2002 Act at section 5 requires the Commissioner to conduct each stage of an investigation in private.
29. When conducting investigations, the Commissioner strives to achieve an appropriate balance between speed and thoroughness. Timescales are important to anyone involved in making or answering a complaint. All investigations therefore have targets for completion.
30. However, the Commissioner is not prepared to compromise the outcome because of shortcuts that involve making assumptions or that risk ignoring material facts and circumstances. This means that each Investigating Officer (**IO**) is expected to plan the investigation carefully, and to seek to avoid delay in carrying it out and in writing up their conclusion. If in doubt, reference should be made to the Senior Investigating Officer (**SIO**), the Hearings and Investigations Officer (**HIO**) or the Commissioner.
31. The Commissioner highly values impartiality and dealing sensitively with all parties. Experience has shown that even those who appear confident may still find the process stressful, particularly where a public hearing is involved.
32. As such, all ESC staff are required to work in accordance with the Commissioner's purpose, values and strategic objectives. To ensure we are working in this way, those who are party to our work will be given the opportunity to provide anonymous feedback about us at the conclusion of every investigation. We will also publish the results of these surveys on our website.

## A.4 Purpose of the Manual

33. This Manual outlines the steps that the Commissioner, the Standards Team, Appointments Team or any other ESC staff will normally take in assessing, investigating, and reporting on a complaint and the legislative and policy context for so doing.
34. This Manual is intended for internal use only, is supplementary to and should be read in conjunction with, other official (and publicly available) documents. This Manual is shared publicly in line with our commitment to accountability, honesty and transparency.

35. Any processes and template documents included in this Manual are intended for guidance only. It is not possible to anticipate every eventuality in every complaint. At times, an applicable process or guidance need to be adapted so that an assessment, investigation or report can proceed fairly, efficiently and in line with a proportionate use of public money.
36. Throughout this Manual and for the purposes of ESC's monitoring of data, the terms **case** and **complaint** are used. A case can cover one complaint or a number of complaints made by multiple complainers about multiple respondents. A complaint refers to one complaint that is made by a complainer against one respondent.

## C. COUNCILLOR AND MEMBERS COMPLAINTS

### C.1 What we can and cannot investigate

37. The Commissioner can consider any complaint that someone in public office has not behaved in accordance with the provisions of the Councillors' Code or Model Code.
38. Anyone can make a complaint to the Commissioner. There is no requirement for them to first make a complaint through a Council, a Body, a charity, any government body or Scottish Parliament.
39. Anyone can make a complaint about alleged misconduct even where it directly affects another person. However, this type of misconduct may be harder to evidence where the person subjected to it does not want to be involved in the process.

#### C.1.a Complaints about service or performance

40. The Commissioner and the Standards Team cannot assist with complaints relating to a public function which the Councillors' Code or Model Code does not cover. This includes complaints relating to a Council or Body's decisions, functions and service standards (such as missed refuse collections, delayed responses to queries, etc.).
41. The Codes cover conduct or behaviour expected of an individual, rather than that individual's performance in their role, such as attendance at Council or a Body's board meetings, rate of response to communications or political views. The SCS' [Advice Note for Members of the Public relative to councillors](#) and [members](#) are helpful references. More information is available at section C.3.g below.
42. Where a complaint is made about:
  - an individual's performance in their role
  - a public service by the Council or Body
  - a decision by a Council or Body
  - any other function of a Council or Body

the Commissioner must dismiss the complaint. The ESC will try to signpost the complainer to the appropriate office or process where a complaint can be made instead.

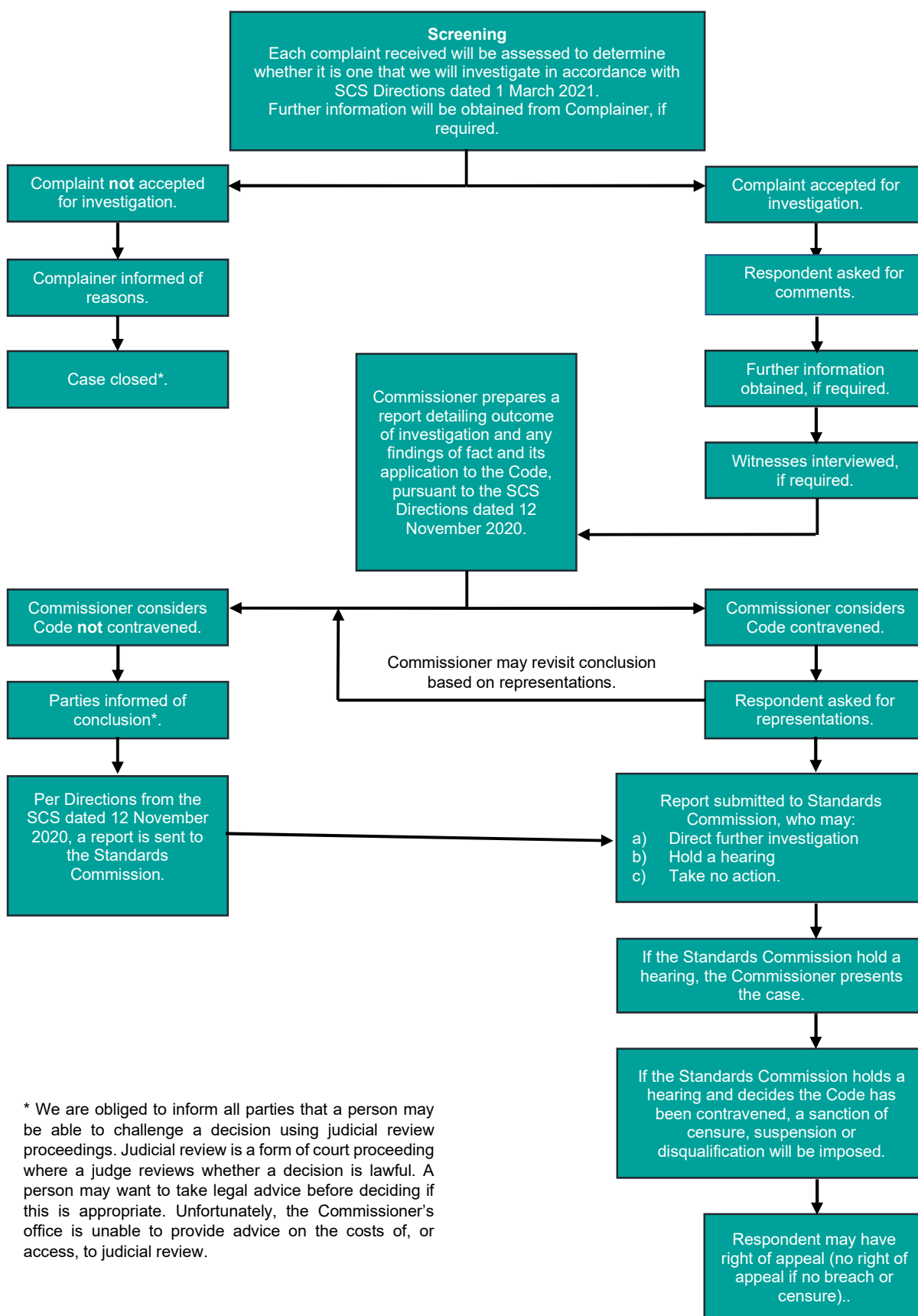
43. Complainers should not face any unnecessary delays if their complaint does not meet the admissibility criteria. Since these cases are straightforward to assess, they will be handled promptly. This ensures that complainers are informed as soon as possible, rather than waiting for an extended period only to learn that their complaint is not admissible.

**C.1.b Admissibility criteria**

44. The Commissioner and the Standards Team will be able to assist with complaints about the conduct of a Councillor or Member where a complainer feels that they have not acted in accordance with an applicable Code.
45. Complaints such as these will be considered admissible for investigation if they match **all** the following admissibility criteria:
  - a. the complaint is made in writing and signed by the complainer;
  - b. the complaint is about a Councillor or Member;
  - c. the complaint relates to the conduct of a Councillor or Member in their role;
  - d. the Councillor or Member has not died prior to the complaint being made;
  - e. the Councillor or Member is not an incapable adult within the meaning of the Adults with Incapacity Scotland Act (2000);
  - f. the complaint is made within a year of the conduct or end of a course of conduct (other than in exceptional circumstances);
  - g. the conduct or course of conduct complained of is, on its face, a breach of an applicable provision of the relevant Code if it could be established that the conduct occurred.
46. The Commissioner does not require to carry out an investigation into a complaint where, on the face of it, the conduct referred to in the complaint would not, even if it could be established to have occurred, constitute a breach of an applicable Code. If an initial assessment of the publicly available evidence demonstrates that the alleged conduct could not be a breach of the relevant Code, then the complaint will be dismissed or closed as inadmissible for investigation.
47. If any one of the admissibility criteria is not met, it is likely that the complaint will be dismissed. This means it will be closed and will not be investigated. The complaint closure letter will set out the reasons why one or more of the admissibility criteria has not been met (see for example Appendices 5a – 5c).
48. The Commissioner believes it is only fair and reasonable that a respondent knows who made a complaint about them. The ESC will provide the respondent with a copy of the closure letter (as appropriate) with the complainer's contact details redacted. This is to support transparency and ensure that processes and decisions remain as clear and open as possible. If a respondent learns of a complaint about them before the admissibility assessment is finished, the ESC may be obliged to confirm that there is a complaint about them. This is covered in section C.6 below.
49. Complaints about conduct that emerges in a respondent's response to an ESC investigation will not be accepted for investigation. This is because a respondent, when engaging as a party or witness to the ESC's investigation, is not acting in their capacity as a Councillor or Member.

## C.2 Overall Investigation Process

### OVERALL INVESTIGATION PROCESS



\* We are obliged to inform all parties that a person may be able to challenge a decision using judicial review proceedings. Judicial review is a form of court proceeding where a judge reviews whether a decision is lawful. A person may want to take legal advice before deciding if this is appropriate. Unfortunately, the Commissioner's office is unable to provide advice on the costs of, or access, to judicial review.

50. Complaints vary greatly. They may contain a complaint against multiple respondents, a course of conduct or a breach of more than one part of the relevant Code (to name a few variations).

### C.3 What happens when we receive a complaint

51. The ESC can receive a complaint either submitted via the website, taken over the telephone or in any other written form submitted in any other manner (e.g. hard copy via regular post).

#### C.3.a Recording a complaint

52. IOs will follow a complaint as set out in the complaint form as closely as possible during assessment and investigations. This may not always be possible and summarisation of a complaint or its separation into different parts may be required.
53. Where a complaint is set out into different parts, those parts will be referred to as issues of complaint. Generally, IOs will record complaints:
- a. by covering the factual elements of the alleged misconduct, such as the date and time the alleged misconduct occurred and the alleged misconduct itself
  - b. by not separating one incident or event into separate issues, i.e. an email sent at the same date and time should not be separated into its constituent parts
  - c. by separating more than one incident or event on separate dates and times into distinct issues for ease of understanding
54. The IO will consider the background to an alleged incident and/or the alleged impact or consequences of the conduct as part of the assessment or investigation. However, they may not be outlined in the recorded complaint itself as this focuses as closely as possible on factual elements and the parts of the Code that are potentially engaged.
55. The ESC tries to allow the complainant an opportunity to provide views on whether the recorded issue(s) of complaint is an accurate reflection of their concerns and can be altered if it is not. This is reflected in the template correspondence, where we specify that a complaint could change based on the information the ESC receives (see Appendices 6a - 6c).
56. The ISO / SISO will check if a complaint could match the admissibility criteria and save it to the internal Case Management System (**CMS**) in the process set out in the process set out in our internal [Complaint Handling Guide \(v 2.0\)](#) (linked internally).
57. It can be difficult to distinguish between an individual making an enquiry about complaining to the ESC or a complainant making a complaint. If this occurs, the usual

practice would be to confirm with the individual if they are in fact making a complaint. If so, we will record the communication containing the enquiry as part of a case file in the CMS but also request a **Complaint Form** to be completed so that all details of what the complainer wishes to complain about are captured.

58. How we record complaints can be different:

- d. if the complaint is on behalf of an organisation, the ISO / SISO will confirm who the contact person for the complaint will be. The complaint will be recorded as one complaint from the organisation;
- e. if a complainer is complaining on behalf of a group of people, such as members of a wider community rather than an organisation, the ISO / SISO should confirm if each member of that wider community or group wishes to or has authorised that Complainer to complain on their behalf. If so, each member of that wider community or group can be recorded as a separate complainer. The complainer may share communications from the ESC with the wider group, if the complainer wishes to do so;
- f. if a complainer has a legal representative or other supporter who has been designated as their representative by the complainer, they will be the contact person for the complaint.

59. The complainer must name the person(s) they wish to complain about before a complaint can be recorded on the CMS. The ESC is only able to record complaints where the person(s) being complained about are identified using their name. The ESC cannot record complaints that use a different description of these individuals such as their role or membership of a committee, for example 'the Council Leader' or 'the Members of the joint integration board'. Where a complaint has been made in this way the ISO / SISO will ask the complainer to provide the individuals' names and will not record the complaint until this is confirmed.

60. The ESC will generally respond to emails and letters that are directly addressed to the ESC. If a complainer wants an email or letter to be dealt with as a complaint, this will need to be clearly indicated and identify the specific issues which the complainer wants the ESC to consider and (if appropriate) provide supporting evidence.

61. The ESC can be copied into correspondence or emails relating to a complaint which is addressed to another organisation. Our policy is to treat such emails and letters as general information and not as a complaint to be actioned by the ESC.

### C.3.b Complaints Checklist

62. All new complaints will be considered by the **Duty IO**. The Duty IO is a member of the Standards Team who is 'on duty' for a designated week. The Duty IO's purpose, role and responsibilities are set out in internal **Duty IO Guidance**. In brief, the Duty IO's role is to:

- review and assess new complaints received in the previous week
  - triage and direct all new complaints from the start, avoiding delays that might arise from bottlenecks in the intake process
  - quickly identify urgent new complaints that need immediate attention or escalation (in accordance with **[insert section]**)
  - ensure fair distribution of new complaints
  - improve the efficiency of handling new complaints, by identifying cases that can quickly be closed and allocate these using the cab rank system, and
  - ensure that the unallocated complaints spreadsheet (the **Spreadsheet**) is being used to accurately record new complaints, information gathered, and their RAG rating.
63. The ISO / SISO or the Duty IO may complete a **Complaints Checklist** to ensure that any clarification or information from the complainer is requested and received, so that assessment can proceed as smoothly as possible when an IO is assigned.
64. The ISO / SISO or Duty IO must double check the complainer's preferred method of contact if they have not specified this in their complaint form or if it is unclear what their preferred method of contact is.
65. The ISO / SISO or Duty IO does not require to double check the complainer's preferred method of contact if it is already specified in the complaint form.
66. The ISO / SISO or the Duty IO may ask a complainer to clarify what their complaint is about. This query is not an investigation. The information the ISO / SISO or the Duty IO will ask a complainer to provide will be guided by the Complaints Checklist and the Duty IO's experience.

### C.3.c Whistleblower complaints

67. The Commissioner is a 'Prescribed Person' under the Whistleblowing Prescribed Persons Order 2015 where a person feels a Councillor or Member in Scotland has acted in a way that breaches the applicable Codes. Whistleblowing has a particular legal meaning.
68. The Public Interest Disclosure Act 1998 (the **1998 Act**) protects workers that disclose issues at their workplace, or former workplace, provided certain conditions are met. If the conditions are met, the identity of a complainer may be withheld, particularly where they are making a complaint as a whistleblower under the 1998 Act. It is important to confirm a complainer is a potential whistleblower from an early stage so that the complainer's identity is given appropriate protection. As such, where the complainer has indicated they are a whistleblower, within 15 working days the ESC will seek further information where necessary, or advise them whether they meet the conditions that engage whistleblowing protection. This Template correspondence is set out in Appendix 3a – Template Correspondence (Whistleblowing).

69. The Commissioner and the ESC is not able to provide legal advice or support as a Prescribed Person. However, in principle, the following conditions need to be met before a complaint engages whistleblowing protection:

- a. The complainer is a “worker”, such as a person
  - i. who has entered into or works under an employment contract, or
  - ii. who works under any other contract (whether express, implied, written or oral) to do or perform personally any work or services for another party to the contract who is not that person’s client or customer,
  - iii. who works on a 'supply' basis (e.g. provided by an agency), or
  - iv. who is provided with work experience in a training course or programme or with training for employment, where the work experience / training was not provided under a contract of employment or by an educational establishment.

This is not intended to be an exhaustive list of who could qualify as a worker. However, these general principles would mean that a person is more likely a worker for the purposes of the 1998 Act.

- b. In addition, the complainer must make a ‘qualifying disclosure’, which means any information which, in the reasonable belief of the worker (the complainer) making the disclosure, tends to show:
  - i. a criminal offence
  - ii. a failure to comply with a legal obligation
  - iii. a miscarriage of justice
  - iv. endangerment of health or safety of any person
  - v. damage to the environment, or
  - vi. deliberate concealment of information related to any of the above.

For the purposes of complaints made to the Commissioner, if the complainer reasonably believes that a person has breached the Code of Conduct, this can constitute a failure to comply with a legal obligation.

We must report how many whistleblowing complaints we receive each year. This is included in the ESC annual report if the Commissioner reasonably believes that such a complaint, if found to be true, concerns a breach of an applicable Code of Conduct. The complaint will be counted even if we are not able to take action on it. No other information about whistleblowing complaints will be shown in our annual reports.

70. If a worker making a complaint reasonably believes that someone has breached the Code, and that their allegation is a true reflection of what occurred, the complaint is likely to be investigated and reported to the SCS without revealing the complainer’s name, if the complaint also matches the admissibility criteria set out in section C1 of this Manual. However, it is not possible for the Commissioner and the ESC to

guarantee that the complainer will remain anonymous. This is because any party may be able to discern, for themselves, on the basis of the nature of the complaint and its contents, who the complainer may be. This is a risk that the Commissioner and the ESC will try to minimise so far as possible by anonymising the information that is provided from all parties in accordance with Appendix L.22 (the Redaction Guidance) of this Manual.

71. Where a complainer is not able to provide the information that supports their whistleblower status, the ESC will inform the Complainer that the complaint cannot proceed as a whistleblowing complaint. The ESC will then confirm with the complainer whether they wish to proceed with the complaint, which will be handled according to the usual process set out in this Manual.
72. The most significant change for the complainer where they do not qualify as a whistleblower is that their name will be shared with the respondent and the SCS. The ESC will not proceed with the complaint unless the Complainer consents to the complaint being handled in accordance with the usual process (i.e. without whistleblowing status).
73. Complaints where the complainer is or claims to be a whistleblower will not be shared with any respondent if the complaint is withdrawn prior to an investigation. However, if the complaint is at investigation stage, the respondent and any parties who are contacted will have to be informed that the complaint has been withdrawn so that they will be aware the matter is closed. For more information on withdrawing a complaint, please see section C8 of this Manual.

#### **C.3.d Anonymous complaints**

74. An anonymous complaint is one where the complainer requests that the ESC does not disclose their name to the respondent. The 2000 Act is clear that investigations into complaints should, so far as possible, be undertaken in response to allegations of misconduct that are made in writing and signed by the complainer. It may be difficult for the person alleged to have breached the Code to respond properly to a complaint whose origin is unknown. The Commissioner will normally decide not to accept or not to progress a complaint on an anonymous basis where there is no evidence supporting why anonymity should be provided. However, the Commissioner will ask for any supporting evidence as a first port of call and may refer an anonymous complaint to the Council or Body concerned or, in appropriate circumstances, to the police or another regulatory body.
75. If the Commissioner decides that there is no basis for granting anonymity, the ESC will inform the complainer of this decision before progressing any further with the complaint.
76. However, even where the complainer does not meet the requirements for being granted anonymity, the Commissioner may elect to investigate the complaint independently where the allegation in the complaint is very serious and may be

substantiated. If so, the Commissioner will take on the complaint as the complainer. Complaints made under an alias or false identity will be considered an attempt to obstruct the Commissioner's statutory functions contrary to section 12(6) of the 2000 Act and could constitute a contempt of court, if certified.

#### C.3.e Complaints that are out of time (12 months or more)

77. A complainer is generally expected to submit a complaint within 12 months of the alleged incident, event or behaviour occurring. Complaints made after this period are not typically investigated. This assessment is part of the admissibility criteria.
78. The Assessment Form (Appendix 4 – Complaint Assessment Form) allows for consideration of complaints submitted after the usual deadline if there are valid reasons to do so. These may include an overriding public interest or delays due to other proceedings before the deadline passed. The Commissioner may choose to proceed with a late complaint if there is an overriding public interest or other justifiable circumstances, at their discretion.
79. If a complaint is submitted outside the standard 12 months period and there are no exceptional circumstances or overriding public interest to justify an exception, the Standards Team will review the complaint and issue a closure letter explaining why it cannot be accepted (Appendix 5a – Template Correspondence (Out of Time)).

#### C.3.f Complaint not about a Councillor or Member

80. The ESC may receive a complaint that does not relate to a Councillor, a Member, or any other person under the Commissioner's statutory remit. These may be complaints about Council officers, Community Councillors, a staff member of the Body who is not on the board, or a member of the public.
81. When this type of correspondence is received, the process is to record the correspondence as an enquiry and issue correspondence explaining why we are unable to accept a complaint about those concerns (Appendix 2- Enquiry Outwith Jurisdiction). If we are aware of an alternative organisation that may be able to investigate complaints of this nature, we will signpost this to the enquirer.

#### C.3.g Complaint not within the remit of an applicable Code

82. The ESC may receive a complaint relating to a Councillor or a Member, but where the alleged misconduct is not covered by the Councillors' Code or Model Code. An example may be a complaint which relates to the performance of a Councillor or Member in their roles (i.e. service standards), such as failure to respond to an email, or failure to attend the number of requisite council committee meetings or board meetings. This is different from a complaint about a provision in the applicable Code. The SCS' [Advice Note for Members of the Public relative to councillors and members](#) explains in more detail what is not covered by the Code and the complaints process. The Code is not intended to cover service and performance issues.

83. When this type of complaint is received, the process is to record the complaint into the CMS and send correspondence to the complainer explaining this (Appendix 5b- Template Correspondence (Closure- Service Complaint)). The SCS has also published an [information card](#) on when the Code (for councillors) applies. It states that “the performance of councillors is a matter for the public, when voting in local elections.”
84. If a complaint is received that relates only to section 2 of the Councillors’ Code setting out key principles or equivalent section of a Body’s Code, it is important to note that a breach of key principles alone does not constitute a breach of the Code. Therefore, allegations solely based on a breach of the key principles will not normally be investigated (unless, on the face of it, a substantive part of the Code has also been breached). In such cases, the complaint will be recorded in CMS and the complainer will be notified in writing with an explanation.

#### C.3.f Self-Referred Complaints

85. In some cases, respondents can make a complaint about their own conduct. These are treated as self-referrals or self-referred complaints. They will proceed in the same way as any other complaint, except that the complainer is also the respondent.

#### C.4 Allocating or self-allocating a case

86. Standards Team members have different preferences for case allocation. Line managers will take account of their line reports’ preferences for active case allocation, self-allocation, or a combination of both.
87. All cases are recorded internally in a Spreadsheet. This shows a list of cases, in chronological order, that are new and require attention by the Duty IO.
88. One of the Duty IO’s key responsibilities is to assign a RAG rating (the **RAG rating**) to a new case. This rating system is how complaints are generally classified, in accordance with internal guidance, to a colour code of red, amber or green. The RAG rating is intended to provide assurance that all IOs have comparable case complexity in their workload and assists with complaint allocation planning (**CAP**).
89. The CAP ensures that Standards Team members each work to an internal template workplan (**Workplan**) with similar caseloads of comparable complexity. The Workplan includes details such as case reference numbers, RAG rating, date the complaint was received, date of allocation, assessment due date, and an investigation report due date. It also records project work, cross-office and stakeholder engagement, and training/development. The Workplan forms the basis for all line management discussions. Each Standards Team member is responsible for keeping their Workplan up to date.

90. The RAG rating of a case is for internal reference only and may be subject to change. IOs should refer to the internal Complaint Allocation Plan Guidance (**CAP Guidance**) for details.
91. The Spreadsheet shows the new case reference numbers, other details of the complaint, RAG rating and notes by the ISO, SISO and/or Duty IO. Generally:
- if a case is allocated by a line manager, the line manager will inform the Standards Team member of that allocation, delete the case from the Spreadsheet, assign the Standards Team member on CMS, and shift the case status from 'new' to 'admissibility' on their behalf;
  - if a case is self-allocated, the Standards Team member is expected to delete the case from the Spreadsheet, assign the case to themselves on CMS, and shift the case status from 'new' to 'admissibility'.
92. A case can be suspended from assessment due to being subject to external legal proceedings. The case will be suspended on the CMS and shown on the Spreadsheet in grey, indicating that this case is not ready for assessment.
93. Generally, Standards Team members will be allocated or self-allocated cases in chronological order on the Spreadsheet, unless:
- a complaint is suitable for allocation per the cab rank by the Duty IO
  - the complaint requires prioritisation due to matching prioritisation criteria
  - a Standards Team member identifies a complaint is related to an ongoing case, so the complaint is added to that case
  - a Standards Team member identifies that they cannot take a complaint due to a reasonably perceived or actual conflict of interest
  - an earlier case is not marked 'ready to assess'
  - a handling IO may have a conflict of interest
  - the Duty IO considers they have capacity, and it is appropriate to add a complaint to their own workplan for assessment.
94. The Duty IO is responsible for allocating specific types of complaints which do not match admissibility criteria in accordance with the internal cab rank for assessment.
95. Where a complaint covers a very serious matter, it would be appropriate to prioritise its consideration ahead of other cases. This is rare and only occurs in circumstances when failing to do so may mean that an individual is exposed to harm or danger as a result of delayed action on the part of the ESC. The factors to consider before making this decision include:
- the complaint is about bullying/harassment (including sexual harassment)
  - an initial judgment about seriousness of complaint
  - continuing exposure of parties to each other and risk of harm to either party

- potential for immediate loss of evidence or high likelihood of rapidly aging evidence, i.e. only witness evidence available
  - high likelihood of the complaint being withdrawn if it is not dealt with sooner.
96. All assessments and investigations must be conducted without fear or favour. This means the process is without bias and proceeds in an impartial and objective manner. No one with an actual or reasonably perceived conflict of interest should ever be involved in an assessment or investigation. A Standards Team member will not normally consider a case if:
- that team member was employed by the Council or Body to which the complaint relates;
  - that team member is a resident in the Council area of the complainer or respondent and could be perceived to have an interest in the outcome of the assessment or investigation;
  - the information in the Register of Interests maintained by the Commissioner discloses information which could be perceived to represent a conflict of interest; and/or
  - the team member declares an interest for any other reason, i.e. they are a friend, relative, or have another relationship with the complainer / respondent / any other named individual in the complaint.
97. Standards Team members should notify the HIO or SIO in the first instance if any potential conflict of interest arises in relation to a case allocated to them. IOs should ensure their Register of Interests is kept up to date. As a minimum, it should be reviewed and updated on an annual basis.
98. At times, it is possible for a potential conflict of interest to be declared but it is not so significant that a member of the public, with knowledge of the relevant facts, would reasonably regard the interest as being likely to influence the consideration of the complaint. If this occurs, the Standards Team member will make a note of the interest, recording the reasons for why it is unlikely they will be influenced by it, share the note with the SIO or the HIO for approval, and save the note into the case file. Where the SIO or HIO considers the interest is significant, the complaint will be reallocated to another Standards Team member.

## C.5 Assessment process

99. The assessment stage for a complaint helps decide if the complaint matches admissibility criteria. This is known as **Stage 1**.
100. The Standards Team member will undertake an initial assessment of complaint material. The assessment will be recorded in a template Complaint Assessment Form (Appendix 4 – Complaint Assessment Form).
101. In Stage 1 for Councillor and Member complaints, only the complainer (or representative) will be contacted for further information to clarify or better understand

the complaint. This is to avoid any misunderstanding that an investigation has started without the respondent having been made aware of it.

102. At Stage 1, the Standards Team member may conduct desktop research from publicly available sources to assess the complaint against admissibility criteria. They can also ask the relevant Council or Body for information if it is not available online. If the research shows that the alleged conduct could not match all the admissibility criteria, the complaint will not be accepted for investigation. To clarify, the admissibility assessment is not a pre-investigation into a complaint.
103. The Duty IO, with assistance from ISO / SISO where requested, is responsible for ensuring that publicly available evidence supporting a complaint is collected and preserved, so far as possible. This aims to prevent loss through passage of time. This type of evidence usually consists of webcast meetings or their video/audio recordings, social media posts, online articles, published meeting minutes and agendas.
104. If a complainer wishes to raise a complaint about conduct shown in a publicly available webcast or series of webcasts, they must either specify the exact time at which the alleged conduct occurred or be very specific about the actions or words of the Respondent that they consider breached the Code. This is essential to ensure that the specific conduct being complained about is clear and can be conveyed in precise terms to the respondent. It is not enough to simply state that evidence can be found in the webcast; an exact time and/or specific details about the conduct must be provided. It would be inappropriate for the Commissioner or the ESC to create a complaint on the complainer's behalf as fairness to the respondent must be maintained. Additionally, the respondent must clearly understand what conduct is being complained about and when it occurred as they would otherwise have no fair opportunity to respond to it.
105. If no time stamps for webcasts and detail about the agenda item being discussed are provided despite requests, and if the complainer is unable to articulate what was said or done that they felt was incompatible with the Code, the complaint will very likely be closed as there would not be enough information to complete assessment.
106. In terms of considering publicly available resources at the assessment stage:
- a. An investigation only needs to take place if the conduct or course of conduct complained of would, on its face, represent a breach of an applicable provision of the relevant Code if it could be established that the conduct occurred. If, however, an initial assessment of the publicly available evidence demonstrates that the alleged conduct could not represent a breach of the relevant Code, then the complaint can be dismissed as ineligible for investigation.
  - b. As such, a Standards Team member can consider publicly available resources for assessment purposes, and if those resources do not support that the

conduct could, on its face, be a breach of an applicable Code, that complaint will be closed or dismissed without reporting to the Standards Commission.

107. Some guidance on when a complaint requires to be accepted for investigation is set out below.

*Example 1:*

The Commissioner receives a complaint that a respondent made racist remarks about asylum seekers on Facebook. The Complainer names the Respondent and sends a link to the Respondent's Facebook account. Despite requests from an IO, the Complainer does not provide any further information to substantiate the allegation or say precisely what remarks gave them cause to complain.

The IO can consider publicly available resources and request information from a Council or Body at the assessment stage. If those resources demonstrate that the alleged conduct could not represent a breach of the relevant Code, then the complaint will be closed without a report to the SCS, as no investigation has taken place.

*Example 2:*

The Commissioner receives a complaint of racist conduct by a respondent. The Complainer includes a screenshot of the Respondent's Facebook post, showing the Respondent had posted that they were happy that the UK Government is taking steps to reduce illegal migration.

The IO can complete the assessment on the basis of the screenshot sent by the Complainer. This is not an investigation. The post doesn't constitute racist conduct and there has been no breach of the Code. As such, the complaint can be closed and does not require reporting to the SCS because it has not been accepted for investigation.

*Example 3:*

The Commissioner receives a complaint about a councillor who has not replied to two emails from the Complainer about potholes. The Complainer provides copies of their emails.

The IO reviews the emails sent in support of the complaint. This is not an investigation. The IO concludes that the lack of response from the councillor is not covered by a provision in the Code and closes the complaint. This does not require a report to the SCS because the conduct does not constitute a breach of the Code and is therefore not accepted for investigation.

108. It is the responsibility of Standards Team members:

- a. to assess the complaint material against the admissibility criteria;
- b. to complete the Complaint Assessment Form in a proportionate manner;

- c. where the Duty IO has not already done so, to request further information from the complainer (or nominated representative) for assessment purposes;
- d. where the Duty IO has not already done so, conduct desktop searches of publicly available sources for any supporting information required to clarify or better understand the complaint;
- e. to form a view as to whether the complaint should be dismissed or accepted for investigation based on the admissibility criteria, and provide reasons supporting their view;
- f. to draft a complaint closure letter or acceptance for investigation letter, as appropriate;
- g. to review any preliminary redaction of personal data by the ISO / SISO and inform them of any redactions that may be required;
- h. alternatively, if the SISO or ISO is unable to help with redaction, the IO will redact the complaint material or closure letter as required;
- i. to refer to the Redaction Guidance (see Appendix 22) to decide what personal data should be redacted from the complaint and other documentation, or not released in the case of other media; and
- j. to seek guidance from the SIO, HIO or the Commissioner, if a document or other media contains sensitive personal data, prior to any decision being taken regarding its release.

109. If Standards Team members are in any doubt as to whether personal data should be released, they should seek guidance from the SIO, HIO or the Commissioner. Similarly, if voluminous amounts of documentation are received that require checking, this should be brought to the attention of the SISO or ISO immediately, in order that extra resources can be allocated where necessary to assist (for instance, from the ESC's Corporate Services Team).

110. All Standards Team members are required to conduct themselves in line with office values in completing their work. As part of this, all Standards Team members should be conscious of whether their communications are:

- well-organised, succinct, professional and relevant to the matter at hand;
- respectful and helpful to the person receiving the communication.

## C.6 Inadmissibility of a Complaint and File Closure

111. If a complaint does not match one of the admissibility criteria, it will not be accepted for investigation and will be closed.

112. The Complaint Assessment Form must be completed, and a draft closure or inadmissibility letter should be prepared. However, drafts may not be prepared if the complaint is voluminous, involves multiple parties or covers multiple issues and the Standards Team member would like to check with the HIO or SIO as to whether the proposed outcome is sensible in advance of preparing draft(s).

113. Both documents, together with a copy of the complaint, will be sent to an IO, the SIO or HIO who is not involved in assessing the complaint for peer review (the **Peer Reviewer**). All peer reviewers will complete the Peer Review using the Peer Review Checklist and in accordance with its Guidance.
114. The Peer Reviewer is responsible for saving the completed Peer Review Checklist to the case file in Sharepoint, unless otherwise agreed with the Standards Team member completing the assessment. The Standards Team member who assessed the complaint is responsible for uploading a copy of the completed Peer Review Checklist to the case file in the CMS.
115. The Standards Team member, SIO or HIO may discuss the matter or revert with comments that can be incorporated into the Complaint Assessment Form and/or the draft letter(s). When this is complete, the Standards Team member will send a link to a copy of the complaint, the Complaint Assessment Form, and the draft closure or inadmissibility letter to the ISO / SISO.
116. The ISO / SISO will gather all the complaints, the corresponding Complaint Assessment Forms, and draft letters that have been peer reviewed and received over the course of a week and save them into the internal shared drives.
117. Every Friday morning (or such other day of the week as the Commissioner may elect), the ISO / SISO will send an update to the Commissioner setting out the complaints, the corresponding Complaint Assessment Forms and draft letters that have been completed over the course of the week. The Commissioner will consider them and decide, using his discretion, whether to accept a complaint for investigation.
118. In straightforward cases, a Standards Team member may send their cases to the SIO or HIO for final review and approval, as set out in the **Scheme of Delegation**. However, the SIO or HIO will not approve any assessment if they conducted the peer review or if there are no comparable precedents with guiding principles from prior decisions. Cases approved by the SIO or HIO will also be sent to the Commissioner, for noting only.
119. The Commissioner may have comments or queries in relation to each complaint, Complaint Assessment Form or draft letter, which may be discussed with the Standards Team member, HIO and/or SIO. The Commissioner's comments are incorporated into the Complaint Assessment Form or draft letter as appropriate to ensure there is an audit trail for decision-making.
120. For cases reviewed and approved under the Scheme of Delegation, the SIO or HIO may also have comments or queries in relation to each Complaint Assessment Form or draft letter, which can be discussed with the team member. The SIO or HIO will complete the remainder of the Complaint Assessment Form on the Commissioner's behalf to ensure there is an audit trail for the decision.

121. In every case, the Complaint Assessment form will be saved on the CMS. The finalised closure or dismissal letters will be issued. The CMS case file will then be closed.

122.

123. The ESC is committed to informing respondents about a complaint and its assessment outcome at Stage 1, whether it is a closure or an investigation, within a reasonable timescale. Our targets for completing Stage 1 are set out in this Manual, with the goal of reaching a decision on admissibility within 9 weeks at most. However:

- a) There may be rare instances where the respondent is aware of a complaint when that complaint is still in the assessment stage where no parties, other than the complainer, would normally be aware of the complaint. The ESC may be required to inform the respondent of a complaint in accordance with statutory obligations or the complainer could directly inform the respondent of their complaint. It may also occur where third parties are informed of the complaint and the respondent subsequently is informed of the same. On these occasions, where the respondent is aware of the complaint made against them and approaches the ESC to confirm receipt of a complaint, the ESC's practice is to confirm to the respondent that a complaint has been received, and it is at assessment stage. When a complaint known to the respondent has been assessed and dismissed, the respondent will also be informed.
- b) For all complaints, all Councillors and Members will be notified of a complaint against them where a complaint is closed or dismissed. This will be done by sending a copy of the complainer's closure or dismissal letter to the respondent, with redactions in place for data covered by data protection regulations (Appendix 5d- Template Correspondence (Copy Closure)), unless the respondent is no longer a Councillor or Member. This was not the previous practice of the ESC. However, it is hoped this new approach will enhance transparency in the ESC's process, particularly for respondents who are already aware of a complaint against them. The complainer's name will normally be shared with the respondent.

124. There may also be instances where the complainer has not provided enough information for an assessment to be made and fails to provide this despite requests from the ESC. For example, a complainer could complain that the respondent had posted an inappropriate comment on their Facebook page but without explaining what that comment was, why it was inappropriate or including a screenshot of that comment. The ISO, SISO or Duty IO will be in touch with the complainer to obtain or verify these. If the complainer does not respond despite more than one reminder for response, the complaint will be assessed with what is available from the complaint form and closed with a closure or dismissal letter due to there not being enough available information to make an assessment. A copy of the complaint's closure or dismissal letter will be sent to the respondent, unless the respondent is no longer a Councillor or Member.

125. However, where this occurs, a Complainer is open to make their complaint to the ESC again and provide the supporting information in support of their complaint. This will be considered a new complaint and not a 're-opening' of the previously closed complaint.
126. There may be other circumstances where a complainer may request a 're-opening' of a previously closed complaint. This can occur if the complainer provides new information relevant to the admissibility criteria which was not previously known or submitted to the ESC. It is important that the new information is relevant to the admissibility criteria, rather than any general new information or developments after a complaint had been made and closed. For example, a complainer may have submitted a complaint that was closed due to the respondent not acting in their official capacity (as a Councillor or Member) at the time of the conduct. The complainer may then subsequently discover additional information about the respondent, but it is unlikely that the complaint will be re-opened unless that information relates to the Councillor or Member's capacity at the time of the conduct.
127. If the complainer submits new information, the Standards Team member will first consider if it is relevant to admissibility criteria:
- c. if it is not, the team member will write to the complainer and the complainer's submission will be handled as Post Decision Correspondence (see Section I of this Manual);
  - d. if it is, the team member will write to the SIO, HIO or the Commissioner with an overview of the new information and how it could affect the assessment on admissibility criteria. Where appropriate, they should also set out a recommendation on whether to re-open the complaint to reassess it for admissibility or to keep the complaint closed, on the basis that the new information while relating to admissibility does not affect the assessment outcome. The complainer will be informed of either decision in writing.

## C.7 Accepting a Complaint for Investigation

128. Complaints will be accepted for investigation when, on its face, the alleged conduct could amount to a breach of the applicable Code if it could be established that the conduct occurred. This investigation stage is known as **Stage 2**.
129. Stage 2 begins when letters for acceptance of a complaint for investigation are sent to the relevant parties (see Appendices 6a – 6c – Template Correspondence (Acceptance)). These acceptance letters will be sent to the complainer, the respondent, and the Monitoring Officer or Standards Officer (as applicable) of the Council or Body of which the respondent is a Councillor or Member. The Chief Executive of the Council or Public Body will also be copied into the correspondence sent to the Monitoring Officer or Standards Officer.

130. Where a Complaint is recommended to be accepted for investigation, the Complaint Assessment Form will be completed, and a draft acceptance or initial notification letter(s) will be prepared for each of the following:
- the complainer(s),
  - the respondent(s), and
  - the Monitoring Officer (copy to the Chief Executive) or the Standards Officer.
131. The Complaint Assessment Form and the draft letters, together with a copy of the Complaint, will be sent to an IO, the SIO or HIO for peer review. All peer reviewers will complete the Peer Review using the Peer Review Checklist and in accordance with its Guidance.
132. The Peer Reviewer is responsible for saving a copy of the Peer Review Checklist to the case file on SharePoint, unless otherwise agreed with the Standards Team member completing the investigation.
133. The Standards Team member, SIO or HIO may discuss the matter or revert with comments that can be incorporated into the Complaint Assessment Form and/or the draft letter(s). When this is complete, the Standards Team member will send a copy of the complaint, the Complaint Assessment Form, and the draft closure or inadmissibility letter to the ISO / SISO.
134. The ISO / SISO will gather all the complaints, the corresponding Complaint Assessment Forms, and draft letters which have been peer-reviewed and received over the course of a week and save it into the internal shared drives. Every Friday morning (or such other day of the week as the Commissioner may elect), the ISO / SISO will send an update to the Commissioner setting out the complaints, the corresponding Complaint Assessment Forms and draft letters which have been completed over the course of the week, for the Commissioner to consider and approve in the exercise of their discretion on whether or not to accept a matter for investigation.
135. In straightforward cases, a team member may, at their own discretion, have the option of sending the documents for peer review and then to the SIO or HIO for final review and approval, subject to the internal Scheme of Delegation. However, the SIO or HIO will not approve any assessment if they conducted the Peer Review in the first instance or if there are no comparable precedents with guiding principles from prior decisions. Cases approved by the SIO or HIO for acceptance will also be sent to the Commissioner, for noting.
136. The Commissioner may have comments or queries in relation to each complaint, Complaint Assessment Form or draft letter, which may be discussed with the Standards Team member, HIO and/or SIO. The Commissioner's comments will be incorporated into the Complaint Assessment Form or draft letter as appropriate to ensure that there is an audit trail for decision-making.

137. The finalised version of acceptance letters will be sent to the relevant parties. The CMS case file will then be moved to 'investigation'.
138. For cases being reviewed and approved under the Scheme of Delegation, the SIO or HIO may also have comments or queries in relation to each Complaint Assessment Form or draft letter, which can be discussed with the team member. The SIO or HIO will complete the remainder of the Complaint Assessment Form on the Commissioner's behalf to ensure there is an audit trail for the decision. The same form will be saved on the CMS..

## C.8 Withdrawing a Complaint

139. The 2000 Act does not refer to withdrawing a complaint. If, at any point during the process, a Complainer wishes to withdraw a Complaint, it will be for the Commissioner to decide whether to accept the withdrawal and terminate the investigation, or to nevertheless proceed and complete the investigation.
140. When reaching a decision whether to accept the withdrawal request, the following factors will be taken into account:
- the request
  - the stage the investigation has reached
  - the public interest in ending or concluding our investigations, and
  - the wishes of any other person who has complained about, or who has been directly impacted by, the conduct in question.
141. Requests to withdraw a complaint should be made, or confirmed, in writing. If not already specified, the Standards Team member should:
- a. ascertain the reasons for withdrawal;
  - b. obtain relevant documentary evidence if necessary;
  - c. where an explanation is made, this will be noted (e.g. an apology has been made and accepted) - although this will not necessarily result in closure of the complaint.

Refusal to give reasons for withdrawal will require careful assessment to eliminate any suggestion that the complainer has been inappropriately influenced by third parties to withdraw the complaint.

142. The Standards Team member will consider the potential reasons or consequences of withdrawal:
- a. any fear of repercussions;
  - b. the effect on other linked cases;
  - c. whether the co-operation / evidence of the complainer is an essential element in the investigation;
  - d. whether there is reason to suppose that the complainer has been inappropriately influenced, threatened or otherwise improperly persuaded to withdraw the complaint by any person;

- e. whether the issues raised are of such importance as to require investigation in the public interest;
- f. the Commissioner may be statutorily obligated to investigate further if proceeding with the complaint may have implications in any ongoing civil or criminal proceedings;
- g. would the personal circumstances of the complainer (or a close associate / relative) be adversely affected by continuing the investigation?

143. The Standards Team member will discuss the request with the Commissioner as the decision is ultimately for the Commissioner to make, to cover recommendations either to:

- a. proceed with a complaint despite the request for withdrawal – where the Standards Team member will send correspondence to the complainer setting out the reasons for proceeding with the complaint despite the withdrawal request; or
- b. agree to withdrawal – where the Standards Team member will send correspondence to the complainer setting out the reasons for accepting the withdrawal.

144. Where the respondent and Council or Public Body have been made aware of the complaint, the Standards Team member will send correspondence to the respondent and Council or Public Body setting out that a withdrawal request has been received and explaining the Commissioner's decision (see Appendices 7a-7d), unless exceptions apply (see paragraph 80).

145. In situations involving multiple complainers, withdrawal by one or several of the complainers will not justify discontinuance of investigation of complaints supported by those who have not requested withdrawal. It will, however, be necessary to notify the respondents of the individual complaints, or such parts of the overall complaint, which have been withdrawn when one or more of the complaints have been accepted for investigation. If this occurs, the names and contact details of the complainer who requested withdrawal of the complaint will not be shared with the respondent.

146. Taking the above into account, the Commissioner may decide not to take an investigation forward. This could be for a number of reasons including:

- it is not in the public interest to proceed with an investigation;
- the respondent has resigned from office or is not standing for re-election;
- information is received about a deterioration in the health of a respondent or a key witness.

147. In some cases, a complainer may wish to withdraw a Complaint where the Commissioner considers that it merits investigation in the public interest. The complainer's withdrawal request will be considered in accordance with this section C8 of the Manual, and where appropriate, will be accepted and the complaint will be closed.

148. However, the Commissioner may continue to pursue the complaint in lieu of the complainer in the Commissioner's name. The complainer will be informed if this occurs, and that this is because the complaint merits investigation in the public interest, taking the following into account:

- a. the seriousness or nature of the allegations made;
- b. whether the investigation can proceed to conclusion without the complainer's engagement;
- c. the likelihood of the conduct or action being repeated, or the conduct being part of a course of conduct;
- d. the impact of the conduct or action on the complainer or others,
- e. if there is a pattern of complaints being made on similar issues and then withdrawn;
- f. whether the respondent has previously been found to have contravened the Code of Conduct in respect of a similar or related matter;
- g. where progressing the complaint could reduce or mitigate future risks;
- h. whether the alleged breach had been rectified, how long that rectification took and the nature of the rectification;
- i. whether an apology had been proffered, how long that apology took, and the nature of the apology;
- j. where there may be other reasons for the complainant withdrawing the complaint (due to anxiety, pressures from others, fear of repercussions, lack of support and advocacy to progress);
- k. the likelihood, if proved, of suspension or disqualification being imposed as sanctions, where the respondent remains or is likely to remain in office for a significant period of time;
- l. the potential for the allegations, if made public or already public, to have a significant impact on confidence in the ethical standards framework.

149. If the Commissioner decides to investigate a complaint that a complainer has asked to withdraw, the considerations and reasons for making that decision will be internally recorded in the case file. The Commissioner is aware that a failure to proceed to investigate any complaint, where there is a demonstrable public interest in the investigation and determination of that complaint, could be detrimental to the ethical standards framework. This is because a lack of investigation could mean that harmful or poor behaviour continues, which in turn could encourage poor conduct by others who have seen such behaviour pass unchecked and without consequence. It could also lead to a deterioration in effective working relationships, erosion of public confidence in the role of a councillor or member and damage to the reputation of the council or public body in question. That risk may be exacerbated in instances where the details of the complaint or information about the alleged breach of the applicable Code are already in the public domain.

150. If a withdrawal request that has been accepted relates to a complaint that is at admissibility stage, the ESC will normally inform the respondent that the complaint has

been withdrawn. The exceptions to this approach, where the respondent will not be informed of a withdrawn Complaint, are:

- a. where a complaint is at admissibility stage and the complainer is or claims to be a whistleblower. This is a measure that assures, in a whistleblowing context, that the complainer's name and details of the complaint are protected even where that complaint has been withdrawn;
- b. where the respondent is no longer a Councillor or Member;
- c. where the complaint is a service complaint (as laid out in section C above);
- d. the reason given by the complainer for the withdrawal is so that they can try to engage with the respondent. This is a measure to ensure the ESC does not make worse a situation where the complaint is about the performance of a respondent in their role, and the complainer and respondent are attempting to resolve the issue themselves.

151. If the withdrawal request relates to a complaint that has already been accepted for investigation, and the withdrawal request is accepted and the case is closed, all parties who have been notified of the investigation will also be notified of the withdrawal. This includes: the respondent (or their representatives), any witnesses, the Council or Body, and the SCS. If the withdrawal request relates to a complaint that has not been accepted for investigation, the respondent will also be notified of the withdrawn complaint unless the respondent is no longer a Councillor or Member.

## C.9 Additional steps for Members' complaints

152. When a complaint is received about a Member, the SISO or ISO should contact the Body to obtain a copy of the Model Code as adopted by that Body that was in place at the time of the events in question.

## C.10 Conducting the Investigation

153. As set out above, the 2000 Act at section 12 (2) requires that investigations shall, so far as possible, be conducted confidentially. All parties will be informed of this requirement, which is included in template correspondence (see Appendices 6a – 6c Template Correspondence (Acceptance for Investigation)).

154. In an investigation, the standard of proof required to determine whether an allegation is substantiated is on the balance of probabilities. This means that, for a conclusion of a breach of the applicable Code to be reached in an investigation, the Commissioner's view must be that a breach is more likely than not to have occurred.

155. **All parties who give information or provide evidence to the ESC during an investigation should expect that their information or evidence will be quoted or included in any report and/or form part of submissions at a public hearing.** Any personal data that the ESC is obliged to protect due to data privacy obligations will be redacted, and wherever possible, information or evidence will be set out on an anonymised or pseudonymised basis. All parties should expect that the report or a

summary of it will be shared with the complainer(s), respondent(s), the Council or Body (as applicable) and the SCS. As a result, any information or evidence provided to the ESC during an investigation is at the discretion of the party being contacted. The exception to this general approach is when the Commissioner issues a notice to a party under s.13 (1) of the 2000 Act, **requiring** them to give relevant information or produce relevant documents. The Commissioner has the same powers as the Court of Session to enforce these provisions of the 2000 Act.

#### C.10.a The Investigation Plan

156. Every complaint is different and the wide discretion available to the Commissioner on how to investigate a complaint will be reflected in the variety of approaches taken by IOs to the investigation.
157. IOs are primarily responsible for managing the efficient and proportionate investigation of all complaints that are allocated or self-allocated. Wherever possible, the complaint should be set out in a manner that reflects an alleged breach of the provision(s) of the applicable Code that are being considered in the investigation.
158. In planning an investigation, IOs will need to take account of, and seek to apply resources appropriately to the following:
- a. any cases linked by party or subject advised by the office at the time of allocation;
  - b. the applicable target timescale for the conclusion of investigations, and the likely impact of current investigations on any which are newly allocated;
  - c. planned leave, and the likely availability of witnesses during holiday periods and in election periods;
  - d. the need to make special arrangements for vulnerable witnesses or whistleblowers;
  - e. any previous decision of the SCS or the Commissioner that appears to turn on similar facts and circumstances;
  - f. any general domestic or European legislation applicable at the time of the incident, including the [Human Rights Act 1998](#);
  - g. any relevant advice note, guidance or dispensation issued by the SCS (available [here](#)) including:
    - Guidance on the Councillors' Code
    - Guidance on the Model Code
    - Guidance on Dispensations; and
  - h. any relevant advice notes issued by the Standards Commission (available [here](#)).
159. If considered necessary, the IO should complete the template Investigation Plan (see Appendix 8 – Investigation Plan), particularly where an investigation is complex (for instance, a Complaint with multiple complainers or respondents) or to keep track of witnesses, their responses, witness interviews, and other documentary evidence. The aim is to help establish the relevant facts, gather the necessary evidence and ensure that the investigation is conducted efficiently and expeditiously. The Commissioner trusts that the IOs are best placed to plan their investigations. As such, it is not required that an Investigation Plan be shared with the SIO, HIO or the Commissioner, although

the Investigation Plan may be shared where the IO is unsure of how to proceed with an investigation.

160. IOs may, and if in doubt about competing priorities should, seek the advice of the SIO, HIO or the Commissioner at any stage of the investigation. The SIO, HIO and the Commissioner encourages the sharing of expertise amongst IOs through the facilitation of regular IO meetings, training events and through individual catch up meetings.
161. It is accepted that evidence gathered must be tested. The evidence gathered during the course of an investigation may or may not be relevant at the time of information-gathering. It is essential for an IO to accurately record all new information within the CMS case file, evaluate its relevance as it arises, and routinely subject that judgement to review as further information is discovered.

#### C.10.b Requests for information

162. It is a normal part of the investigations process to request further information. To help the Standards Team member with timeous assessment and investigation, parties who have been contacted should inform that team member of their contact details (such as change of email address, home address, or contact number) and preference for contact method as soon as possible.
163. Monitoring Officers or Standards Officers may be asked to provide a Councillor or Member's formal Declaration of Acceptance of Office (if a Councillor) or letter of appointment (if a Member), along with an accompanying copy of a Register of Interests for that Councillor or Member. The ESC may also ask for information to establish whether the Councillor or Member was acting in their capacity at the time of the conduct complained of. In accordance with the SCS' Guidance to the Code, the Code applies when the councillor or member:
- a) is acting as a councillor or member;
  - b) has identified themselves as such; or
  - c) could objectively be perceived to be acting as a councillor or member at the time of the conduct in question.
164. Requests for information should be sent in a timely manner and include a deadline to respond. This is usually two or three weeks from the date of the request but may vary. If there is a significant volume of information being requested, more than two or three weeks may be provided. In contrast, if the request is a straightforward query, the ESC may indicate a timeframe of one week for response. The handling Standards Team member must record the due date for that information to be received and send a reminder on the next working day after expiry, noting that if no response is received within a further time period (for instance, one week) then the assessment or investigation will proceed without the responder's input.

165. All deadlines for a response may be extended further, on request and in writing, by the person who is providing the information. Where a request is received, the IO should consider the request with reference to the Guidance on Extension of Time (Appendix 12 – Guidance on Extension of Time).
166. The time taken to respond to ESC requests for information will be tracked and recorded and may be included in the final investigation. Any extensions granted will not be open-ended and will be assessed on a case-by-case basis, even if personal reasons prevent timely responses. Extension will not exceed six months and will only be granted in exceptional circumstances, when parties provide clear and compelling evidence and commit to meeting the extended deadline.
167. Generally, a legitimate first-time request will be accepted as a matter of fairness. However, any subsequent requests will be subject to rigorous scrutiny and may be rejected if deemed excessive as the office must be fair to both complainers and respondents. Additionally, delays in the investigation process may themselves undermine the integrity of the ethical standards framework.
168. If no response is forthcoming despite a reminder or an already granted extension from the ESC, the Standards Team member will proceed to conclude the investigation without the requested input. This strict measure is enforced to ensure fairness as one party's inaction will not be permitted to obstruct a time-critical investigation or cause delay in reporting progress.
169. The Commissioner may draw a negative inference from any failure to respond or provide information requested. The SCS may also consider a respondent's failure to co-operate with an investigation without good cause when determining an appropriate sanction.
170. The ESC encourages all parties to be as full and frank as possible in the information or evidence they provide, to best support their version of events or views. Where sensitive or confidential information or evidence is provided, the Standards Team member should first confirm with the party providing that information or evidence whether they understand the contents, even if marked confidential, may become public due to the report being shared with the complainer(s), respondent(s), Council or Body, or at a public hearing, if any.
171. The Commissioner has powers to require any person who, in the Commissioner's opinion, can give relevant information or produce relevant documents, to do so. The Commissioner has the same powers as the Court of Session to enforce the attendance and examination of witnesses and the production of documents (see section 13(1)(a) and (b) of the 2000 Act). Further, the SCS has issued guidance in their sanctions policy that a failure to cooperate with investigation and/or adjudication processes will be an aggravating factor that may increase the severity of a breach finding (please see the [SCS' sanctions webpage](#) for more information). The ESC will report any failure to cooperate with an investigation to the SCS to inform their decision on sanctions.

172. IOs may wish to refer to the factsheets available from the ESC's website for information requests. These are available as follows:

- [For complaints about Councillors and Members;](#)
- [For complaints about MSPs.](#)

#### C.10.c Process on receipt of information

173. Where information has been requested and received, the information should be saved as soon as possible into CMS under the relevant Case reference number, under a file name that is consistent with the Naming Convention (see Appendix 1b – Naming Convention).

174. The relevant Standards Team member should be notified as soon as possible and save the information into CMS under the relevant Case reference number, using a file name that is consistent with the Naming Convention (as above). The ISO / SISO may be asked to assist with this.

#### C.10.d Documentary evidence

175. The ESC may receive information or evidence relating to a Complaint or an investigation in the form of physical documents received via post or clippings from newspapers, magazines and so forth. These should be scanned into a PDF file as soon as possible and saved into CMS using a file name that is consistent with the Naming Convention. It is important to preserve physical documentation as soon as possible and ensure that the scanned copy is an exact reproduction of the original, in case the original is altered, damaged, lost or destroyed.

176. Where original documents are received as evidence by the ESC and the sender has requested the return of these original documents, the ESC will preserve them in a secure place and return the original documents to the sender as soon as a PDF copy has been made and saved into CMS.

177. Documents received by post that are not originals will be saved in accordance with the office's records management policy and procedures. Broadly, post arrives to the office and is stamped with the date received by the receptionist. At set times during the week, a member(s) of the ESC office attends the physical office and collects the post. The post is then scanned (inclusive of the dated envelope) and named in accordance with the Naming Convention. The scanned documents are then emailed to the relevant staff member. The hard copy is stored in the office in a locked cabinet and shredded after the appropriate retention period, following [the ESC's Records Management Plan](#).

#### C.10.e Electronic evidence

178. Electronic evidence comprises Information and Communication Technology (ICT) resources and data, such as emails, screenshots (saved as a digital image file or similar) of social media posts, data on hard drives or other electronic storage devices,

mobile phones and other portable devices, SIM cards, digital files including photographs, audio recordings, CCTV / video footage and so forth.

179. Electronic evidence must be saved into CMS using a file name that is consistent with the Naming Convention (as above). Larger electronic files (such as audio/visual files) will be stored securely in shared drives and hyperlinked in a file saved in CMS under the relevant case reference. This is to save storage space on CMS.
180. Particular attention should be paid to electronic evidence where metadata can contain personal information (such as the home address where a digital recording is made, or video clips from a vehicle's dash camera where the licence plate could be shown).
181. The ESC must handle private data in accordance with statutory requirements. If it is not possible to present electronic evidence without showing personal information, consent should be sought at the earliest opportunity.

#### C.10.f Witnesses and other parties to an investigation

182. The scope and complexity of investigations vary on a case-by-case basis. A complainer or respondent or any other party to an investigation may be asked to provide as much evidence and supporting information as possible, including witness evidence.
183. Because the ESC as a public body is required to use public resources proportionately and in the public interest, not every witness nominated by a complainer, respondent or any other party will necessarily be contacted. This is especially true when the alleged conduct is clearly documented through a public webcast, or where multiple witnesses are provided but they all attest to the same fact(s) without adding any relevant new information. Whilst corroborating evidence is beneficial, seeking confirmation from multiple parties may not represent the most efficient use of public resources. Witnesses may find it helpful to refer to [the ESC's online information for witnesses](#) for more information. The IO may also signpost any parties, as appropriate, to [the privacy notice for witnesses available on the ESC's website](#).
184. Where a Standards Team member is unsure whether to contact a witness for more information, they may discuss with the SIO, HIO or the Commissioner as appropriate. The reasons for not contacting a witness where they have been put forward by the complainer or respondent or any party to an investigation should be discussed and recorded on the case file in a file note.
185. If a respondent has been in contact with any witness with a view to influence or impact their evidence, or if the respondent has engaged in any other inappropriate behaviour that may impede the investigation, this conduct is likely to be added to the complaint being investigated. This will be reported to the SCS as a failure to respect the Commissioner as officeholder, their staff, and the ethical standards framework as a whole. Given the seriousness of such conduct, the 2000 Act allows the Commissioner

to certify such conduct to the Court of Session as equivalent to contempt of court. Furthermore, the SCS has issued guidance in their sanctions policy that any attempt to interfere inappropriately with the investigation process or to influence a witness is an aggravating factor that may increase the severity of a sanction if a breach is found (please see the [Standards Commission's sanctions webpage](#) for more information).

#### C.10.g Conducting interviews

186. Interviews may or may not be conducted during an investigation. The breadth and complexity of investigations vary on a case-by-case basis, and at times, it is not a good use of public resources to conduct interviews where documentary evidence or substantive written responses from key parties is clear, available and already establishes the facts in a case.
187. Interviews are aimed at obtaining testimonial evidence such as the recollection of individuals who saw an event or have direct or indirect knowledge of anything relevant to an investigation.
188. Where an interview will be conducted, the interviewee must be referred to the Witness Policy (Appendix 11 – Witness Policy) and given a copy of the Interview and Information Request Sheet (Appendix 10c – Interview Information Sheet). Reasonable adjustments may be made in response to any requests and provided on a case-by-case basis. Parties may wish to refer to the ESC's [Accessibility Policy](#) for further information.
189. A request for an interview will be in writing in the form of correspondence (Appendix 10a – Template Correspondence (Request for Interview)).
190. Wherever possible, the interview will be conducted by the handling IO and at times may also have another IO or the SISO / ISO in attendance for note-taking purposes. The interviews are conducted on a remote basis via the telephone, Microsoft Teams or Zoom, unless there are special reasons why an interview must be conducted in person, such as to accommodate a request for reasonable adjustments. Where an interview will be conducted in person, the IO must inform the Corporate Services Team as soon as possible and liaise with the interviewee as to their preferred location and time.
191. Bearing in mind the need for confidentiality in the investigative process, witnesses called for an interview will be informed, when contacted, of the general nature of the matter on which they are requested to provide information in a manner that does not compromise the evidence they will be giving. A written record of all information provided to the witness will be kept in the form of a file note or in the interview record (see below section on Record of interviews). Interviews are not generally recorded in an audio/visual format and all interviewees must be informed of this policy in advance.

192. Before starting an interview, the IO will identify themselves and explain in general terms:

- the powers of the Commissioner to conduct investigations;
- the investigative process and possible consequences of an investigation;
- whether the interviewee is being interviewed as complainer, respondent or witness;
- the requirement of confidentiality at the investigation stage;
- what the interviewee can expect to happen in terms of next steps. This will include information on what use may be made of any personal data, including special category data, such as the publication of reports, and possible subsequent attendance at a Standards Commission Hearing where their identity may become public.

193. In advance of the respondent's interview, the respondent should already have been provided with details of the allegations and shown the supporting evidence, in anonymised or pseudonymised form where warranted. The respondent will also have had the opportunity to provide a substantive view or response to the complaint when first notified of it. The respondent can also respond and provide supporting evidence, in advance of, during, or at any point after the interview. The respondent may identify witnesses, indicate where further records can be found, and submit any information or documents. The IO must note full details of any additional information and, if necessary, seek the assistance of the respondent or other parties. The IO will subsequently take appropriate action to interview the identified witnesses and to discover and secure any identified evidence, to the extent deemed relevant to the allegations.

194. The interview should be flexibly adapted in response to the behaviour of the interviewee and the information provided. If the interview is lengthy, reasonable comfort breaks will be offered and noted.

195. The IO will ensure that relevant documents are available and can be shared with the witness during the interview. Any records produced by the interviewee will be retained, noted in the interview record, and stored securely with other evidence in CMS.

196. The IO may interview any party at any stage during an investigation. However, interviews must balance thoroughness with the efficient and proportionate use of public resources. Accordingly, witnesses, should be prioritised based on the significance of the information they can provide, their availability and other relevant factors. Individuals who would have general knowledge about the matter being examined but are more likely not involved in the alleged conduct may be interviewed. Individuals who would have direct knowledge of the matter, and who might also be involved in the alleged misconduct are likely to be interviewed. However, the order in which witnesses or parties are interviewed will ultimately be at the discretion of the handling IO or subject to the availability of witnesses or other parties.

197. The interview with the respondent should normally take place after all available witnesses have been interviewed, to enable the respondent to provide exculpatory or mitigating information on the evidence gathered. However, this is not always possible given timescales and the availability of persons to be interviewed. The IO will also take account of the Respondent's initial response to the complaint, as this may render an interview unnecessary and/or dictate that it should be conducted in advance of others.
198. Care must be taken to establish all potential witnesses and to identify any reasonable suspicion of complicity in misconduct or other wrongdoing before an interview is undertaken. However, the number of witnesses that are interviewed will vary on a case-by-case basis and reflect the balance of good use of public resources and proportionality against a fair and thorough investigation.
199. During the investigative process, the respondent is entitled to have legal representation and to attend the interview with that representative or other supporter. That representative or other supporter will act as an observer, provided they undertake to respect the confidentiality of the investigation, are reasonably available, and are not connected to the matter under investigation. The presence of that representative or observer shall not relieve the respondent of the obligation to respond personally to the matter under investigation.
200. The respondent shall communicate to the ESC the identity of the respondent's legal representative or other supporter in advance of the interview, to allow the ESC to determine whether there is any substantive justification to refuse the participation of that person. The representative or other supporter shall be required to agree to respect the confidentiality of the investigation. If there is no agreement, they will not be permitted to observe the interview.
201. The ESC will not allow the lack of availability of the legal representative or other supporter to unduly delay the scheduling of an interview. If, during the interview, the IO considers the presence of that person to be disruptive, they may be asked to leave, and the respondent will be obliged to continue with the interview without their presence.
202. The legal representative or other supporter cannot respond on behalf of the respondent or otherwise intervene in the interview process in any manner.
203. If a party other than the respondent justifies a need for the presence of legal representation or other supporter at an interview, it may be authorised at the discretion of the Commissioner provided the above conditions are met.
204. Interviews will normally be conducted in English. If the interviewee is not fluent, they may ask to bring an interpreter to the interview or ask for the ESC to arrange for an interpreter. Any interpreter shall be required to be approved by the Commissioner and respect the confidentiality of the investigation.

205. Throughout the interview process, all parties should be aware of the ESC's [Accessibility Policy](#). If there are specific needs that require reasonable adjustments, these will be made available wherever possible.

#### C.10.h Record of interviews

206. All interviews will be recorded in writing using the appropriate template (Appendix 10b – Interview Record Template), regardless of whether it is in person or conducted remotely via a remote working platform or by telephone. While this is not current practice, if interviews are audio- or video-recorded, it will be done openly, all interviewees will be informed of this, and their consent obtained. However, a written record of the interview will still be produced despite the interview being audio- or video-recorded. All records will be retained in accordance with the ESC's [Records Management Plan](#).
207. After the interview, the interviewee may be contacted in writing by the IO in order to confirm any substantive statements shared during the interview. The interviewee will be invited to respond to the IO to confirm or correct the accuracy of such substantive statements as soon as possible.
208. The interviewee may also be invited to review an interview record 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. Where amendments are made to the interview record based on corrections raised by the interviewee, this will be recorded as an amendment in the record or can be included in a separate supplementary statement if the changes are substantially different from what was said at the interview and noted by the IO. The IO may provide a period of time as to when the interview or witness statement should be signed and returned. Digital or typed signatures will suffice. The ESC will retain the original document and the IO will offer the interviewee a personal copy that must be kept confidential and protected from unauthorised disclosure. The ESC's copy will be retained in accordance with the ESC's internal File Plan and Retention Schedule.
209. These measures aim to address any evidential matters in the investigation of a Complaint and are fundamental to trusted outcomes from the ESC. This is particularly important where an investigation touches on highly sensitive, controversial or contentious matters and should always be a part of the evidence-gathering process in very serious complaints relating to bullying and harassment (including sexual harassment).
210. The material referred to in the paragraph above will be saved to the relevant case file in CMS.
211. All interview records or witness statements are confidential to the investigation and the ESC, in keeping with the statutory requirement to conduct all investigations confidentially, as far as possible. Interview records or witness statements will not be

shared with any other party during the investigation. However, these may be shared at the end of an investigation in a bundle of documents if the report referred to the SCS results in a public hearing. It may also be shared with the respondent or their representative at their request in order to prepare the respondent's response to a Proposed Breach Report.

212. It is recognised that not all interview records or witness statements require to be signed by a witness. The Commissioner takes this opportunity to highlight that any witness who has been contacted as part of the investigation may be called to give evidence before the SCS to provide evidence. Where this happens, any witness called to give evidence at a SCS Hearing will be required to take an oath or make an affirmation as to the truthfulness of their testimony.

#### **C.10.i Requests for further information**

213. The IO may re-interview any party to clarify significant facts or obtain additional facts as further information is obtained. If this is the case, the re-interview may take the form of a telephone call and be subsequently recorded in a telephone note, or in the form of an email. All further information gathered in this way will be recorded in writing, verified as set out in the previous section (where applicable), and saved to the relevant case file in CMS.
214. During any investigation, IOs may receive further information from parties to any complaint. Where this occurs, the information may be shared with another party for further comment if the IO considers this necessary. The comments from any party will not be attributed to that party if they are shared with another. However, it may still be possible for a party to be identifiable based on the nature of the comments provided. The respondent will also receive a copy of the Report (see section C.11) and will be given the opportunity to provide comments or representations. While providing comments or representations, the respondent may ask for the information considered during the investigation. Any information released to the respondent will require to be redacted pursuant to the ESC's data privacy and protection duties.

#### **C.10.j Adding new issues of complaint to an open investigation**

215. There may be some instances where IOs receive further information from parties that shows a separate or new issue of complaint that requires investigation due to being on its face a possible breach of the applicable Code. If this occurs, the IO will consider the new information and update the Complaint Assessment Form for the case to reflect their assessment of that new information and why or why not it could be an additional issue of complaint. The IO will send a copy of the updated Complaint Assessment Form to the Commissioner for their consideration and to exercise their discretion on whether to accept the additional complaint issue for investigation or not. A note of their decision will be made to ensure there is an audit trail for decision-making. Where appropriate, the updated Complaint Assessment Form can also be sent to the SIO or HIO for review and approval under the Scheme of Delegation. A note of this will also

be taken to ensure there is an audit trail. The Commissioner will be informed of any decisions under the Scheme of Delegation, for noting.

216. Where a new issue of complaint is added to an open investigation, the IO will write to all affected parties such as the complainer(s), respondent(s) and the Monitoring Officer or Standards Officer (as appropriate) to inform them. The IO will invite views on the new issue of complaint and conduct the investigation into the issue as part of the original investigation. Any new issue of complaint added during an open investigation will be noted in the Report.
217. Where the new issue of complaint is considered admissible but covers an unrelated issue of complaint or different set of circumstances from an open investigation, the complaint will be recorded as a new complaint (with a new reference number). The complaint will then be assessed using the normal process.
218. Where a new issue of complaint is **not** considered admissible due to not matching the admissibility criteria, the IO will write to the complainer to explain the decision and set out the reasons why. The respondent(s) and the Monitoring Officer or Standards Officer (as appropriate) will be informed that a new issue of complaint had been considered but closed, confirming that it will not form a part of the open investigation.
219. All correspondence and documentation covering the new issue of complaint, its consideration and reasoning for why it is or is not accepted for investigation will be saved to the Case file on CMS.

#### **C.10.k Three Month Interim Reports to the SCS**

220. Where an investigation will take more than three months to complete, the Commissioner will provide an interim report to the SCS with:
- a. a summary of the investigative work undertaken;
  - b. an explanation as to what requires to be done to complete the investigation; and
  - c. an indication of when it is expected that a final report will be issued.

The Commissioner will also provide written updates to the respondent(s), complainer(s) and the relevant Council or Body, every three months from the investigation's opening date (and every three months thereafter), on the progress of investigations in respect of a complaint or complaints about a Councillor or Member. Some parties may consider that three months is too long in between progress updates. We will accommodate reasonable requests for more frequent updates. Parties can, as a matter of course, expect updates at intervals of up to three months as a minimum. Any written update will be in the format set out in the Template correspondence Appendices 13a – 13d (3 Month Interim Reports).

## C.11 Reporting

221. An investigation is complete when the IO believes there are no more reasonable and proportionate steps to take and a report is produced setting out the complaint background, complaint issues, investigative findings and outcome.
222. Where an investigation has been completed, the IO should progress to drafting the report as soon as practicable to preserve the IO's familiarity with the case and its findings. The IO should consider how best to format the report for accessibility and ease of reading. At times, a report in the form of correspondence may be appropriate because it is proportionate to the Complaint and the scope of the investigation.
223. All investigations undertaken by the Commissioner will be reported to the SCS once completed within seven days of the date on which an investigation has concluded and a report is prepared, for the SCS to make the decision on the disposal of each complaint. If part of the complaint was dismissed at the admissibility stage, the SCS is sent a copy of the investigation notification letter which explains the dismissal reasons. The notification letter will not be included in any productions if there is a hearing.
224. For the avoidance of doubt, the Commissioner's investigation and report is for the purposes of reaching a view and/or making a recommendation in respect of the disposal of complaints about Councillors and Members. All final decisions, disposals or sanctions in any complaint are a matter for the SCS.
225. Any complaint that could relate to a respondent's right to freedom of expression must also cover analysis of Article 10 of the European Convention on Human Rights. There are three types of report templates that may be used:
- e. 'Report by correspondence' – this template is for straightforward complaints which, on investigation and on the balance of probabilities, are factually not proven or, if proven, it is clear there is no breach of the applicable Code. This type of report only briefly covers Article 10 of the European Convention on Human Rights and its analysis.
  - f. 'A10 Report by correspondence' – this template is for complaints which are proven on balance and represent a breach of an applicable Code, on its face. However, there is more in-depth analysis of the respondent's rights under Article 10 of the European Convention on Human Rights.
  - g. 'Report' – this template is the longform report for complex complaints with multiple issues, parties, witnesses or provisions of an applicable Code. Extensive analysis of Article 10 of the European Convention on Human Rights is expected.

**Article 10 of the European Convention on Human Rights (ECHR)**

Article 10 of the ECHR provides all people the right to freedom of expression. This right is applicable and enhanced in a political context. The Commissioner and our office are obliged to consider Article 10 rights in any investigation or reports covering freedom of expression, particularly where a report and any prospective sanction by the SCS based on its findings and conclusion could mean an interference with a Respondent's rights.

However, not all investigations or reports require to cover Article 10.

Example 1:

If the factual basis of a Complaint is not proven in an investigation, we will not consider Article 10 in a Report. This is because there can be no interference with the Respondent's rights.

Example 2:

If the Complaint does have a factual basis but borderline as to whether a breach of the Code has taken place or not (a "borderline" case), then any Report in this situation will consider Article 10. This can follow the structure of analysing and providing reasons for why a breach of the Code has not taken place, and then consider in the alternative whether Article 10 would have protected the conduct even if it were a breach.

Example 3:

If there is a factual basis for the conduct in the Complaint and a breach of the Code has taken place, Article 10 analysis will always be in any Report where the breach relates to Code sections that are included in the [Standards Commission's Advice Note on Article 10](#) (with the exception of cases covering section 7 of the Code where the matter relates to policy or political discussion).

**C.11.a Report structure, format and style**

226. All Reports will be in the structure, format and style prescribed in the templates (see Appendices 14a, 14b and **14c** – Template Reports). The contents of each Report will turn on the facts and circumstances of each individual case.
227. The ESC reviews and updates the format of template reports, in consultation with the SCS. There is scope for any report template to be revised so that team members can draft reports that are proportionate to the investigation and findings.
228. Any Report should be an objective and neutral account of all the facts examined and supported by available evidence. It will normally contain, as a minimum:
- a. the names of the complainer and the respondent;

- b. background information;
- c. findings that detail what evidence was obtained and when;
- d. views as to whether the allegations are factually substantiated, partially substantiated, or unsubstantiated;
- e. consideration of whether, from the facts that can be proven on the balance of probabilities, a breach of the applicable Code has occurred;
- f. views as to whether, where the allegations are factually substantiated or partially substantiated, that conduct could amount to a breach of the applicable Code.

**229. All reports are referred to the SCS for it to make the final decision on the disposal of the Complaint, either by deciding to: take no action, hold a Hearing, or direct that further investigation is undertaken in accordance with section 16 of the 2000 Act.** The SCS may well come to a different view to that of the ESC and, as such, may make a finding at Hearing that differs from that of the Commissioner.

#### **C.11.b Tone of voice**

230. IOs are encouraged to prepare the Report in accordance with the Style Guide (see Appendix 23 – Style Guide), bearing in mind the role of the ESC to investigate and report, without fear or favour, allegations of a breach of the applicable Code. The tone of voice should be neutral and factual, and comply with the values of this office as set out in the [Revised Strategic Plan](#). All reports should be drafted in plain English, so far as possible.

#### **C.11.c Report review**

231. When an investigation is complete, the IO will draft a Report covering the factual findings of the investigation and investigative outcomes. The draft Report will be subject to an internal peer review process. The draft Report should be sent to an IO, or the SIO or HIO who did not handle the investigation, for initial consideration and review. All peer reviewers will complete the Peer Review Checklist in line with Peer Review Guidance.

232. It is normal for staff to have internal discussions about a draft Report. Any suggested changes and input can be incorporated. In straight-forward cases, it may not be necessary to send the draft Report to the SIO or HIO for review and the IO may, at their own discretion, have the option of sending the Report, upon peer review by another team member, to the ISO or SISO directly for consolidation into a weekly update for the Commissioner's review and approval.

#### **C.11.d Report approval**

233. When the Peer Reviewer has no further comments on the draft Report, it will be sent to the Commissioner for final review and approval. The Commissioner may discuss the draft Report with any Standards Team member at any time. The team member will consider any suggested changes and input them into the draft Report. They may also make a case not to incorporate suggested changes, in discussion with the Commissioner. As all reports are issued for and on behalf of the Commissioner, their

approval for final content is required unless the HIO or SIO can approve the report under the Scheme of Delegation.

#### **C.11.e No Breach: process of sending and referring a No-Breach Report**

234. Where the draft Report has taken the view that there is no breach of an applicable Code, it will be finalised (together with any appendices) and redacted in line with the Redaction Policy (see Appendix 22 – Redaction Policy). This will be the No Breach Report.
235. The ESC sends all No Breach Reports and attachments to the respondent, complainer, Monitoring Officer / Standards Officer, Chief Executive of the Council or Body, and the SCS. No Breach Reports that take the view that a respondent did not breach an applicable Code due to their right to freedom of expression under Article 10 of the European Convention on Human Rights will be shared with the respondent and the Council or Body for their comments in advance of being finalised. The ESC will share these comments with the SCS.
236. The Commissioner's investigations are conducted, so far as possible, in a confidential manner pursuant to s 12(2) of the 2000 Act. All parties will be reminded of this at the start of the investigation.
237. The Commissioner is not able to provide any advice on this matter and parties may wish to seek their own independent advice. As set out above, the No Breach Report will be shared with all parties and the SCS. If there are any queries about the contents of the Report or the Commissioner's reasoning or views in the Report, this should be handled as Post-Decision Correspondence (see section I.4 Handling PDC below).
238. The Commissioner understands that a No Breach Report may be a disappointing outcome for any complainer. Where a complainer receives the No Breach Report and disagrees with the administration of the investigation, the Complainer may consider making a service complaint to the ESC (see section I.5 Handling CAU below).
239. Where a complainer disagrees with the Commissioner's decision, the ESC is obliged to inform them that they may be able to challenge the Commissioner's decision using judicial review proceedings. Judicial review is a form of court proceeding where a judge reviews whether a decision is lawful. A complainer may want to take legal advice before deciding if this is appropriate. The Commissioner's office is unable to provide advice on the costs of, or access to, judicial review.

#### **C.11.f Breach: process of sending a Proposed Breach Report**

240. Where the Commissioner has taken the view that there is a breach of an applicable Code, the draft Report will be finalised (together with any annexes) and redacted in line with the Redaction Policy (as above). This will be the Proposed Breach Report. Pursuant to s 14(2) of the 2000 Act, no report concluding that a Councillor or Member has contravened an applicable Code shall be submitted to the SCS unless that

councillor or member, as respondent, has been given a copy of the Proposed Breach Report and an opportunity to comment on it. The 2000 Act also requires that a copy be sent to the Council or Body for comment.

241. The Proposed Breach Report will be issued to the respondent(s) and the Monitoring Officer or Standards Officer for representations or further comments (see Appendices 16a – 16b). The complainer will be provided with an update, and the SCS will be notified that a Proposed Breach Report has been issued for representations.

242. The ESC will usually provide a deadline by which responses or representations may be received. This is usually one to three weeks from when the Proposed Breach Report is issued to the Council or Body and to the Respondent. This could vary depending on the length and volume of materials enclosed.

243. Where the party may not be able to respond within that period, an extension of time may be requested in writing to the ESC, setting out the reasons why (please see [Guidelines on considering extensions of time](#)). Any extension of time that is granted cannot be open-ended, even in cases in which the parties may not be able to respond for personal reasons. In general terms, six months should be the maximum extension and only granted when parties provide clear supporting evidence and a commitment to providing a response by that extended deadline.

244. In circumstances where a significant period is requested for providing representations due to an individual's personal circumstances, the ESC may contact the SCS for their guidance, particularly if the finding is that a breach may be considered to be minor or technical in nature. This is to better support the respondent if they find providing representations to a Proposed Breach Report to be challenging.

245. The time taken for a respondent and the Monitoring Officer / Standards Officer to respond to a request for representations will normally be shown in the final Report.

#### **C.11.g Breach Report: receipt of responses from the Council / Body**

246. Where a response from the Council or Body has been received (usually from the Monitoring Officer or the Standards Officer), the response will be considered by the handling IO and, where appropriate, discussed with the SIO, HIO or the Commissioner. Any suggested changes or substantive comments relating to the Proposed Breach Report will be included in the Final Report, where these suggested changes or comments represent information that significantly alters the factual findings or conclusions of the Proposed Breach Report. The following are examples of such incidences:

- where the Proposed Breach Report contains errors as to times and dates of a factual occurrence, such as the time and date of a Council meeting or the date of an email;
- where the Proposed Breach Report has misquoted the Monitoring Officer / Standards Officer;

- where the Proposed Breach Report has omitted reference to a significant factual occurrence that could alter the breach finding, which was unknown to the IO at the time of drafting the Report.

247. Depending on the response received from the Council or Body, a Proposed Breach Report may not be significantly amended before being finalised for issue to the Standards Commission as the Report. If no response is received after more than one reminder, the Proposed Breach Report may be finalised without the response. The attempts to obtain a response will be noted in the Report.

248. In some circumstances, the response received from the Monitoring Officer / Standards Officer may be such that the Commissioner no longer considers there was a breach of the Code. If this occurs, the IO will note in the Report the substance of the response that has led to this view and change the Report from a breach outcome to a no breach outcome.

249. All responses received from the Monitoring Officer / Standards Officer will be saved into the relevant case file on CMS. A full copy of it will be annexed to the Report in its entirety, regardless of whether amendments to the Proposed Breach Report were made or not. This is so that the SCS will have every opportunity to review the entirety of any comments. Where possible, the finalised Report will highlight the parts that have been substantively amended further to any representations, for ease of reference. All representations that are received and annexed to a Report will normally be shared with all parties.

250. If a party does not wish to provide comments or representations to a report, that party is expected to inform the ESC so that the report can be finalised without delay.

#### **C.11.h Breach Report: receipt of representations from the respondent**

251. Where the respondent has provided representations to the Proposed Breach Report, these representations will be considered by the handling IO and, where appropriate, discussed with the SIO, HIO and/or the Commissioner. As above, any suggested changes or substantive comments relating to the Proposed Breach Report will be included in the Report in full as an Appendix. Where these suggested changes or comments represent information which significantly alters the factual findings or conclusions of the Proposed Breach Report the Report will be amended to take account of the new information. The following are examples of such incidences:

- where the Proposed Breach Report contains errors as to times and dates of a factual occurrence;
- where the Proposed Breach Report has misquoted the respondent;
- where the Proposed Breach Report has omitted reference to a significant factual occurrence that could alter the breach finding, which was unknown to the IO at the time of drafting the Report.

252. Depending on the representations received from the respondent, the Proposed Breach Report may not be significantly amended before being finalised for referral to the SCS. If no representations are received after the deadline for representation expires (with or without a request for extension of time), or after a reminder, the Proposed Breach Report may progress to be finalised without the representations. The attempts to obtain representations will be noted in the Report.
253. In some circumstances, the representation from the respondent(s) may be such that the Commissioner no longer considers that they breached the Code. If this occurs, the IO will note in the Report the substance of the representation that has led to this conclusion and change the Report from a breach outcome to a no breach outcome. As above, **representations that are received and annexed to a Report will normally be shared with all parties.**
254. Any representations from the respondent(s) will be saved into the relevant case file on CMS and a full copy of it will be annexed to the Report in its entirety, regardless of whether amendments were made or not. This is so that the SCS will have every opportunity to review the entirety of any representations. Where possible, the finalised Report will try to highlight the parts that have been substantively amended further to any representations, for ease of reference.
255. If a party does not wish to provide comments or representations to a report, that party is expected to inform the ESC so that the report can be finalised without delay.

#### C.11.i Finalising the Proposed Breach Report

256. The IO will finalise the Proposed Breach Report to reflect any changes suggested by the Council, the Body or the respondent(s) in accordance with the above. A section of the Proposed Breach Report will need to be updated to reflect that responses from the Council (or Body) and representations from the respondent(s) have been received. It is good practice that any other changes made, including those where corrections relate to errors in times, dates or other factual occurrence and corrected misquotes, will be highlighted to the respondent and the Council or Body in the covering correspondence enclosing the Report or in the Report, so that the SCS has every opportunity to consider them.
257. The responses and representations received will be shown as appendices. Any reminders for responses and/or representations and substantive amendments (if any and where possible) will also be noted in the Report.

#### C.11.j Process of sending and referring a Breach Report

258. Once the IO has updated the Proposed Breach Report, it will be sent to the Commissioner for final consideration. The Commissioner will consider and approve the draft. Thereafter the Breach Report, together with any attendant appendices, will

be redacted in accordance with the Redaction Policy (Appendix 22 – Redaction Policy).

259. The IO will issue the Breach Report to the respondent, the complainer, the Monitoring Officer / Standards Officer and the SCS using the appropriate Template correspondence (Appendices 15a – 15d – Template Correspondence (Reports)). The Chief Executive of the Council / Body will also be copied into correspondence sent to the Monitoring Officer / Standards Officer. The ISO / SISO may assist with this process.

260. The SCS will be provided with the contact details of witnesses and parties referred to in a Final Report, in accordance with the SCS' Hearing Rules. This assists the SCS in their functions. The data is shared pursuant to the [Information Sharing Agreement](#) between the SCS and the ESC.

## C.12 Interim Reports

261. In accordance with s 21 of the 2000 Act, the Commissioner may submit an interim report (**Interim Report**) on an open investigation being conducted by the Commissioner.

262. The SCS may also direct the Commissioner to submit an Interim Report. In accordance with the 2000 Act, an Interim Report is necessarily on an open investigation and cannot be prepared or referred when a Complaint is at assessment stage.

263. If the Commissioner considers an Interim Report should be submitted, or where the SCS has directed the Commissioner to submit an Interim Report about an open investigation, the handling IO will draft an Interim Report with the support of the SIO, HIO or the Commissioner. The Interim Report **will not** cover:

- a. legal context of the interim suspension process and basis, as its intended audience is for the SCS' Members who are familiar with this background;
- b. a recommendation that an interim suspension should result. The ESC does not make recommendations on sanctions when reporting to the Standards Commission in any other circumstances and taking such a course of action in the case of interim reports would be the equivalent of doing so. Such decisions are statutorily a matter for the Standards Commission.

264. However, the Interim Report **will** cover, amongst other things:

- a. the allegations made in the complaint;
- b. any public interest and proportionality considerations in respect of the imposition of an interim suspension on the Respondent, including any potential consequences of not doing so;

- c. whether the further conduct of the Commissioner's investigation is likely to be prejudiced if an interim suspension is not imposed (for instance, if there are concerns that the Respondent may try to interfere with evidence or witnesses).

265. The SCS will consider the Interim Report and make a decision pursuant to section 21 of the 2000 Act. More information about this is available from the SCS website [on interim suspensions](#).

266. The Commissioner may consider that an Interim Report is appropriate in the following circumstances (which are non-exhaustive):

- a. on the face of it, evidence of a breach; and
- b. the alleged misconduct is so serious that there is an ongoing negative impact on any party to the Complaint, despite interim measures being put in place; or
- c. there is evidence or a distinct possibility that collusion or other activity might compromise the outcome of the investigation, including interference with witnesses or evidence.

267. Where the Commissioner considers that an Interim Report is appropriate, that Interim Report will be prepared as soon as possible and not more than two weeks after the Commissioner's decision. The SCS will be informed that an Interim Report will be referred as soon as possible after the Commissioner decides an Interim Report is appropriate.

268. The Interim Report will be shared with the respondent by the ESC for comment prior to referral to the SCS. The complainer will be informed that an Interim Report has been referred.

### C.13 Timescales and KPIs for Assessment, Investigation and Reporting

269. The Commissioner and all ESC staff are conscious that an efficient and timely complaint handling process is critical to trust and confidence in any ethical standards framework. As such, ensuring that our process is efficient and timely is included in our strategic objectives.

270. At times, due to varying reasons, a backlog of Complaints may arise. In these instances, it is the ESC's aim to address the backlog as soon as practicable to triage cases, preserve evidence, and keep all parties informed on progress. The aim of this section of the Manual is to set out target timescales for completing assessments, investigations and reporting, so that a backlog is less likely to happen. Additionally, it allows for recording, measuring and reporting on the progress and performance of our office in an open, transparent and accountable manner. The targets are set with an understanding of historic timescales for completing the various stages of complaint handling work, a benchmarking exercise with other comparable investigative bodies, and in public consultation which includes with the Standards Commission, SOLAR and other stakeholders.

271. Where a complaint is likely to take more than two months for assessment, the ISO, SISO or IOs should write to the complainer to inform them of the delay, explain why, apologise for any inconvenience caused, and set out when the Complainer may expect to hear from the ESC again with an update.
272. The ESC will generally aim to complete the initial assessment and any subsequent investigation within the expected key performance indicator (**KPI**) timescales set out below. However, this will depend on the complexity of the complaint, availability of information from, and the co-operation of, all parties involved. Overall, assessments and investigations will be completed as soon as possible, consistent with a full and proper evaluation of each situation.
273. If it is not possible to complete the investigation within three months, the Commissioner is required by s 12(5) of the 2000 Act and in line with this Manual's processes to advise the SCS, the Council or Body, the respondent and the complainer, and continue to update those parties every three months thereafter until the process has concluded.
274. The Standards Team members are expected to complete their work in accordance with specific targets set out in KPIs. This applies to all complaints received by the ESC (Councillor, Member, MSP and Lobbying).
275. There are separate KPIs for Stage 1 (Complaint Assessment) and Stage 2 (Complaint Investigation) because not all complaints are accepted for a full investigation. Stage 1 measures how quickly and effectively complaints are assessed to decide if they should either be closed or accepted for investigation. As some complaints do not progress beyond this stage, it is important to track this separately.
276. Stage 2 focuses on complaints that are accepted for investigations, measuring how efficiently they are investigated and reported on. Keeping these KPIs separate ensures clear performance tracking for both the assessment and the full investigation process.
277. When complaints arrive (as outlined earlier), they are assigned a RAG rating to reflect their complexity. This ensures that more complex cases are recognised from the start. For Stage 2 KPIs, different targets are set for Red, Amber and Green cases, allowing performance to be measured separately based on the complexity of each complaint.
278. Beneath these high-level KPIs, a series of internal KPIs will track progress through each stage, ensuring there are no bottlenecks.

**Table 1 - Stage 1 and Stage 2 KPIs.**

Stage	Action	RAG Rating	Timeframe	Target (25/26)	Target 26/27)	Target (26/27)
<b>Stage 1 – Complaint Assessment</b> (Time taken to assess and either close or decide to investigate)	<b>Complete Stage 1 by assessing and deciding the outcome for complaints about:</b> <ul style="list-style-type: none"> <li>• Councillors</li> <li>• Members</li> <li>• MSPs</li> <li>• Lobbyists</li> </ul>	<b>Green</b> <b>Amber</b> <b>Red</b>	Within <b>9 weeks</b> of receiving complaint	85%	90%	95%
			Within <b>10 weeks</b> of receiving complaint	90%	95%	100%
			Within <b>11 weeks</b> of receiving complaint	95%	100%	-
			Within <b>12 weeks</b> of receiving complaint	100%	-	-
<b>Stage 2 – Investigation</b> (Time take to investigate and complete the case)	<b>If a complaint is accepted for investigation, complete the investigation and close the case for:</b> <ul style="list-style-type: none"> <li>• Councillor</li> <li>• Member</li> <li>• MSP</li> <li>• Lobbyist</li> </ul>	<b>Green</b>	1 - 3 months from Stage 2 start	80%	90%	100%
			3 – 6 months of Stage 2 start	90%	100%	-
			6 – 9 months of Stage 2 start	100%	-	-
		<b>Amber</b>	3 – 6 months of Stage 2 start	80%	90%	100%
			6 – 9 months of St 2 start	90%	100%	-
			9 – 12 months of St 2 start	100%	-	-
		<b>Red</b>	6 – 9 months of Stage 2 start	80%	90%	100%
			9 -12 months of Sage 2 start	90%	100%	-
			12-15 months of Stage 2 start	100%	-	-

279. Achievability of KPIs and targets depends in part on external influences. The following common parameters that can have an impact on time taken for investigations were considered when the above KPIs and targets were set:

- responses to requests for information are not always received within the allotted time period;
- there can be repeated requests for extensions of time to respond to ESC;
- we cannot assume normal workloads in circumstances with a backlog;
- the number of complaints received may be higher than the average number of complaints historically received for a given period;
- responses from parties may be voluminous and contain much more material than the norm;
- complaint material or responses can be considerably more complex than the norm.

Other factors that can have an impact on achievability include stable governance and a stable and well-resourced workforce. It is anticipated that performance against the KPIs and targets will be monitored, recorded and reported on publicly, so that the ESC office can:

- learn from them and improve upon its processes and procedures over time and
- be held to account for its performance.

280. The key is to undertake a full and fair investigation without any avoidable loss of momentum. Time management is an important responsibility for all IOs. During the investigation process, it may be helpful for IOs to consider monitoring investigations by:

- a. diarising deadlines for responses to requested information and, where required, issuing reminders promptly;
- b. being aware of timescales for linked complaints across the team;
- c. scrutinising the list of complaints on CMS to account for the wider needs of the team if a complaint requires prioritising due to being received earlier in time;
- d. considering targets and year-end considerations.

281. The parties to a complaint or investigation may require more time before being able to respond substantively to the office (upon the office's request for more information). Where a request for extension of time is made, the parties should be referred to the [Guidance on Extension of Time](#). The Standards Team member conducting the investigation is best placed to decide on whether to grant the extension of time required and may grant more or less time than that requested by that party, depending on the circumstances and the stage of the investigation.

## C.14 Further Investigation

282. In accordance with section 16(a) of the 2000 Act, the SCS may direct the Commissioner to carry out further investigations on receiving a Report. Where this

occurs, the SCS contacts the Commissioner's office in writing to direct that a further investigation into a complaint take place, setting out the issues requiring further investigation, and requesting the Commissioner's office provide an estimated timescale for how long the further investigation may take.

283. The handling IO will consider the SCS' direction for further investigation and draft the response to the SCS request for an estimated timescale. Estimated timescales can vary depending on the number of actions required in the further investigation direction. The response will be prepared with the support of the SIO or HIO and the Commissioner. After issuing the formal response, the handling IO will conduct the further investigation in line with the principles covering investigations outlined above. The SCS will inform the parties to a complaint that there is a direction for further investigation.

284. Upon completion of the further investigation, the handling IO will prepare a written response to the SCS that sets out the findings on each issue that required further investigation. The handling IO will follow instructions from the SCS as to the parties to contact with the outcome of the further investigation (if any).

285. The SCS will then make the final decision on the Complaint in accordance with section 16 of the 2000 Act.

### C.15 Post-Investigation: SCS Hearings

286. All investigations result in a report that will be referred to the SCS for their final disposal.

287. Section 16 of the 2000 Act gives the SCS the power to hold a Hearing, require further investigation or take no action. Section 17 of the 2000 Act lets the SCS decide what procedures to follow at any Hearing, known as the 'Hearing Rules' or 'Hearing Process Guide & Rules'. Members of the SCS agree the content of the Hearing Rules.

288. The Hearing Rules' aim is to ensure that Hearings are managed fairly, efficiently and in an open and transparent manner. The Hearing Rules state the actions the SCS will take after a decision is made to hold a Hearing. They also outline the procedures to be followed by anyone who attends a Hearing.

289. The Hearing Process Guide and Rules are reviewed and updated on a regular basis. As such, staff will ensure they refer to the SCS' [current version](#) of the Hearing Process Guide and Rules wherever possible.

#### C.15.a Notification of Hearing, the Pre-Hearing Meeting, and Joint Statement of Facts

290. Generally, within seven days of the SCS' decision to hold a Hearing, the Executive Director will write to the ESC providing notification of the SCS' decision to do so. This is referred to as the 'Notification of Hearing'.
291. Upon receipt of the Notification of Hearing, the ESC is required (normally within 21 days of the date of the Executive Director issuing the letter referred to above) to send to the Executive Director:
- a. confirmation of the ESC's representative at the hearing;
  - b. the names and contact details of any witnesses who the ESC proposes to call, including confirmation of whether they will be available for the hearing and a brief summary of the evidence they will provide;
  - c. any documents the ESC's representative intends to refer to at the Hearing;
  - d. any request for the SCS to require a person to attend the Hearing, give evidence and/or produce documents in terms of section 17(5)(a) of the 2000 Act.
292. On receiving the Notification of Hearing from the SCS, the SIO, HIO and the Commissioner will decide on the case presenter and discuss possible approaches to evidence, submissions at the Hearing, or whether external representation is required for particularly complex cases involving multiple parties, witnesses or challenging issues. Where it is decided that external representation is appropriate in the circumstances of a particular case, the SIO or HIO will contact the external representative and provide a copy of the report and hearing bundle. The external representative's views will be considered when considering the information to be provided to the SCS under the Hearing Rules.
293. The handling IO will have an important and significant role in hearing preparation, given their depth of knowledge of a case. This includes bundle preparation with support from the SISO or ISO, reviewing redactions, submissions and attending the hearing to support the Commissioner, HIO or SIO as appropriate.
294. The SCS will usually hold a Pre-Hearing Meeting (**PHM**), which is normally attended by the SIO, HIO or the Commissioner.
295. The PHM is a meeting held between the SCS panel Chair, the Executive Director and/or Case Manager, the ESC (represented by the SIO, HIO or Commissioner) and the respondent(s) and their representatives in advance of the Hearing to discuss topics such as:
- a. procedural arrangements;
  - b. issues requiring clarification;
  - c. identifying who is to be called or cited as a witness and the relevance of their evidence;
  - d. considering whether it would be appropriate to apply the SCS' Abbreviated Hearing Process; and

- e. providing the parties with an opportunity to discuss whether they can agree any facts as outlined in the ESC's Report.

296. The handling IO, HIO, SIO or the Commissioner may prepare a written document containing agreed facts and endeavour to agree this with the respondent(s) by asking for their comments on the document before signature by the HIO, SIO or the Commissioner, and the respondent or their representative. This document is known as the 'Joint Statement of Facts' (**JSF**) and if it can be agreed by the parties, will be sent to the SCS at least 14 days in advance of the Hearing date.
297. In all cases, the HIO, SIO or the Commissioner will seek to reach agreement with the respondent or their representative, preferably in advance of the PHM, on the facts that can be agreed. However, a signed and finalised version of the JSF is rarely achievable until there has been a discussion at the PHM. There may also be instances where an agreement is not possible, in which case there will be no JSF sent to the SCS. The ESC will let the SCS know if this occurs, and the reasons why.
298. While not always possible to achieve, depending on the circumstances, the Commissioner considers it best practice to forward the draft JSF ahead of any PHM, as this helps to focus discussion at the PHM, even if the respondent(s) has/have not yet submitted a statement of case.
299. The JSF may be prepared by the handling IO, HIO or SIO and sent to the respondent(s) in advance of the PHM in draft form, inviting comments from the respondent(s) on the draft and, if comments are received, to consider the comments and where appropriate, amend the draft JSF.
300. Alternatively, the JSF may be prepared after the PHM when the SCS' Panel members have decided it would be helpful to have a JSF in place for that specific case. If so, the JSF will be prepared by the handling IO, HIO or the SIO and sent to the respondent(s) as soon as practicable after the PHM, for comments by the respondent(s) and finalised when the draft is agreed and signed by the HIO or SIO (on behalf of the Commissioner) and the respondent(s) or their representative. The JSF will be sent to the Standards Commission at least 14 days in advance of the Hearing Date.

### C.15.b Process of collating a Hearing Bundle

301. A 'Hearing Bundle' consists of all of the relevant written documentation to be provided to the SCS in advance of the hearing. The IO should follow the process and adhere to the responsibilities relating to Hearing Bundle production set out in the Bundle Preparation Guidance (at Appendix 17 - Bundle Preparation Guidance).
302. The redaction of the Hearing Bundle should follow the Redaction Guidance (Appendix 22 - Redaction Guidance). Every Hearing Bundle, when redacted, requires at least two persons to review. This is because redaction of private or sensitive data is a very time-consuming and labour-intensive process. As such, this system has been put in place to minimise the possibility of human error. The Hearing Bundle, when it is finalised, will be sent to the HIO, SIO or handling IO for final review.

### C.15.c Sending the Hearing Bundle

303. The finalised and redacted Hearing Bundle will be sent to the SCS for inclusion in its 'Inventory of Productions' or 'IOP', a numbered copy of which is sent by the SCS to the ESC and the respondent (or their representative).
304. Upon receipt of the numbered IOP, the ISO / SISO should save it into CMS and send a copy of it on to any external representative for their reference. There may be further updates to the IOP, particularly if the respondent(s) decide(s) to send more information to the SCS. According to the Hearing Rules, all parties (including the ESC) may lodge further documents with the SCS up until 14 days before the date of the Hearing. As such, the IOP may continue to be updated until that time.

### C.15.d Contacting ESC Witnesses, Witness Policy and Witness care

305. This section is applicable only for witnesses that are cited by the ESC (**Witnesses**). In addition to confirming Witness availability for a Hearing, sharing their contact details, and a brief summary of the nature of their evidence with the SCS and the ESC sharing the SCS' [Guidance for Witnesses](#) with ESC Witnesses, the ESC will:
- d. for **in-person Hearings**: inform the Witness of the hearing venue, date, time, and what the Witness can generally expect to happen on the day. The ESC will inform the Witness of the summary or topics that the Witness will likely be asked questions about (from the ESC) at the Hearing.
  - e. for **online Hearings**: inform the Witness that the SCS will be in touch with a hearing link and that this will be tested with the SCS in advance of the hearing. The ESC will inform the Witness of the summary or topics that the Witness will likely be asked questions about (from the ESC) at the Hearing.
306. All Witnesses should also be referred to the [ESC's webpage for Witnesses](#) for more information.

307. The ESC is not likely to call the complainer as a Witness if all the facts of a complaint are not contentious (for instance, there is already video evidence available).

308. The Commissioner recognises the time and effort that being a Witness involves. If there are any reasonable adjustments or special arrangements that will make the process more accessible, the Witness should let the ESC staff know as soon as possible. Generally, all Witnesses can expect:

- the Hearing Panel will consist of no fewer than three members of the SCS;
- unless the SCS decide otherwise, the hearing will be held in public;
- if the Hearing is held in person, you will have to attend a physical venue;
- if the Hearing is held online, it will be live-streamed but not recorded, with comments functions turned off;
- you will be asked to take an oath or affirmation before giving your evidence;
- the ESC's representative will take you through your evidence by asking questions;
- the respondent (the person who has been complained about), or their representative will have an opportunity to cross examine, which means they will also be able to ask questions about your evidence;
- the ESC's representative may re-examine your evidence, which means they can ask questions after the respondent or their representative has finished their questions;
- the respondent's representative may be a legal professional;
- the Hearing Panel may interrupt, intervene or ask questions at their discretion;
- Witnesses may be able to view the remainder of the hearing once their own evidence has been given;
- Witnesses may have to wait until called to give evidence, although an estimated time will be given. The waiting times will vary and depend on any preliminary matters at the beginning of the Hearing, and/or the nature and extent of other Witnesses' evidence.

### C.15.e SCS Hearings

309. The SCS runs the Hearing and will make all the arrangements for it, including issuing notice of the date, time and venue or, where the Hearing will be held remotely, send the online joining details nearer to the Hearing date. The link to the online hearing will usually be tested in advance to ensure it is working properly (audio and video) for the SCS and attendee and to check connectivity. The Executive Director will also give notice of the Chair and SCS members selected to form the Panel at the Hearing. The IO can best assist the HIO, SIO, the Commissioner or the representative at the hearing in the following ways:

- being fully conversant with the detail of the investigation and of the issues in dispute;
- drafting or otherwise providing input to a draft JSF or submissions;
- in complex cases, preparing a chronology or summary of key issues;
- taking notes of timings during the Hearing, submissions made, and evidence heard; and
- attending the Hearing (where the Hearing is held in person) to support the HIO, SIO, the Commissioner or other representative where possible.

The HIO, SIO, the Commissioner or Commissioner's representative may also wish to discuss with the IO in advance of the hearing: which evidence to lead in evidence in chief or in cross-examination, by whom it is likely to be best explained, and the approach to be taken to opening submissions.

310. After hearing evidence and submissions, the Hearing Panel will retire to consider whether there has been a breach of the Code. If the Panel finds there has been a breach, they will offer the respondent or their agent the opportunity to make representations in mitigation before retiring to consider what sanction to impose. The Commissioner does not make any submission on sanction.

### C.15.f Post Hearing Process

311. After the Hearing, the SCS will provide the ESC, the Council / Body, the complainer(s) and the respondent(s) with an update about the written decision in accordance with the SCS' Hearing Rules (in its applicable version).

## C.16 Guidance on handling complaints backlogs

312. The Commissioner and the Standards Team recognises that, at times, it is unavoidable that a backlog of complaints could arise despite best efforts to progress complaints timeously. This could occur due to varying reasons that are outside the office's control, such as shortage of staff, unexpected long-term absence of a key staff member, or a sudden increase in the volume and/or complexity of complaints due to an external event. This part of the Manual sets out measures that we put in place where a complaint backlog arises.

313. A complaints backlog consists of a large volume of complaints that are awaiting assessment. The early signs that a complaints backlog is building up could be:

- f. the number of complaints awaiting assessment is increasing rather than decreasing;
- g. the 'outflow' of completed complaints is significantly lower than the number of 'inflow' complaints being received;
- h. complaints have been awaiting assessment for a period of more than two months;
- i. there is significant staff turnover or unavailability such that, despite full workloads of all Standards Team members, there is no or very limited capacity to address the complaints awaiting assessment; and
- j. staff are already operating in excess of their agreed workplans.

314. The most important measure to put in place where a backlog arises is to prioritise triage where the ISO, SISO or Duty IO considers the complaints that are received in the backlog and assesses them against the following factors:

- k. How closely a complaint matches the admissibility criteria – where a complaint does not match one of the admissibility criteria, the complainers will receive approved closure or inadmissibility letters (per the process set out in sections C.5 and C.6 above). The aim of this is to bring down the number of cases waiting at the assessment stage that do not need to be there due to being clearly inadmissible.
- l. Whether a complaint needs to be investigated by an IO in advance of all other complaints in the backlog queue due to the nature of the complaint (see the process and considerations in C.4 above). These will be flagged to the SIO or HIO and assigned to an IO.
- m. Whether it is a complaint that, on its face, matches the admissibility criteria but that does not match the criteria for advance consideration.
- n. An evaluation of whether there is sufficient information to support the complaint and, if not, contact the complainer for more detail where appropriate. This includes conducting desktop research to identify supporting materials, screen-capturing these, locating and saving audio/video recordings to minimise loss of documentary evidence due to the passage of time while the complaint awaits assessment. A Council / Body may also be contacted in for transcripts or audio/video recordings.

315. For all complaints and particularly for the complaints described in category (c) above, there are set templates for providing periodic updates (ranging from three to four weeks) to the complainer, so they are aware of the backlog, the reasons for it, and what is being done to address it. The complainer will be told at what time they can next

expect to hear from the ESC. The aims of these communications are to be as open and transparent as possible about a backlog situation, and to manage expectations.

316. If there is a backlog that is not representative of a normal case queue, the line managers in the Standards Team may take the decision (with agreement from the Commissioner) to divide the team members into Stage 1 and Stage 2 teams. This means that there will be more resource committed to triage and completing Stage 1.
317. A banner may be shown on the ESC website informing all stakeholders of the backlog and the approximate time that an initial assessment is currently taking. This will be monitored and updated as progress is made in bringing down the assessment time.
318. If the backlog arose due to a staff shortage, the Commissioner and the Senior Management Team will convene to discuss whether workforce planning is required to determine if the shortage can be addressed and how.
319. The Commissioner, Standards Team and wider ESC office understands how important it is to have a timeous process in place, for complaint parties and the wider public. It can be very distressing and stressful to have complained about someone, or to be complained about, and an ongoing investigation or any prolonging of reaching a resolution is never desirable.
320. The impact of any complaints backlog is deeply felt. For this reason, the Commissioner, Standards Team and wider ESC office commits to the targets and timescales set out in this Manual and will be monitoring performance against these targets. These will be published and shared with the public so that we are accountable and transparent about our progress. If there is scope for us to reduce our KPI timescales in the future, we will do so by setting more stretching targets.

## C.17 Criminal proceedings

321. Where the ESC is informed that conduct which is the subject of a complaint is pending or is already subject to a Police investigation or criminal proceedings, the assessment or investigation of a Complaint will be suspended until such time as the Police investigation or criminal proceedings conclude. If this occurs at assessment, the complainer will be notified. If this occurs during an open investigation or at reporting stage, all parties will be notified. The ESC may request the crime reference number or other details as this will help the office stay informed when the Police investigation or criminal proceedings conclude.

## D.MSP COMPLAINTS

322. The statutory functions and powers of the Commissioner are available to review on our [website](#). The Commissioners functions in relation to investigating complaints about the conduct of MSPs are set out in the 2002 Act ([Scottish Parliamentary Standards Commissioner Act 2002](#)).

323. In accordance with section 16(3) of the 2010 Act (the Scottish Parliamentary Commissions and Commissioners etc. Act 2010), the Commissioner's functions may be discharged by any other person authorised for those purposes by the Commissioner. Unless the context requires otherwise, references in this document to the Commissioner should be understood to include anyone so authorised. However, pursuant to section 16(4) of the 2010 Act, any delegation does not affect the responsibility of the Commissioner for the performance of the ESC's functions.

## D.1 What we can and cannot investigate

324. MSPs are required to abide by what the 2002 Act describes as the 'relevant provisions'. A 'relevant provision' is defined in section 3(3) of the 2002 Act, which is "any provision in force, or treated as having been in force under subsection (4A), in the standing orders, in the Code, in the Scotland Act 1998 (Transitory and Transitional Provisions) or made by or under an Act of the Scottish Parliament in pursuance of section 39 (members' interests) of the Scotland Act".

325. In addition, the 2006 Act (the Interests of Members of the Scottish Parliament Act 2006) contains such relevant provisions, including any determinations made under that 2006 Act, the Standing Orders and the Code of Conduct. The [latest version of the determination](#) was published in 2017. It sets out the requirements for the form and content of the written statement that each member is required to complete for inclusion on their register of interests. It may be helpful to refer to the resources available from the [Scottish Parliament](#) website.

326. The Commissioner can consider a Complaint that a Member of the Scottish Parliament has not behaved properly in accordance with the relevant provisions for MSPs. Our website has more information about [what we can consider](#). Generally, for the ESC to be able to investigate a complaint about a MSP, the Complaint needs to satisfy all three tests set out in section 6 of the 2002 Act:

- **First Test:** the Complaint must be 'relevant'. 'Relevant' means:
  - the complaint is about a member of the Parliament;
  - it is not an 'excluded complaint' or, if it is, the Commissioner has been directed under section 12 of the 2002 Act to investigate it; and
  - it appears at first sight that, if all or part of the conduct complained about is established, it might amount to a breach of a relevant provision (see section 6(4) of the 2002 Act)
- **Second Test:** the Complaint meets all the 'specified requirements' as set out in section 6(5) of the 2002 Act, such as the Complaint: being made in writing to the Commissioner, being made by an individual person and stating that person's name and address, names the MSP concerned, and sets out the facts relevant to the conduct complained about.

- **Third Test:** the Complaint warrants further investigation. A complaint ‘warrants further investigation’ if it appears after an initial investigation that the evidence is sufficient to suggest that the conduct complained about may have taken place.

327. The ESC will not be able to assist with Complaints relating to a public function that the relevant provisions for MSPs do not cover. For example, complaints about a Minister rather than an MSP, or where the conduct complained of took place when the MSP was acting in private or family life. The introduction to the Code also makes it clear that the conduct must be “in relation to their Parliamentary duties as an MSP” for the Code’s provisions to apply. For instance, a MSP posting on their social media account may not be considered to be acting in relation to their Parliamentary duties. Where a complaint is made to the ESC relating to an issue that is not covered by a relevant provision, such as the Code, the ESC will try to be of assistance, where possible, by signposting to the appropriate office where that complaint can be made. This will be indicated in any closure letter (see Appendices 25a – 25h – MSP Template Correspondence) issued to the Complainer.

328. The ESC will also not be able to assist with Complaints that are known as ‘excluded complaints’ (unless directed otherwise by the SPPAC). Section 3(2) of the 2002 Act states an ‘excluded complaint’ is a class of complaint that is excluded from the Commissioner’s jurisdiction by any provision in the Standing Orders or in the Code. Examples of ‘excluded complaints’ are set out as follows:

- complaints about a member’s conduct at a meeting of the Parliament including treatment of another member – these are to be referred to the Presiding Officer or, if a committee meeting, the Convener;
- complaints made under section 8 of the Code relating to engaging with constituents – these are to be referred to the Presiding Officer;
- complaints about a member’s use of the Reimbursement of Members’ Expenses Scheme – these are to be referred to SPCB;
- complaints about cross-party groups – these are to be referred to the SPPA Committee or SPCB (if it relates to Parliamentary facilities and services);
- complaints about use of SPCB facilities and services and breaches of SPCB policies (which do not relate to conduct at a meeting of the Parliament or at a committee) – these are to be referred to SPCB.

## D.2 General approach to MSP Complaint investigations

329. The Commissioner is an officeholder appointed by the Scottish Parliament and is expected to act independently. This is set out in section 4 of the 2010 Act. However, the Commissioner may be directed by the SPPAC under section 4 of the 2002 Act, except as to whether or how any investigation is carried out.

330. The 2002 Act at section 5 (2) requires that investigations shall be conducted in private. While this requirement cannot be enforced within the 2002 Act, the Commissioner will request all parties to respect it. All parties to a complaint are informed of the confidential nature of the Commissioner's investigations. This is reflected in the Commissioner's template letters shown in the Appendices to this Manual (see Appendices 25a – 25h – MSP Template Correspondence).

### D.3 What happens when we receive certain types of MSP complaints

331. The ESC occasionally receives complaints relating to MSPs of a specific type, i.e. the complainer wishes to remain anonymous, where the complaint is not about an MSP and so forth. We set out below the general approach within the ESC to these types of complaints.

#### D.3.a. Anonymous complaints

332. An anonymous complaint is one where a complainer is not named or wishes to remain unnamed. The Commissioner does currently have the leeway under the section 4 Directions to not provide the name of the complainer to the respondent MSP in certain circumstances. These Directions should be consulted if a complainer makes a request of this nature. In relation to complaints about an MSP this means the complaint fails to meet the Second Test (under section 6(5) of the 2002 Act) and is therefore undirected. How an undirected complaint is handled is dependent on whether the Complaint also fails the Third Test (section 6(6) of the 2002 Act). This process is covered below in section D.5 on handling MSP complaints.

333. The Commissioner may also consider whether it would be appropriate to inform an MSP of the name of a complainer (and without prejudice to any other matter the Commissioner considers relevant). The Commissioner shall have regard to:

- a. whether the complainer is / appears to be a vulnerable person;
- b. any reasons given by the complainer as to why the MSP should not be informed of the complainer's name;
- c. whether informing the MSP of the complainer's name would likely prejudice an investigation into the complaint.

334. Where the Commissioner considers it would be inappropriate to inform the MSP of the complainer's name, the Commissioner shall report on the matter to the SPPAC setting out the reasons for that decision (see paragraphs 3(1) and 3(2) of the Directions).

#### D.3.b Complaint not about an MSP

335. At times, a complaint may be received that does not relate to an MSP or any other person under the Commissioner's statutory remit. When this type of correspondence is received, correspondence will be sent to the complainer or enquirer explaining this.

#### D.3.c Complaint not within the Commissioner's remit

336. A complaint may be received relating to an MSP, but where the alleged misconduct is not covered by a relevant provision. An example may be a complaint that is an 'excluded complaint'; for instance, it relates to an MSP's conduct at a meeting of the Parliament including treatment of another MSP, which is a complaint to be referred to the Presiding Officer or, if a committee meeting, the Convener. When this type of complaint is received, the process is to record the complaint as set out above into the CMS and correspondence will be sent to the complainer explaining this. A copy of the same correspondence will be sent to the respondent, with private data redacted.

#### D.4 MSP complaint handling process

337. There are two stages when handling a complaint relating to an MSP. **Stage One** (also **Stage 1**) consists of investigating and determining whether a Complaint is admissible. Where the Complaint is admissible, the Complaint will enter **Stage Two** (also **Stage 2**), where it will be further investigated and ultimately reported to the SPPAC.

338. The IO will handle the complaint at both Stage One and if applicable, Stage Two. Stage One of the process will be recorded in the Template MSP Stage One Form (Appendix 26 – MSP Stage One Form), which records a summary of the Complaint, steps taken by the handling IO to substantiate the conduct complained of, evaluation of the information gathered at this stage, and the IO's conclusions as to whether the Complaint should enter Stage Two, including supporting reasons.

339. Where it is not possible for the ESC to complete the Stage One investigation within two months of the complaint being received, the Commissioner is required by section 7(11) of the 2002 Act to make a report to the SPPAC on the progress of any investigation into the complaint. Under the SPPAC Directions on the 2002 Act this report must also be sent to the Complainer(s) and Respondent(s), as long as doing so would not prejudice the outcome of the investigation.

340. It is the responsibility of Standards Team members handling MSP complaints:

- a. to assess the complaint material at this stage and fill in the Stage One Form;
- b. where not already completed by the Duty IO, to request, where necessary, further information from the complainer and conduct desktop searches of publicly available sources for any supporting information required to better understand or substantiate the complaint;
- c. to form a view as to whether the Complaint should be closed at Stage One or proceed to Stage Two for investigation and provide reasons supporting their view;
- d. to draft a complaint closure letter or notification letter that the Complaint has entered Stage Two, as appropriate;
- e. to review any preliminary redaction of personal data by the ISO / SISO and inform them of any redactions that may be required;

- f. alternatively, if the ISO / SISO is unable to help with redaction, the IO will redact the Complaint material as required;
- g. to refer to the Redaction Guidance in Appendix 22 in deciding what circumstances personal data should be redacted from the Complaint and other documentation, or not released in the case of other media;
- h. seek guidance from the HIO, SIO or the Commissioner if a document or other media contains sensitive personal data, prior to any decision being taken regarding its release.

341. If there is any doubt as to whether personal data should be released, please contact the HIO, SIO, Corporate Services Team or the Commissioner in this regard. Similarly, if voluminous amounts of documentation are received that require checking, this should be brought to the attention of the ISO / SISO immediately, in order that extra resources can be allocated to assist where necessary.

## D.5 Dismissing an MSP complaint and closure

342. Upon consideration using the MSP Stage One Form, a Complaint may not be accepted for investigation (i.e. it may be dismissed on the basis that it does not meet the First, Second and/or Third Tests as set out in the 2002 Act).

343. Where it appears that a complaint is recommended to be dismissed due to failing to meet the First or Third Test, the MSP Stage One Form should be completed, a draft closure or dismissal letter should be prepared to the complainer(s) and a draft closure or dismissal letter should be prepared to the MSP(s).

344. When it appears that a complaint is recommended to be dismissed due to failing the Second Test (where the complaint does meet the Third Test), a report should be made to the Clerk of the SPPAC, who will give direction as to how to progress.

345. All documents, together with a copy of the complaint, will be sent to an IO, or the HIO or SIO who has not been involved in Stage One, for peer review using the Peer Review Checklist and attendant Guidance.

346. The IO, HIO or SIO who conducts the peer review may discuss the matter with the IO and/or revert with comments that the IO can incorporate into the Stage One Form and/or the letter. When this is complete, the IO will send a copy of the MSP complaint, the Stage One Form, and the draft closure or dismissal letters to the ISO / SISO. In straight forward cases, it may not be necessary to send the draft documents to the SIO or HIO for peer review and the IO may, at their own discretion, have the option of sending the documents to an IO for peer review and then to the SIO or HIO for final review and approval, subject to the internal Scheme of Delegation. However, the SIO or HIO will not be able to approve any Stage One documentation if they conducted the peer review in the first instance.

347. The ISO / SISO will gather all the complaints, the corresponding MSP Stage One Assessment Forms, and draft letters received over the course of a week and save it

into the internal shared drives. Every Friday morning (or such other day of the week as the Commissioner may elect), the ISO / SISO will send an email to the Commissioner setting out the Complaints, the corresponding MSP Stage One Assessment Forms and draft letters that the IOs and HIO / SIO have completed over the course of the week, for the Commissioner to consider and approve in the exercise of their discretion.

348. The Commissioner may have comments or queries in relation to each MSP Stage One Assessment Form or draft letter, which may be discussed with the IO, HIO or SIO. The Commissioner's comments will be incorporated as appropriate, and the finalised version of the closure or dismissal letter will be sent to the complainer, with a copy also sent to the respondent. The case file will then be closed on CMS. For cases being reviewed and approved under the Scheme of Delegation, the SIO or HIO may also have comments or queries in relation to each MSP Stage One Assessment Form or draft letter, which can be discussed with the team member. The SIO or HIO will complete the remainder of the MSP Stage One Assessment Form on the Commissioner's behalf to ensure there is an audit trail for the decision. The same form will be saved on the CMS. The case file will then be closed but sent to the Commissioner, for noting.

## D.6 Accepting a complaint for investigation

349. Upon considering a complaint using the MSP Stage One Form, a complaint may be accepted for investigation at Stage Two (i.e. it cannot be dismissed on the basis that it does, on its face meet the First, Second and Third Tests as set out in the 2002 Act).
350. Where it appears that a complaint is recommended to be accepted for investigation at Stage Two, the MSP Stage One Form should be completed and a draft acceptance or initial notification letter should be prepared for each of the following: the complainer(s), the MSP(s), and the Clerk of the SPPAC. The letter to the respondent must make it clear that the Commissioner is obliged to report to the SPPAC on the outcome of an investigation and that such a report, inclusive of any representations that they make, will ultimately be published by the Scottish Parliament.
351. The MSP Stage One Form and the draft letters, together with a copy of the complaint, will be sent to the HIO or SIO for review. The HIO or SIO may discuss the matter with the IO and/or revert with comments which the IO can incorporate into the MSP Stage One Form and/or the letters. When this is complete, the IO will send a copy of the complaint, the MSP Stage One Form, and the draft acceptance letters to the ISO / SISO.
352. The ISO / SISO will gather all the materials set out above into an appropriate location in the internal shared drives. The ISO / SISO will send an email to the Commissioner as set out above showing the Complaints recommended for acceptance for the Commissioner to consider and approve in the exercise of their discretion on whether to accept a matter for investigation.

353. The Commissioner may have comments or queries in relation to the MSP Stage One Form or draft letter with the handling team member. The Commissioner's comments will be incorporated into the MSP Stage One Assessment Form or draft letter as appropriate and the finalised version of the acceptance letters will be issued to the complainer(s), the respondent(s), the Clerk of the SPPAC. The case file will then be updated on CMS to reflect that the matter is now under investigation.

## D.7 Withdrawing a Complaint

354. Under section 11 of the 2002 Act, a complainer may withdraw their complaint up until the point a report is sent to the SPPAC.

355. This withdrawal must be by notice in writing by the complainer. If this withdrawal occurs during the assessment period (Stage 1), the Commissioner will cease assessing the complaint and inform the MSP that the complaint has been withdrawn. If this withdrawal happens during the investigation period (Stage 2) the Commissioner will inform the MSP that the complaint has been withdrawn and ask their opinion on whether the investigation should continue despite the withdrawal. Taking this opinion into account along with the complainer's reasons for withdrawal, the Commissioner will then make a recommendation to the SPPAC whether to continue the investigation or not. If the investigation is stopped, the Commissioner will inform the MSP, the complainer and the SPPAC of this decision. If the Commissioner decides that the investigation should go ahead, a report will be sent to the SPPAC with the Commissioner's reasons and the SPPAC will give a direction instructing how the Commissioner should proceed.

## D.8 Conducting an investigation into an MSP Complaint

356. Where a complaint passes the First Test, Second Test and Third Test, it is considered admissible. The IO, on behalf of the Commissioner, investigate with a view to:

- a. making findings of fact in relation to whether the MSP concerned has committed the conduct complained about; and
- b. reaching a conclusion as to whether that MSP has, as a result of that conduct, breached the relevant provision or provisions identified by the Commissioner for the purposes of the First Test.

357. Where a complaint proceeds to Stage Two for investigation or has been directed to be investigated by the SPPAC, please refer to section C.10 above on the conduct of investigations into Councillor / Member Complaints for guidance on the conduct of investigations into Complaints relating to MSPs. The general principles of conducting an investigation continue to apply. Reference must be made to [section 8 of the 2002 Act](#) on investigations into admissible complaints.

358. Where it is not possible for the ESC to complete the Stage Two investigation within six months of the complaint being progressed to Stage Two, the Commissioner is required by section 8(3) of the 2002 Act to make a report to the SPPAC on the progress of the investigation into the complaint. Under the SPPAC Directions on the 2002 Act, this report must also be sent to the Complainer(s) and Respondent(s), as long as doing so would not prejudice the outcome of the investigation.

#### **D.8.a Conducting Interviews**

359. In regards to interviews, paragraphs 3-9 of the Directions set out that at least 48 hours before interviewing any person for the first time in the course of an investigation, the Commissioner shall notify that person in writing (via notification transmitted by electronic means):

- the purpose of the interview;
- the powers of the Commissioner under section 13(1) of the 2002 Act;
- the procedure to be followed in connection with the investigation of the Complaint, including that the interview will be tape-recorded;
- the right of that person to have a third party present at the interview;
- the right of that person to have his or her views conveyed through an interpreter.

360. A notification transmitted by electronic means is to be treated for the purposes of paragraph 3 of the Directions if it has been recorded and is capable of being reproduced in legible form.

361. The Commissioner shall allow any person interviewed to have a third party present and their views conveyed through an interpreter.

362. If the Commissioner interviews any person in the course of an investigation, the Commissioner shall have regard to whether or not that person appears to be a vulnerable person. A vulnerable person means a person who by reason of age, infirmity, illness, disability or any other circumstance appears to the Commissioner to be in need of care or attention.

363. Any interviews that are carried out in the course of any investigation shall be tape-recorded and that tape recording will be kept by the ESC. In practice, the tape recording is a digital audio recording from an electronic recording device and may develop into being a MS Teams recording upon completion of data protection impact assessments.

364. No summary of an interview with a witness shall be included in any Report by the Commissioner to the SPPAC unless the witness has been given a copy of the draft summary and an opportunity to make representations about the draft summary. The Commissioner shall annex to the Report to the SPPAC any representations which are not given effect in the summary.

#### **D.8.b Documents and records**

365. In relation to documents and records, the Commissioner shall keep (whether in written or electronic form) the details of each interview which is carried out in the course of any investigation. The Commissioner shall also keep each document which is considered in the course of any investigation process unless the document requires to be returned to the person who provided it – where this occurs, the Commissioner shall make and keep a copy of it.
366. All documents and records shall be kept for at least 12 months from the date on which the Complaint was dismissed by the Commission or the Report upon the investigation's outcome was made. If the Commissioner is directed to carry out further investigation under [section 10 of the 2002 Act](#), the documents and records shall be kept for a minimum period of 12 months from the date on which the Commissioner's report on the further investigation was made. The Commissioner may destroy the documents and records after these periods, unless the SPPAC instructs otherwise.

#### **D.8.c Criminal offences**

367. Where the Commissioner is satisfied, in relation to a MSP Complaint, that a MSP has committed the conduct complained of and that the conduct would (if proved) constitute a criminal offence, the Commissioner shall:
- (a) suspend investigation and consideration of the complaint;
  - (b) submit a report to the Procurator Fiscal (COPFS); and
  - (c) notify the SPPAC (see paragraph 15 of the Directions).
368. The parties to a Complaint (namely the MSP who is complained about, the complainer and the SPPAC) will be informed of the referral to the COPFS (referred to in (b) above). The COPFS will be requested to confirm their position on whether it intends to become involved in the matters which are the subject of the Complaint.
369. The Commissioner shall resume investigation and consideration of a complaint in respect of which investigation was suspended:
- a. at the conclusion of the criminal proceedings instituted as a consequence of the report by the Commissioner;
  - b. on receipt of confirmation from the Procurator Fiscal that no such proceedings will be raised; or
  - c. on receipt of confirmation from the Procurator Fiscal that the Commissioner may do so.

### **D.10 Reporting**

#### **D.10.a Report structure, format and style**

370. All complaints that have concluded Stage 2 investigations will be reported to the SPPAC, pursuant to section 9 of the 2002 Act. Reports will be in the structure and format prescribed in the Template (see Appendix 27 – Template Report). The contents

of each Report will turn on the facts and circumstances of each individual case. As such, it is not possible to detail the content of each Report.

371. As a matter of policy, any testimony of Parliamentary Clerks is confirmed with them before including that content in any report to the SPPAC.

372. There are two types of Reports under section 7(2) and 7(4) of the 2002 Act, as follows:

- a. A Report pursuant to section 7(2) of 2002 Act: where a complaint is admissible – the Commissioner will proceed to Stage Two of investigation and (a) make a Report to the Parliament informing it of that fact and of the relevant provision or provisions identified by the ESC for the purposes of the First Test and (b) inform the Complainer and the MSP concerned accordingly.
- b. A Report pursuant to section 7(4) of the 2002 Act: where a complaint passes the First Test but fails the Second Test but likely passes the Third Test, the Complaint shall not be dismissed as inadmissible without first making a Report upon the matter to SPPA and receiving a direction under section 7(7)(a). This Report must set out:
  - the reasons as to why the Commissioner considers that the Complaint fails to meet one or more of the specified requirements (the Second Test);
  - the reasons (if known) for that failure;
  - any other matters which the Commissioner considers relevant; and
  - the recommendation of the Commissioner as to whether, having regard to all the circumstances of the case, the Complaint should be dismissed as inadmissible for failing to satisfy the Second Test or should be treated as if it had met all of those requirements and
  - contain a statement that the Commissioner considers the Complaint passes the Third Test.

373. Upon completing a Stage Two investigation, a Report shall be prepared pursuant to section 9 of the 2002 Act and sent to the SPPAC. The Report should be an objective account of all the facts examined and supported by available evidence. Report should be an objective account of all the facts examined and supported by available evidence. It will normally contain:

- a. the details of the complaint;
- b. details of the investigation carried out by the Commissioner;
- c. the facts found by the Commissioner in relation to whether the Member of Parliament concerned (whether or not named in the complaint) has committed the conduct complained about;
- d. the conclusion reached by the Commissioner as to whether that Member has, as a result of that conduct, breached the relevant provision or provisions identified by the Commissioner for the purposes of the first test and the reasons for that view.

374. The Report shall not express any view upon what sanction would be appropriate for any breach.
375. Due to requirements for accessibility, the representations from respondent MSPs should be requested to be made in the form of MS Word documents.

#### **D.10.b Tone of voice**

376. All Standards Team members are encouraged to prepare the Report in accordance with the Style Guide (see Appendix 23 – Style Guide), bearing in mind the role of the ESC to investigate and report, without fear or favour, allegations of misconduct in breach of the applicable Code. The tone of voice should be neutral, factual and comply with the values of this office as set out in the Strategic Plan. All reports should be drafted in plain English, so far as possible.

#### **D.10.c Report review**

377. When an investigation is completed, the IO will proceed to draft a Report covering the factual findings of the investigation and investigative outcomes. The draft Report will be sent to an IO who did not handle the investigation, the HIO or SIO for peer review. Any Report will be subject to peer review and all reviewers will complete the Peer Review Checklist, in accordance with the Peer Review Guidance.

#### **D.10.d Report approval**

378. When there are no further comments on the draft Report, it will be sent to the Commissioner for final review and approval. The Commissioner may discuss the draft Report with the HIO / SIO and the IO at any time. The IO may consider any suggested changes and input them into the draft Report.

#### **D.10.e No Breach: process of issuing and sending a finalised No Breach Report**

379. Where the draft Report has concluded that there is no breach of an applicable Code, the draft Report will be finalised (together with any annexes) and redacted in line with the Redaction Policy (see Appendix 22 – Redaction Policy). This will be the No Breach Report, and sent to the SPPAC and the MSP.

#### **D.10.f Breach: process of issuing a Proposed Breach Report**

380. Where the draft Report has concluded that there is a breach of a relevant provision, the draft Report will be finalised (together with any annexes) and redacted in line with the Redaction Policy (as above). This will be the Proposed Breach Report.
381. Pursuant to section 9(3) of the 2002 Act, no report concluding that a MSP, who is named in the report, has breached a relevant provision shall be made to the Parliament unless the Member concerned has been given a copy of the draft report and an opportunity to make representations on the alleged breach and on the draft report; and

there shall be annexed to the report made to the Parliament any representations made by that member which are not given effect to in that report.

382. Paragraphs 18 and 19 of the Directions state that where there is a question about whether a Member's alleged treatment of a person breaches the Code on treatment of staff or treatment of other Members, the Commissioner shall:

- a. as far as possible, make available a copy of the Report in draft to the person and the respondent MSP;
- b. give the person and the Member an opportunity to make representations to the alleged breach and draft Report;

The Commissioner shall not include any information in the finalised Report that identifies the person or enables the person to be identified (but the draft Report circulated to the person and Respondent member may include identifying information).

#### **D.10.g Breach: Receipt of representations from the Respondent**

383. Where the respondent has provided representations to the Proposed Breach Report, these representations will be considered by the handling IO and, where appropriate, discussed with the HIO, SIO or the Commissioner. Any suggested changes or substantive comments relating to the Proposed Breach Report will be included in the Final Report in full as an appendix to the Final Report where these suggested changes or comments represent information which significantly alters the factual findings or conclusions of the Proposed Breach Report. The following are examples of such incidences:

- where the Proposed Breach Report contains errors as to times and dates of a factual occurrence;
- where the Proposed Breach Report has misquoted the respondent;
- where the Proposed Breach Report has omitted reference to a significant factual occurrence that could alter the breach finding, which was unknown to the IO at the time of drafting the Report.

384. Depending on the representations received from the respondent, the Proposed Breach Report may not be significantly amended before being finalised for issue to the SPPAC. If no representations are received after the deadline for representation expires (with or without a request for extension of time), or after reminders, the Proposed Breach Report may progress to be finalised without the representations. The attempts to obtain representations will be noted in the Report.

385. In some circumstances, the representation from the respondent may be such that the finding of breach cannot be further supported. If this occurs, the IO will note in the Report the substance of the representation that has led to this conclusion, and change the Report from a breach outcome to a no breach outcome.

386. Any representations from the respondent(s) will be saved into the relevant case file on CMS. In line with section 9(3) of the 2002 Act, a full copy of representations will be annexed to the Final Report in its entirety, regardless of whether amendments were made or not.

#### D.10.h Process of sending and referring the finalised Report

387. Once the Proposed Breach Report has been updated as above, it will be sent to the HIO, SIO and the Commissioner for final consideration. The Commissioner will approve the draft and thereafter the finalised Report will be issued to the SPPAC using the appropriate Template correspondence (Appendix 28a – Template Correspondence (Issuing finalised Report)). A copy of the finalised Report will be sent to the MSP (Appendix 28b).

#### D.11 Timescales and KPIs for investigating and reporting

388. The IOs are expected to conduct Stages One and Two in accordance with the timescales and targets as set out in **Section C** of this Manual, which sets out the timescales and targets for all complaints received by the Commissioner.

#### D.12 SPPAC Hearings

389. Section 10 of the 2002 Act gives the SPPAC the power to direct the Commissioner to carry out further investigation into the Complaint. Where the Commissioner finds the Code was not breached, the SPPAC will normally note the Report. However, the Parliament is not bound by the facts found, or the conclusions reached, by the Commissioner in a report made under section 9 of the 2002 Act.

390. Where the Commissioner finds there has been a breach, the SPPAC will consider the Report in full. This will initially be done in private. The SPPAC will invite the MSP to submit representations, which will also be considered in private. The SPPAC may also decide to ask the Commissioner to conduct further investigations. The SPPAC's decision on whether to accept the Commissioner's finding of a breach will be announced in public. The SPPAC may then recommend a sanction to the Scottish Parliament. The Report will always consist of the information set out in section 9(2) of the 2002 Act, namely:

- a. details of the complaint;
- b. details of the investigation carried out by the Commissioner;
- c. the facts found by the Commissioner in relation to whether the MSP concerned (whether or not named in the complaint) has committed the conduct complained about;
- d. the conclusion reached by the Commissioner as to whether that Member has, as a result of that conduct, breached the relevant provision(s) identified by the Commissioner for the purposes of the first test and the reasons for that view.

Wherever possible, the copy of the report and its appendices will be sent as one PDF with all third party information redacted. Copies of documents should also, so far as possible, be available for the SPPAC in MS Word format for accessibility purposes.

## **E. PUBLIC APPOINTMENTS**

391. The Commissioner has a duty under the Public Appointments and Public Bodies etc. (Scotland) Act 2003 to prepare a Code of Practice for Ministerial Appointments to Public Bodies in Scotland (the Code of Practice or “Code” in this Section E of the Manual) and to promote compliance with its provisions. The Scottish Ministers and the Scottish Government directorates on their behalf are expected to follow the Code to ensure that appointments are made on merit, after fair and open competition. If anyone believes that the Code has not been complied with, they may make a complaint to the Commissioner and the Commissioner is to investigate such complaints under the same Act. Additionally, the Commissioner is to examine in general terms the methods and practices of the Scottish Ministers in making these appointments and may also examine the making of a given appointment if considered appropriate. The Act may be seen at [the Public Appointments and Public Bodies etc. \(Scotland\) Act 2003](#). The procedures used for investigating complaints or conducting such examinations are set out in this section of the Manual.
392. Prior to raising a complaint with the Commissioner, it is the Commissioner’s policy that the Complainer must first give the Scottish Government the opportunity to respond to their concerns. If the Complainer is dissatisfied with the Scottish Government’s response, they may then ask the Commissioner to consider an investigation.
393. Complaints about public appointments are handled by a central team within the Scottish Government entitled the Public Appointments Team (**PAT**) or by the Scottish Government’s Complaints Group in cases where it would be inappropriate for PAT to investigate the matter. More details on how to make a complaint to the Scottish Government may be seen at [on this page on the Appointed for Scotland website](#) and [on this page of the Scottish Government's website](#).
394. The Commissioner will investigate all complaints relating to appointment rounds within their remit that Complainers believe have not been resolved following investigation by the Scottish Government. A list of those bodies the Commissioner regulates may be seen at [www.publicappointments.org/regulating-appointments/regulated-bodies/](http://www.publicappointments.org/regulating-appointments/regulated-bodies/).
395. There may also be cases in which the Commissioner considers it appropriate to examine a given appointment process to assess whether it complied with the provisions of the Code. This may be in response to a reported concern from one of the Commissioner’s Public Appointments Advisers or to concerns raised more generally by the Scottish Parliament or elsewhere in the public domain about the suitability of an appointee. Equally, the Commissioner may examine appointments over which the office has had no direct oversight. The decision to conduct such examinations is statutorily discretionary for the Commissioner.

396. Following completion of the investigation of a complaint, the Commissioner will not enter into protracted discussion about the outcome of the investigation and will not reopen the investigation unless relevant new evidence comes to light.
397. The Commissioner has no remit to investigate complaints relating to non-selection or non-reappointment unless it appears that the selection process has breached the Code.

## E.1 Dealing with Complaints about Public Appointments and Conducting Examinations

398. Reference should be made to the Staff Guidance and Procedure and Public Appointments' Complaints Handling Guidance. Complaints relating to public appointments are handled in accordance with paragraph A22 of the Commissioner's Code of Practice.
399. Staff are expected to use their discretion as to the appropriate template letter to use by referring to the Summary List of Documents.

### E.1.a Methodology for Investigations and Examinations of Public Appointments Processes and Complaints about these and/or the Commissioner, their staff or their representatives.

400. This part of the Manual sets out the methodology, used by the office of the Ethical Standards Commissioner (ESC), for a complaint investigation or an examination of the methods and practices employed by the Scottish Ministers in the making of appointments, and recommendations for appointment to the relevant Bodies. Please note that this methodology is only relevant to the ESC's responsibilities under the Public Appointments and Public Bodies etc. (Scotland) Act 2003.
401. The investigation or examination by the Commissioner's office follows a set pattern. If a complaint or concern is raised regarding a public appointment an investigation will follow. The purpose of the complaint investigation or examination is to obtain sufficient evidence to determine whether there is reasonable cause to believe that a breach of the Code of Practice for Ministerial Appointments to Public Bodies in Scotland has occurred or is about to occur. The office will review whether the practices required by the Code have been followed. The office will also review an action or set of actions, relevant to the complaint or examination, against the principles of the Code to evaluate whether these principles have been upheld.
402. It is always for the Commissioner to determine how the Code is to be interpreted.
403. The office will collect and analyse all available factual evidence that is relevant to the complainer's allegation(s), as well as to the respondent's defence(s). The same process is carried out if the Commissioner wishes to examine the methods used in a public appointments process.

404. Depending on the nature and complexity of the complaint, the Commissioner may seek specialist advice or comment from relevant experts.
405. All matters will be examined and decided upon, giving consideration to the merits of each individual case. Factors taken into account may include the frequency and similarity of particular breaches, any mitigating circumstances, information available to the Commissioner and any other relevant matter.
406. All information will be considered strictly within the context of the investigation and will not be used by the office for any other purpose except for those specified in the publication scheme or required by statute.
407. The Commissioner will make a final determination when they are satisfied that sufficient material from all relevant sources has been obtained and examined. There is no right of appeal.
408. After a final determination is made, the Commissioner will also determine the next course of action. This may be a report to the Minister and / or directorate concerned or a report to Parliament if the breach has been identified as a material one.
409. A typical investigation will follow these steps:
- o. The Commissioner will write to the relevant head of directorate, chair of the Scottish Government Complaints Group and / or Minister outlining their concerns regarding the appointment process and indicating that the concerns were sufficient to merit further investigation. For internal complaints (complaints about us), the relevant staff member or sub-contractor will be advised that they are the subject of an investigation.
  - p. The Commissioner will request a copy of the audit trail relevant to the appointment process or issue under examination or investigation. Electronic or original versions are to be provided, for example if an email formed part of the audit trail, the Commissioner will require the original email to be provided to the office in electronic format as opposed to a hard copy being printed out. The Commissioner is willing to consider receipt of material in other formats if provision of original material poses a particular challenge. In such cases, the office should be approached for a discussion.
  - q. The Commissioner's team will establish a case file. This will contain all the information gathered pertinent to the investigation or examination.
  - r. The Commissioner will, if required, arrange for a member of the office team to conduct initial interviews with the party or parties subject to the examination or investigation as well as with other parties that may hold information pertinent to the examination or investigation. Time permitting, a set of preliminary questions will be passed to the interviewee(s) to allow them time to prepare their response. Interviews may be recorded and, if so, interviewee(s) will be advised that this is the case. The purpose of this is to ensure that an accurate record of the discussion is obtained. Depending on the nature of the complaint or

investigation, interviews may be conducted in advance of the audit trail being collected.

- s. The Commissioner will review the interviewee(s)' answers to the questions and the audit trail (the case file). If the Commissioner has remaining concerns regarding the appointment process or associated issues, or feels that there is insufficient information available to make a determination, the Commissioner will request additional documentary information to be provided and may also confirm a requirement for further interviews. This will usually be to afford the relevant parties an opportunity to address any continuing concerns.
- t. Once this process is complete, the Commissioner may provide a report for each party, in the form of a minute, on the discussions that took place and offer each party an opportunity to comment on the report. Any disagreement as to the content of the report may be checked against the recording of the conversation if that was used and/or notes and, if merited, will be altered. The Commissioner's decision as to the contents of these minutes is final, although if there is a continuing disagreement, the comments pertinent to that disagreement will be lodged along with the Commissioner's approved report in the case file.
- u. Based on the sum of the information in the case file, the provisions of the Public Appointments and Public Bodies etc (Scotland) Act 2003 (the Act), and the Code, the Commissioner will produce a final report giving their decision. The report may be for the relevant minister and/or sponsor directorate only and may include recommendations as well as the Commissioner's decision. If it is the Commissioner's decision that a material breach of the Code has occurred, the procedure to be followed will be as set out in section 2 of the Act. Complaints that are upheld and that relate directly to the conduct of the Commissioner's employees or sub-contractors will lead to invocation of the performance management and/or disciplinary and grievance procedures and/or to a review of contract.

410. The management of the case file and any other records held by the office are governed by the requirements of the Freedom of Information (Scotland) Act 2002, the General Data Protection Regulation (GDPR) 2018 and in accordance with Freedom of Information legislation and the office Publication Scheme.

## F. LOBBYING COMPLAINTS

411. The Commissioner has a duty to investigate and report on complaints that a person has or might have failed to comply with section 8(1) of the 2016 Act ([Lobbying \(Scotland\) Act 2016](#)), failed to provide accurate and complete information in an application made under section 9, to comply with the duty to submit information returns under section 11, or to supply accurate and complete information in response to an information notice in accordance with section 17. The Commissioner may make a finding of fact if satisfied on the balance of probabilities that the fact is established.

412. When a Complaint is received, it will first be assessed for admissibility before being accepted for investigation. Both the assessment and the investigation will be conducted in private in accordance with section 22(4) of the 2016 Act. The Standards Team will use the lobbying complaint assessment form (see Appendix 29 – Assessment Form (Lobbying)).

413. A Complaint is admissible if (a) it is relevant (in that it appears at first sight to be about a person who may be or have been engaged in lobbying and it could be a breach of sections 8(1), 9, 11 or 17 of the 2016 Act ), and (b) it meets the conditions set out below pursuant to section 23(3) of the 2016 Act:

- a complaint must be made in writing to the Commissioner;
- it is made by an individual and signed by that individual, stating the individual's name and address;
- it names the person to whom the complaint relates;
- it sets out the facts related to the conduct complained about; and
- it is made before the end of the period of one year beginning on the date when the individual who made the complaint could reasonably have become aware of the conduct complained about.

414. Where a Complaint is inadmissible due to being irrelevant, the Commissioner is statutorily required to dismiss the Complaint. The handling IO should fill in the lobbying complaint assessment form and draft a dismissal letter for the Commissioner's approval containing the reasons for why the Complaint is considered irrelevant. A letter to the SPPAC should also be prepared to report, in the Commissioner's discretion pursuant to section 29 of the 2016 Act, that a lobbying complaint has been received and closed.

415. To be admissible, a Complaint that is both relevant and meets the conditions above would also require further investigation if, after an initial investigation, the evidence is sufficient to suggest that the person who is the subject of the Complaint may have failed to comply with sections 8(1), (9), 11 or 17 of the 2016 Act. Additional information may be requested from the Respondent to assess whether a Complaint is admissible or not.

416. Where a Complaint is relevant but fails to meet one or more of the conditions in section 23(3) of the 2016 Act, the Commissioner may dismiss the Complaint **unless** (i) the Complaint is of a kind specified in a direction by Parliament or (ii) the Commissioner considers that the Complaint warrants further investigation. In circumstances where (i) or (ii) occurs, the Commissioner must make a report to the Parliament. The report will be drafted by the handling IO for the Commissioner's approval. The report must include:

- reasons why the Commissioner considers that the Complaint fails to meet one or more of the conditions mentioned in section 23(3) of the 2016 Act;
- the reasons for that failure (if known);

- a statement that the Complaint warrants further investigation (if applicable);
- the recommendation of the Commissioner as to whether, having regard to all the circumstances of the case, the Complaint should be dismissed as inadmissible for failing to meet one or more of the conditions mention in section 23(3) or should be treated as if it had met all those conditions; and
- any other matters that the Commissioner considers appropriate.

417. Where a complaint is admissible, the Commissioner must notify the person who is the subject of the Complaint that a Complaint has been received, inform that person of the nature of the Complaint and inform that person of the name of the individual who made the Complaint (except where the Commissioner considers that it would not be appropriate to do so).

418. [The Lobbying \(Scotland\) Act 2016 \(Reporting Procedures\) Resolution 2017 \(legislation.gov.uk\)](https://legislation.gov.uk) requires the ESC to submit reports to the SPPAC as opposed to the Clerk of the Scottish Parliament (which is the contact provided in the 2016 Act). As such, all communications should also be sent to the SPPAC and not the Clerk.

419. If a lobbying complaint has not been assessed for admissibility before the end of the period of 2 months beginning on the date the complaint is received, the Commissioner must, as soon as possible thereafter, make a report to the Clerk to SPPAC at the Scottish Parliament on the progress of the assessment of admissibility.

420. If an investigation is not completed before the end of the period of 6 months beginning on the date the Complaint is found to be admissible, the Commissioner must report to the Clerk to the SPPAC at the Scottish Parliament on the progress of the investigation. The handling IO will draft the report and either send the draft to the HIO or SIO for review, prior to sending to the Commissioner for approval or only to the Commissioner for review and approval (in straightforward cases).

421. Where an investigation has been concluded, the Commissioner must report upon the outcome of the investigation to Parliament. Before providing the report to Parliament, the Commissioner must first provide a copy of the draft report to the person who is the subject of the report and provide that person with an opportunity to make representations on the draft report. The report must contain:

- details of the Complaint;
- details of the assessment of admissibility carried out by the Commissioner;
- details of the investigations carried out by the Commissioner;
- the facts found by the Commissioner in relation to whether the person who is the subject of the complaint failed to comply with sections 8(1), (9), 11 or 17 of the 2016 Act;
- any representations made by the subject of the Complaint.

422. Complaints made under the 2016 Act will be progressed in accordance with the KPIs or targets set out in this Manual at [Section C](#). The same assumptions to the KPIs or targets set out there apply.

## **G. SEXUAL HARRASSMENT COMPLAINTS**

423. The 2021 Act, the 2021 Councillors' Code and the 2021 Model Code make it clear that sexual harassment is under the remit of the Commissioner. The process for receiving, logging, assessing and investigating Complaints containing allegations of sexual harassment or elements of sexual harassment will be the same as that set out in the parts of this Manual applicable to who the Complaint is about. For instance, if the Complaint is about a Councillor or Member, section C of the Manual will remain relevant. If the Complaint is about a MSP, section D of the Manual will remain relevant.

424. However, given the very serious nature of this type of complaint, there are special considerations that the Commissioner and the ESC staff will make when handling sexual harassment Complaints. These are set out in this section. These are informed by external training and input on:

- understanding sexual harassment and sexual violence,
- awareness of the impact of sexual violence,
- how investigation procedures and personnel can best tailor their interactions with complainers in such cases,
- best practice in trauma-informed approaches in supporting complainers and witnesses through the complaints process, and
- an understanding of the support available from Rape Crisis Scotland and the Scottish Women's Rights Centre.

425. The Commissioner and all ESC staff understand the importance of a trauma-informed approach to handling sexual harassment complaints. In handling communications or contact with the complainer or witnesses, the Commissioner and the ESC staff understand that:

- later experiences, in which trust is breached, or that trigger feelings of coercion, lack of control, powerlessness, or domination, can bring back distressing memories of the trauma and associated feelings;
- a person affected by trauma might understandably want to avoid people, places or situations that remind them and bring back distressing memories of the trauma and associated feelings;
- a person's young age when first experiencing trauma, the person(s) responsible for the trauma and its duration are among the reasons for people's different responses to trauma;
- people use different ways to survive, adapt to, and cope with trauma and its impact, and that some of these can seem confusing or self-defeating unless

viewed as adaptive coping responses to overwhelming threat and its consequences;

- it is important to be able to recognise when someone is affected by trauma so that help can be given, if and where needed.

426. Trauma-informed organisations are those that integrate the principles of safety, trustworthiness, choice, collaboration and empowerment into all aspects of their work and commit to ensuring that physical environments, staff behaviour and organisational policies and procedures reflect trauma-informed principles and values. Trauma-informed organisations also hold in mind the needs of workers in responding to people affected by trauma. The Commissioner and the ESC staff are wholly committed to those principles and values.

427. The Commissioner and all ESC staff, when working with complainers or other parties on the complaints or reporting process, will:

- always be approachable;
- always have an open mind and investigate the Complaint fully;
- always signpost to sources of support, including emotional support for complainers and witnesses;
- give ample time for complainers and other parties involved to make their statement or give information about the Complaint;
- help the complainer and other parties involved to feel understood when they are experiencing stress and trauma following giving information about the Complaint;
- try their best to ensure all practical needs are accommodated;
- provide a single named ESC source of contact who the complainer or other parties can contact consistently throughout the Complaints and investigations process and, if not, provide continuity during different contacts;
- agree a manner in which the ESC can update the complainer and other parties on progress with the Complaint and any investigation, such as frequency and format in which the update is provided;
- keep the complainer and other parties informed about the progress on the Complaint and the investigation in a way which suits them best.

428. The Commissioner and all ESC staff, when working with complainers, will **always**:

- recognise and respect their feelings of stress and distress;
- listen to what we are being told and give ample time;
- explain why difficult questions are being asked and why;
- recognise how difficult it is to speak out.

429. The Commissioner and all ESC staff, when working with complainers, will **never**:

- suggest what happened shouldn't have upset them or is not a big deal;
- rush someone or expect a clear timeline of events in recollection;
- try and catch someone out with unexpected questions;

- make excuses for the respondent's behaviour.

The Commissioner and all ESC staff recognise that an investigation in such cases must be handled thoroughly and with sensitivity and that it, and its outcome, must present a fair and balanced view on the veracity of the allegations.

## H. HANDLING “SUPER-COMPLAINTS”

430. There may be occasions on which the conduct of one or more councillors, board members, MSPs or lobbyists leads to a significant number of complaints being submitted to our office in a relatively short period of time. The complaints may relate to a single act, such as a social media post that led to many members of the public raising concerns with us or failure to register a registrable event. They could equally arise on occasions on which a number of linked acts of alleged misconduct give rise to many complaints being made to us about all or a proportion of those acts.

431. When we receive multiple linked complaints of this nature, we group them together into either a single case or into a class of cases which we term a ‘super-complaint’. This part of the manual sets out the different procedures that apply to our ‘super-complaint’ handling only.

### Triage

432. The staff who log complaints to our CMS on a day-to-day basis need to be mindful of the fact that certain complaint types we receive are likely to be repeated by other members of the public and will, consequently, likely give rise to a ‘super-complaint’. Factors that staff will consider include:

- the level of recent or current public/media interest in the conduct that has been complained of;
- whether the conduct complained of relates to a matter of recent public concern;
- whether the conduct complained of relates to highly contentious political issues or views that receive considerable media attention;
- the likelihood of the conduct being complained of being known to and/or highlighted with large numbers of members of the public.

This list is not exhaustive. When a few complaints about similar conduct of this nature are received, the staff member responsible for logging them on CMS will highlight this fact with the SIO or HIO, prior to assigning them to a case. A case discussion will then be held, involving the Commissioner if appropriate, to identify whether these complaints are likely to be the first in a series of the same or similar complaints. If they are largely the same, they will be allocated to a single case. If there are substantial differences between them, the SIO or HIO will stream the different complaint types into different categories to allow them to be allocated to a series of linked cases. A lead IO will be allocated to the linked complaints and cases to assess their admissibility in the usual way. If they aren’t admissible, draft letters to this effect will be prepared by the lead IO for the Commissioner’s approval. If the complaints meet the criteria for admissibility, then a lead investigator will be allocated to oversee the investigation of the super-complaint. This will usually be either the SIO or HIO.

433. The initial role of the lead investigator is to design an investigation plan to handle the super-complaint. The plan will set out not only what needs to be investigated but also the likely resources needed to complete each stage of the investigation and the anticipated timescales for doing so. Some of the resources will be needed to complete

administrative tasks and others to complete investigatory work and the plan will identify the level at which the work is to be completed. The plan will be agreed with the Commissioner. Once the plan has been agreed, the Commissioner will consult with the lead investigator to allocate aspects of all the work needed to complete the investigation to members of the investigatory team, to ensure the work is evenly distributed and the investigation can be conducted timeously.

434. The investigation should thereafter proceed in accordance with the other procedures set out in this Manual. The lead investigator will be responsible for ensuring that draft correspondence templates, decision letters and reports for each complaint type are agreed by the Commissioner as the investigation proceeds

## **I. OTHER COMMUNICATIONS**

435. In addition to communications relating to complaints and investigations, the ESC also receives a variety of other communications. This section outlines how each type of communication will be dealt with.

### **I.1 Press enquiries**

436. The ESC occasionally receives press enquiries relating to a specific Complaint, complainer or respondent. The internal process to handle press enquiries is for the ISO / SISO or the CSO to:

- a. save the press enquiry into the relevant internal shared drive folder;
- b. indicate on CMS that a press enquiry has been received relating to that particular Complaint under the case file reference number.

437. We appreciate that each enquiry turns on its own circumstances. However, the most frequent media query tends to be whether a Complaint has been received relating to a respondent. However, the ESC's office may not be able to provide comment generally on whether a complaint has been made or received, in line with statutory provisions under which the ESC's office operates to conduct investigations confidentially.

### **I.2 Freedom of Information Requests (FOI) and Subject Access Requests (SAR)**

438. A FOI request is a request for information pursuant to the Freedom of Information (Scotland) Act 2002. Meanwhile, a SAR is a request for personal data that the ESC office may hold about you. If IOs receive a FOI request or SAR, they must send the FOI request or SAR to the Corporate Services Team (**CST**) as soon as possible for their further handling. The CST may further require assistance from the handling IO on a SAR or FOI request relating to a Complaint, for instance, in confirming that all the

materials involved in a Case file have been gathered in response to the SAR or FOI request.

439. SAR or FOI requests are very time-sensitive. When the ESC receives a FOI request or SAR, the time period in which we have to provide a response starts to run from the moment the request reaches our inbox, not when we read it. It is therefore important for ESC staff to include a message in their out of office message directing people to the general office inbox for FOI requests/SARs.

### I.3 Deciding whether a communication is Post-Decision Correspondence (PDC) or Service Complaint About Us (CAU)

440. The ESC may receive communications after a Case file has been closed, known as 'Post-Decision Correspondence' (PDC). Occasionally, the PDC may contain a service complaint about how a Case file has been handled, known as a 'Complaint About Us' (CAU). It may also be possible for PDC to contain a FOI request or SAR. If so, the FOI request or SAR should be referred to the CST as soon as practicable for their further handling.
441. At times, PDC may set out an enquiry or concern, but these may not necessarily be a CAU. Deciding whether PDC contains a CAU can be challenging. Guidelines to help decide this are set out at Appendix 2 of Part 2 of the [Complaint Handling Procedure](#) (CHP). Examples of issues that do not qualify as a CAU and that are not appropriate to be handled using the CHP are set out below (in relation to Standards):
- a. dissatisfaction with any decisions of the Commissioner about whether, when or how to proceed with an investigation (as this is a quasi-judicial matter);
  - b. dissatisfaction with any conclusions of the Commissioner following an investigation, as this is a quasi-judicial matter (and would also be prejudicial to the respondent);
  - c. a request for a review of the Commissioner's/IO's work or decisions during assessment and /investigation, as this is a quasi-judicial matter;
  - d. dissatisfaction with a matter related to an investigation that would require production of legally confidential information (section 12(2) of the 2000 Act), as this is a quasi-judicial matter;
  - e. dissatisfaction about a typographical error (as this does not equate to maladministration).
442. In relation to Appointments, examples of issues that do not qualify as CAU and that are not appropriate to be handled using the CHP include a decision by the Commissioner on the outcome of a complaints investigation, unless new evidence is provided that has not been considered (as this is a statutory function of the Commissioner) or the Commissioner's interpretation of the Code of Practice, as this is also a statutory function of the Commissioner.

### I.4 Handling PDC

443. Where PDC is received by the ESC, the PDC should be named in accordance with the Naming Convention and then saved into the relevant Case file on CMS. Where appropriate, the handling IO should be notified that PDC has been received for their particular Case file, if the PDC was sent only to [investigations@ethicalstandards.org.uk](mailto:investigations@ethicalstandards.org.uk) or [info@ethicalstandards.org.uk](mailto:info@ethicalstandards.org.uk).
444. PDC must always be handled politely and in a timely fashion. PDC varies greatly in terms of form and content. As such, it is not possible to cover how to respond to every type of PDC received. Generally, all staff at ESC should strive to respond to the content of PDC as honestly and transparently as possible.
445. Responses to PDC should contain reference to and a copy of the Post Decision Factsheet (Appendix 21 – Post Decision Factsheet).
446. All PDC should be saved in the appropriate case file on CMS.

## I.5 Handling CAU

447. The process of handling CAU is set out in the [CHP](#). All staff across the ESC must cover this procedure as part of their induction and must be given refresher training as required, to ensure they are confident in identifying complaints, empowered to resolve simple complaints on the spot, and familiar with how to apply this procedure (including recording complaints). Generally, the process is as follows:
- A. Stage 1 – Frontline response:** for issues that are straightforward and simple, requiring little or no investigation, an 'on-the-spot' apology, explanation, or action to put the matter right will be issued. At this stage, the CAU should be resolved or a response provided in five working days or less (unless there are exceptional circumstances). The response should be issued directly using the most appropriate method (telephone, MS Teams, email or face-to-face). We will tell the complainer how to escalate their complaint to stage 2.
- B. Stage 2 – Investigation:** where the complainer is not satisfied with the frontline response, or refuses to engage at stage 1, or where the complaint is complex, serious or 'high-risk', the Complaint is to be acknowledged within three working days. We will then contact the complainer to clarify the points of the CAU and outcome sought (where these are already clear, we will confirm these in the acknowledgement). The CAU should be resolved or a definitive response provided within 20 working days following a thorough investigation of the points raised.
- C. Independent external review (SPSO or other):** where the complainer is not satisfied with the Stage 2 response from the Commissioner, the complainer is entitled to pass the CAU to the Scottish Public Services Ombudsman (**SPSO**) to assess whether there is evidence of maladministration not identified by the Commissioner.
448. All CAUs are to be recorded in the office CAU log available internally.

## I.6 Unacceptable Behaviour Policy (UBP)

449. The ESC has a [UBP](#). Where any person or organisation dealing with the ESC's staff does so in a manner that falls within the definition of unacceptable behaviour under the UBP, a staff member may invoke the UBP and inform that person or organisation of this decision together with reasons for why this was done. That person or organisation will have a right of appeal, and a review will be conducted on any decision to restrict contact with ESC staff based on that person or organisation's response. This will allow that person or organisation to demonstrate a more reasonable approach at a later time.

## **J. OFFICE PROCESSES**

450. All documents saved into the CMS will follow the Naming Convention (Appendix 1b – Naming Convention).

451. The Standards Team consists of the SIO, HIO, the IOs, SISO and the ISO. The CSO provides leave cover for the ISO or SISO and may, at times, also join the Standards Team's meetings. The Commissioner may, at times, join the Standards Team's meetings.

### **J.1 Standards Team meetings and notes**

452. The Standards Team meets every Tuesday to discuss workload, casework, templates, processes, team strategy and other related matters. The meeting time and dates may shift in accordance with work capacity and annual leave arrangements.

453. The meetings may be conducted in person or remotely to account for flexible working arrangements. The meetings are a space to discuss case assessments and investigations, giving the opportunity to raise any issues encountered during work so that the team can support each other to share knowledge, experience, and ideas for resolving an issue. Team members can also share an issue that took place another time and explain how it was resolved, the outcome, and whether that resolution worked well, and why or why not. It is a space to seek support and to share learning, in accordance with the ESC's commitment to supporting staff and building resilience.

454. A record of the issues discussed at each meeting, including an update on case progress will be saved to the shared internal drive (see below) for the team's ease of reference at any time. The contents of the information saved will reflect what was discussed by the team and, as it contains information relating to investigations, must not be shared externally.

### **J.2 Standards Team weekly updates to the Commissioner**

455. Over the course of the week, Complaint assessments, case investigations and draft Reports may be completed, ready for the Commissioner's consideration and approval.

456. IOs will send to the ISO / SISO any completed assessments together with the Complaint forms, attendant draft correspondence, and draft or final Reports. The ISO / SISO will save these into a file on the shared drive and compile an email (sent weekly to the Commissioner) containing links to these documents, for the Commissioner's consideration and approval.

457. It is normal for correspondence to be issued by the IO indicated in the signature box. As the Commissioner is the appointed office holder, the decisions contained within correspondence are, as a matter of course, approved by the Commissioner. However, all ESC staff are committed to direct communications with any stakeholders, and as

such should be the primary point of contact with any queries related to a case. General enquiries should be directed at [investigations@ethicalstandards.co.uk](mailto:investigations@ethicalstandards.co.uk).

### J.3 Standards team process of issuing communications

458. The IOs are the first point of contact for all parties to a Complaint. As such, IOs are expected to communicate with all parties directly (whether in written or verbal communication). At times, the ISO / SISO may be asked to issue correspondence on behalf of the IO particularly where there is lack of capacity in the office to handle workload.

### J.4 Operating the CMS

459. All documentation and material relevant to a Case file must be saved to CMS using file names consistent with the Naming Convention. At times, the ISO / SISO may be asked to save material to CMS on the IO's behalf. All files must be kept as up to date as possible.

460. Training and refreshers on operating CMS will be periodically run internally so that the Standards Team can stay up to date with developments.

### J.5 SharePoint

461. The Standards Team has a shared Standards drive in ESC's SharePoint platform. This is accessible by staff members only. This contains templates for the office's use, copies of hearing rules, Codes and so forth. There is also a Standards Team Folder that is used to save the Standards Team's meeting notes and action plan, which can be accessed by the team at any time.

## K. CONCLUDING REMARKS

462. This Manual is intended for internal use when handling Complaints, assessments and investigations relating to the Commissioner and the ESC's various statutory functions. Some processes and policies have been updated from the 2018 Investigations Guidelines (not published) to reflect the current processes and policies of the ESC. Likewise, in future, it is possible for the processes and policies set out in this Manual to change in accordance with the scope of the Commissioner's statutory remit under applicable legislation.
463. This Manual will be reviewed on a quarterly basis to reflect feedback, ensure it remains up to date and reflects the Commissioner and the ESC's current processes and policies.

Version	Description	Date	Author
1.0	First draft	31/03/2023	Senior Investigating Officer
1.2	Revised to update process on complaints received after 3 April	17/08/2023	Senior Investigating Officer
1.3	Revised to clarify approach to whistleblowing complaints	21/12/2023	Senior Investigating Officer
1.4	Updates to include internal checklists and clarify scheme of delegation processes	Finalised 18/04/2024	Senior Investigating Officer
1.5	Updates which include recording of group complaints; extension of a complaint for failure to cooperate with investigation; clarify what witnesses can expect	Finalised 25/09/2024	Senior Investigating Officer
2.0	Revised Manual	11-04-2025	SIO and HIO