

# Ethical Standards Commissioner

## INVESTIGATIONS MANUAL

### Complaint Handling Processes and Procedures

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

March 2023

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## A. INTRODUCTION

1. As set out in our revised Strategic Plan for 2021-2024, the purpose of the office of the Ethical Standards Commissioner is to conduct, without fear or favour, investigations into the ethical conduct of individuals in public life in Scotland and to report honestly and transparently on our findings. We will conduct all of our activities in an ethical way, characterised by effective stewardship of public money, accountability, honesty, integrity, propriety, fairness and transparency. We will operate an effective complaints system that delivers successful and trusted outcomes, and provide assurance to the public and our stakeholders that our objectives are being met in accordance with our purpose and values. Our values matter to us. We have also undertaken to treat each individual and organisation that comes into contact with us with empathy, kindness and respect, recognising that their trust in us must be earned. We will also ensure that our commitment to equality, diversity and inclusion informs all of our work
2. This Investigations Manual has been created to codify our investigations processes across all aspects of the office's work. This includes the work of the Standards team, which investigates conduct complaints against local authority elected members, board members of public bodies, lobbyists and Members of the Scottish Parliament, and the Public Appointments team, which investigates complaints relating to public appointments and which examines the appointments practices of the Scottish Ministers.
3. This Investigations 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) and the Society of Local Authority Chief Executives (SOLACE), and members of the public via public consultation which ended on 28 November 2022. This Manual is published on our website in line with our commitment to accountability, honesty and transparency. This Manual will be reviewed and updated regularly to ensure it remains a true reflection of our office's processes and takes account of any changes from applicable Code and guidance revisions and legislative amendments.
4. Any instructions and template documents included in this Manual are intended as guidelines for staff only, given the huge variation in circumstances that every investigation presents. Whilst 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 and divergence from them to suit the circumstances in a given case will sometimes be in order. 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.

## A.1 Legal Powers

5. The statutory functions of the Ethical Standards Commissioner (“the ESC”) are set out in a document available from our [website](#). One of the core functions of the Commissioner is to investigate complaints about the conduct of MSPs, local authority councillors, board members of public bodies (including conduct comprising of bullying, harassment and sexual harassment) and lobbyists. The Commissioner may also conduct investigations into allegations of breaches of the Code of Practice for Ministerial Appointments to Public Bodies in Scotland as well as more generally examining the appointments practices of the Scottish Ministers. The Commissioner’s functions in relation to conduct are set out in various pieces of legislation which will be further 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**”);
  - f. the Scottish Parliamentary Standards (Sexual Harassment and Complaints Process) Act 2021 (the “**2021 Act**”).
6. 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.

## A.2 The Applicable Codes

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

7. The 2000 Act provides for the introduction of updated codes of conduct for local authority councillors and members of relevant public bodies.
8. The current version of the code of conduct for local authority councillors (“**Councillors**”) is the Councillors’ Code of Conduct 2021 (the “**Councillors’ Code**”), which 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 [here](#).

9. The code of conduct relevant to board members of public bodies ("**Members**") was the Model Code of Conduct for Members of Devolved Public Bodies 2021, (the "**Model Code**"), which 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 [here](#).

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

10. The 2002 Act provides that Members of Scottish Parliament (**MSPs**) are required to abide by what the 2002 Act describes as the "**relevant provisions**"<sup>1</sup>. These include the following (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;
  - 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 the power to issue Directions to the Commissioner, particularly as to the way in which complaints are to be investigated and reported on.

11. The 2021 Act is an Act of the Scottish Parliament to allow the Commissioner to investigate complaints of past sexual harassment made about members of the Parliament 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.

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<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.

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

12. 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.

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

13. 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) and to promote compliance with its provisions. The Code 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 to ensure that appointments are made on merit, after fair and open competition. The Code and the guidance on its application produced by the Commissioner have statutory force. The Commissioner is required to report to the Scottish Parliament in cases in which the Code has been breached and where that breach is material in nature.

## A.3 General Approach to Investigations

14. 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, 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 complaints received relating to Councillors, Members, MSPs, Lobbyists, or under the Code of Practice.
15. However, the Commissioner may be directed by the Standards Commission for Scotland (the “Standards Commission”, the “Commission” or “SCS”) (2000 Act, section 10), except as to how any investigation is carried out. 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 of course to the requirements of reasonableness in terms of administrative law. As at date of writing, the Standards Commission for Scotland has issued 3 Directions to the Commissioner in respect of complaints about councillors and members of devolved public bodies:
  - A. On 1 July 2020, the Standards Commission issued a Direction directing that the Commissioner submit interim reports to the Commission and update the parties

where an investigation takes more than a three-month period (the “Progress Direction”). The Progress Direction was renewed on 27 September 2022 and expires on 26 September 2024.

B. On 12 November 2020, the Standards Commission issued a further 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 (the “Outcome Direction”). The Outcome Direction was renewed for a period of 3 months on 8 November 2022, and subsequently renewed on 1 February 2023 and expires on 31 January 2025.

C. On 1 March 2021, the Standards Commission issued a further Direction directing the Commissioner carry out an investigation into every complaint about a Councillor and Member save in specific circumstances set out in the Direction (the “Eligibility Direction”). The Eligibility Direction was renewed on 27 February 2023 and expires on 26 August 2023.

16. 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 will request all parties to respect it. As of 7 December 2021, all parties to a complaint that has been 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 73 of the [Councillors’ Code Guidance](#) and paragraph 76 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 the Appendices to this Manual.
17. 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 (the “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.
18. When conducting investigations, the Commissioner is concerned to achieve an appropriate balance between speed and thoroughness. Timescales are important to anyone involved in making or answering a complaint. All investigations are therefore subject to targets for completion. However, the Commissioner is not prepared to compromise the outcome on the basis of shortcuts which involve making assumptions or which 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 through and in writing up their conclusion. If in doubt, reference should be made to the Senior Investigating Officer (“SIO”) or to the Commissioner.

19. The Commissioner places a very high value on impartiality, and on dealing sensitively with those involved in the investigation of complaints. Experience has shown that even those who appear confident, or confident, may still find the process stressful, particularly where a public hearing is involved.
20. As such, all staff are required to work in accordance with the Commissioner’s strategic objective – the operation of an effective complaints handling system that delivers successful and trusted outcomes. Their work will also be conducted in line with the office’s values to investigate, without fear or favour, the complaints received. Staff are also required to communicate with kindness and empathy. To ensure that 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

21. This Manual outlines the steps which the Commissioner, their team or any appointed staff will normally take in assessing, investigating, and reporting on a complaint and the legislative and policy context for so doing.
22. This Manual is intended for internal use only, is supplementary to, and should be read in conjunction with, other official (and publicly available) documents referred to within this document. However, as set out above, it is shared publicly in line with our commitment to accountability, honesty and transparency.

## B. DEFINITIONS AND ACRONYMS

23. In this Manual, the following terms and definitions apply:

<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</b>	The ESC's public appointments team consisting of the Public Appointments Manager and Public Appointments Officer
<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>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 Councillor’s Code or Model Code (which may be in the <a href="#">Complaint Form</a> or otherwise 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>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, comprising of the Head of Corporate Services, Business Officer and Corporate Services Officers
<b>CSO</b>	The ESC’s Corporate Services Officer
<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 Standards Commission or his or her staff as appropriate.
<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 Commissioner’s report
<b>HIO</b>	Hearings & Investigations Officer of the Commissioner’s office
<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 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</b>	The officer, often referred to as the MO, designated by the Council in terms of section 5 of the <a href="#">Local Government and Housing Act 1989</a>
<b>PHM</b>	Pre-Hearing Meeting held by the Standards Commission
<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>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 Standards Commission 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 Standards Commission 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 Standards Commission 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>Standards or investigations team</b>	The ESC's Complaint handling team which includes the SIO, HIO, IOs, SISO and ISO
<b>Standards Commission, the Commission, or SCS</b>	The Standards Commission for Scotland.
<b>Standards Officer</b>	An officer in a 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.

## C. COUNCILLOR AND MEMBERS COMPLAINTS

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

24. The Commissioner and their team can look into a complaint that someone in public office has not behaved in accordance with the provisions of the Councillors' Code or Model Code (relating specifically to Councillors and Members). More information is available from our website [here](#).
25. The Commissioner and their team will not be able to 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.). 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 Body's board meetings, rate of response to communications or political views. Where a complaint is made to the ESC relating to these issues, the ESC staff will try to be of assistance, where possible, by signposting the appropriate office or process where a complaint can be made. This will be indicated in any complaint closure letter issued to the Complainer.
26. However, this is different from a situation where a Complainer is unhappy with the conduct of a Councillor or Member, or their decision, because the Complainer feels that a Councillor or Member has conducted themselves inappropriately pursuant to the applicable Code. Complaints such as these will be considered admissible for investigation if they match all of 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;
  - g. the conduct or course of conduct complained of is, on its face, a breach of an applicable provision of the relevant Code.
27. If any one of the admissibility criteria is not met, it is likely that the Complaint will not progress to investigation. Any 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). For complaints received after 3 April 2023, a copy of this letter will also be sent to the Respondent with the Complainer's contact details redacted.
28. Throughout this Manual and in the monitoring of data, the terms "case" and "complaint" are used. The following provides more detailed information:

**Complaint:** When a Complaint is made against more than 1 Councillor or Member (for example 3 Councillors), the number of Complaints will reflect the number of Councillors or Members complained of (that would be 3 complaints), as there are potentially three separate outcomes.

## Examples

- 1 Complaint with 1 signature from 1 Complainer against 1 Councillor = 1 Complaint
- 1 Complaint with 17 signatures from 17 Complainers against 1 Councillor = 17 Complaints
- 1 Complaint with 1 signature from 1 Complainer against 20 Councillors = 20 Complaints
- 1 Complaint with 11 signatures from 11 Complainers against 25 Councillors = 275 Complaints
- 15 Complaints with 1 signature from 1 Complainer each against 1 Councillor = 15 Complaints

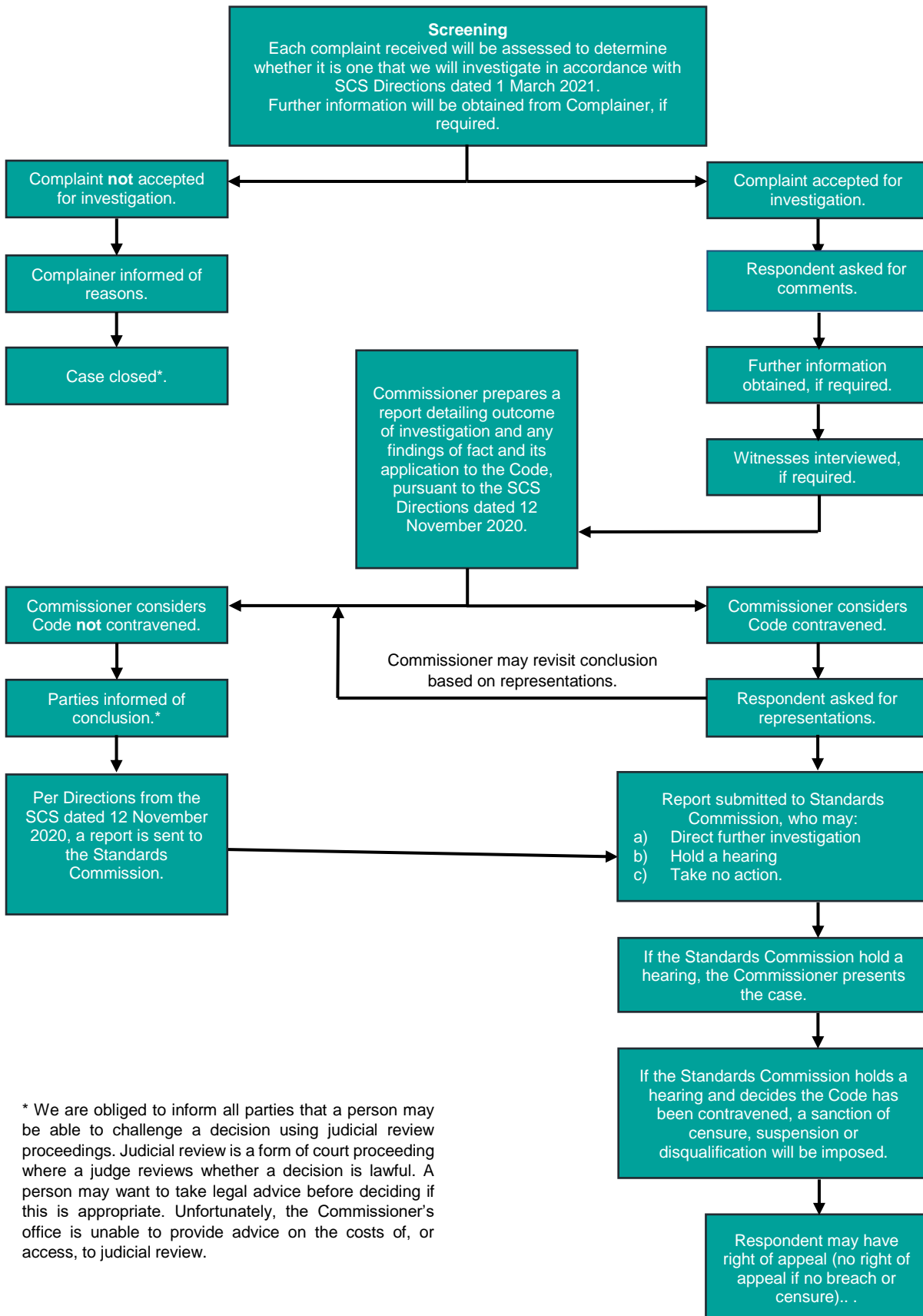
**Case:** A case relates to a number of Complaints which are being considered or investigated (as applicable) together as the subject matters of the complaints are the same or related.

## Examples

- 1 Complaint with 1 signature from 1 Complainer against 1 Councillor = 1 case
- 1 Complaint with 17 signatures from 17 Complainers against 1 Councillor = 1 case
- 1 Complaint with 1 signature from 1 Complainer against 20 Councillors = 1 case
- 1 Complaint with 11 signatures from 11 Complainers against 25 Councillors = 1 case
- 15 Complaints with 15 signatures from 15 Complainers against 1 Councillor and about the same matter (and considered / investigated together) = 1 case
- 4 Complaints with 4 signatures from 4 Complainers all against same 16 councillors and about the same matter (and considered / investigated together) = 1 case

## 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.

29. Complaints vary greatly. They may contain an allegation against multiple Respondents, or allegations covering a course of conduct, or allegations of a breach of more than one part of the relevant Code (to name a few variations). IOs will work to follow the contents of the Complaint form as closely as possible during initial assessment and investigations. It is recognised this may not always be possible and summarisation of a Complaint or its separation into constituent parts may be required. Where a Complaint is set out into constituent parts, those parts will be referred to as 'issues' of Complaint. The following is a general approach for how IOs will record Complaints for the purposes of assessment or investigation:
- a. A recorded Complaint should only cover the factual elements of the alleged misconduct, such as the date and time the alleged misconduct occurred and the alleged misconduct itself;
  - b. A recorded Complaint covering one incident or event should not be separated into separate issues i.e. an email sent at the same date and time should not be separated into its constituent parts;
  - c. A recorded Complaint covering more than one incident or event on separate dates and times should be separated into distinct issues for ease of understanding and assessment.
  - d. The background to an alleged incident and/or the alleged impact or consequences of the conduct will be considered as part of the investigation, but may not be outlined in the recorded complaint itself (which focuses as closely as possible to factual elements).

The ESC tries to allow the Complainer an opportunity to provide views on whether the recorded Complaint, as set out, 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).

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

30. When a Complaint is received by the ESC, regardless of whether it is in a Complaint Form submitted via the website or in any other written form submitted in any other manner (e.g. hard copy via regular post), the Complaint will be recorded and saved into the internal Case Management System (**CMS**) in the process set out in in the [Complaint Handling Guide \(v 2.0\)](#) , which is a procedural guidance document for use by the ISO / SISO.
31. All documents saved into the CMS will follow the Naming Convention (Appendix 1b – Naming Convention).
32. At times, it can be difficult to distinguish between an individual making an enquiry about complaining to the ESC or an individual who is making a Complaint. If this occurs, the usual practice would be to confirm with the individual whether 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.

## C.3.a Whistleblower complaints

33. 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. 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 Public Interest Disclosure Act 1998. Confirming that a Complainer is complaining as a potential whistleblower from an early stage is important so that the complainer’s identity is given appropriate protection. As such, where the Complainer has indicated they are making a Complaint as a whistleblower, the ESC will issue correspondence based on the appropriate Template to confirm with the Complainer whether they meet the conditions which engage whistleblowing protection. This Template correspondence is set out in (Appendix 3a – Template Correspondence (Whistleblowing)).
34. Where a Complainer is not able to provide the evidence which supports their whistleblower status, the ESC will inform the Complainer that whistleblower status cannot be evidenced and that, as such, the Complaint cannot proceed as a whistleblowing Complaint. The ESC will confirm with the Complainer whether, despite this, the Complainer wishes to proceed with the Complaint, which will be handled according to the usual process set out in this Manual. The most significant change for the Complainer in these circumstances is that their name will be shared with the Respondent. 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).

## C.3.b Anonymous complaints

35. An anonymous Complaint is one where a Complainer is not named or wishes to remain unnamed. These will be considered, in the first instance, by the Commissioner. The 2000 Act is clear that investigations into complaints should, so far as possible, be undertaken in response to allegations of misconduct which are made in writing and signed by the Complainer. At times, 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 request 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.

36. 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. Complainers may refer to the Commissioner's Guidance on Requests for Anonymity (which will be published in the 2023/2024 financial year). 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 sufficiently substantiated. In these circumstances, the Commissioner will take forward the Complaint as the Complainer.

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

37. A Complainer should normally make a Complaint about an event or behaviour within 12 months of the event or behaviour occurring. Complaints that are outwith time are an exception set out in the Eligibility Direction and are not directed for investigation.
38. However, the Assessment Form (see Appendix 4 – Complaint Assessment Form) allows for consideration of a Complaint which is out of time where there are circumstances that make it appropriate to do so, such as overriding public interest or the Complainer was reasonably unaware of the conduct before the time limit expired. The Commissioner may decide to proceed with a Complaint that is out of time if there is an overriding public interest or other justifiable circumstances.
39. Where a Complaint has been submitted out of the usual 12 month period and there are no circumstances or overriding public interest to justify an exception to consider the Complaint, the ESC will issue Template correspondence to the Complainer explaining that the Complaint cannot be accepted (Appendix 5a – Template Correspondence (Out of Time)).

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

40. A Complaint may be received relating to neither a Councillor, a Member, nor any other person under the Commissioner's statutory remit. These may be Council officers, Community Councillors, a staff member of the Body who is not on the board, and so forth. When this type of correspondence is received, the process is to record the correspondence as an enquiry and issue Template correspondence to the Enquirer explaining why we are unable to investigate the enquirer's concerns. If we are aware of an alternative body that is able to investigate complaints of this nature, we will signpost this to the enquirer.

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

41. A Complaint may be received 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 attend the number of requisite Council Committee meetings or Board meetings, rather than an express provision in the applicable Code. When this type of Complaint is received, the process is to record the Complaint into the CMS, as set out above, and Template correspondence will be issued to the Complainer explaining this.
42. A Complaint may also be received relating only to section 2 of the Councillors' Code (which sets out the key principles) or the equivalent section of the Model Code or applicable Code governing a Body. Both the Councillors' Code and the Model Code make it clear that a breach of key principles is not, in itself, a breach of the Code. As such, an allegation of a breach of key principles will not normally be accepted for investigation (unless a substantive part of the Code has been, on its face, breached). When this type of complaint is received, the process is to record the Complaint into the CMS, as set out above, and Template correspondence will be issued to the Complainer explaining this.

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

43. In some cases, Complaints are initiated by the potential Respondent; these are treated as self-referrals or self-referred Complaints. They will proceed in much the same way as any other Complaint, except that the Complainer is also the Respondent. The Council or Body will be notified in the usual way. It may be that the Councillor or Member will already have notified the relevant Monitoring or Standards Officer.

### C.4 Assigning an Investigating Officer to a Case File on CMS

44. The Commissioner trusts that IOs are best placed to regulate their own workload and capacity. As such, IOs are encouraged to assign themselves to a Case file on CMS as and when they are ready to accommodate the additional work, bearing in mind the expectations as to timescales set out in section C13 of this Manual. The method of assigning an IO to a Case on CMS is set out in the [Complaint Handling Guide \(v 2.0\)](#).
45. The IOs are encouraged to take on Cases in a chronological order. For instance, a Case covering a Complaint(s) that is(are) received earlier in time should be assigned so that progress can be made on the Case before another where the Complaint(s) are received later in time. However, there are two exceptions to this where:
  - a. The underlying Complaint in a Case does not match the admissibility criteria for investigation, and as such is closed at the admissibility stage. The Commissioner is mindful of having Complainers wait for an assessment where their Complaint is clearly out of time, not about a Councillor / Member, not within the remit of the applicable Codes, or otherwise does not meet with one of the admissibility criteria. As such, these Complaints may be dealt with sooner given

the assessment process would be straightforward and it would be disappointing for a Complainer to wait for an extended period of time only to be informed their Complaint is not admissible for one or other these reasons. A triage system is in place for the purpose of ensuring that such cases are dealt with timeously.

- b. The underlying Complaint in a Case is very serious such that it would be appropriate to consider it in advance of other Cases (whether in any backlog queue or not). This is rare, and only occurs in circumstances where 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 includes:
- Complaint covers bullying/harassment (including sexual harassment)
  - 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 withdrawal of complaint if not dealt with sooner.
46. 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. Cases will not normally be considered by an IO if that IO:
- Has been employed by the Council or Body of which the Respondent is or was a member;
  - Is a resident in the Council area of the Respondent and could be perceived to have an interest in the outcome of the assessment or investigation;
  - If the information in the Register of Interests maintained by the Commissioner discloses information which could be perceived to represent a conflict of interest;
  - If the IO 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.
47. IOs should notify the Commissioner 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.
48. 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 team member will make a note of the interest, recording the reasons for why it is unlikely that the team member 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 team member.

## C.5 Assessment process

49. The IO will undertake an initial assessment of Complaint material. The assessment will be recorded in the Template Complaint Assessment Form (Appendix 4 – Complaint Assessment Form). At the assessment stage in Complaints relating to Councillors and Members, only the Complainer (or, where appropriate, the nominated representative of the Complainer) will be contacted for further information to clarify or better understand the Complaint. The IO may also contact the relevant Council or Body so that any audio/video recording of a public meeting can be obtained and reviewed. It is likely that desktop research from publicly available resources may also be used. No other parties will be contacted at the assessment stage. This is to avoid any misunderstanding that an investigation has commenced without the Respondent being made aware. For the avoidance of doubt, the assessment process is in no way a pre-investigation or investigation into a complaint.
50. In circumstances where the ESC is handling a Complaints backlog, where Complaints are not able to be allocated or assessed within target timeframes, the IOs may be allocated cases by the SISO, ISO or a 'duty IO' in order to preserve as much readily available evidence as possible. This aims to prevent loss through passage of time as the team works through the backlog. This type of evidence usually consists of webcast meetings or their video/audio recordings, social media posts and online articles.
51. It is the responsibility of IOs:
  - a. to assess the Complaint material at this stage and fill in the Complaint Assessment Form;
  - b. to request further information from the Complainer (or the Complainer's nominated representative) and conduct desktop searches of publicly available sources for any supporting information required to clarify or better understand the Complaint;
  - c. to form a view as to whether the Complaint should be dismissed or accepted for investigation and provide reasons supporting their view; IOs must comply with the Directions issued by the Standards Commission, as reflected in the Complaint Assessment Form, in reaching that view;
  - d. to draft a Complaint closure letter or acceptance for investigation letter, as appropriate for the outcome of the assessment;
  - 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 SISO or ISO is unable to provide assistance for redaction, the IO will redact the Complaint material as required;
  - g. to refer to the Redaction Guidance (see 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 SIO, HIO or the Commissioner if a document or other media contains sensitive personal data, prior to any decision being taken regarding its release.

52. If IOs 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 which 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).

## C.6 Inadmissibility of a Complaint and file closure

53. Upon assessment using the Complaint Assessment Form, a Complaint may not be accepted for investigation (i.e. it is inadmissible on the basis that the Complaint does not match one of the admissibility criteria).
54. Where it appears that a Complaint is recommended to be inadmissible, the Complaint Assessment Form should be completed and a draft closure or inadmissibility letter should be prepared. Both documents, together with a copy of the Complaint, will be sent to the SIO or HIO for review. The SIO or HIO may discuss the matter with the IO and/or revert with comments which the IO can incorporate into the Complaint Assessment Form and/or the letter. When this is complete, the IO will send a copy of the Complaint, the Complaint Assessment Form, and the draft closure or inadmissibility letter to the ISO / SISO. In straight forward cases, it may not be necessary to send the draft documents to the SIO or HIO for review and the IO may, at their own discretion, have the option of sending the documents to the ISO / SISO directly.
55. The ISO / SISO will gather all the Complaints, the corresponding Complaint 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 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.
56. The Commissioner may have comments or queries in relation to each Complaint Assessment Form or draft letter, which may be discussed with the IO, HIO and/or SIO. The Commissioner's comments would be incorporated into the Complaint Assessment Form or draft letter as appropriate to ensure that there is an audit trail for decision-making. The finalised version of the closure or dismissal letter will be sent to the Complainer. The Case file will then be closed on CMS.
57. There may be instances where the Respondent is aware of a Complaint when that Complaint is still in the assessment stage (i.e. it is not accepted for investigation and as such no parties, other than the Complainer, would normally be aware of the Complaint). This may happen if the Complainer directly informs the Respondent of the Complaint made against the Respondent. 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 in the assessment stage. When a Complaint known to the Respondent has been assessed and dismissed, the Respondent will also be informed of the dismissal as a matter of courtesy. 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. In line with this approach, all Councillors and Members will be notified of a complaint against them in cases in which the complaint is ultimately dismissed. This will be done by sending a copy of the Complainer's dismissal letter to the Respondent, with redactions in place for data covered by data protection regulations.

58. 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 IOs 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 closed with a closure or inadmissibility letter due to there not being enough available information to make an assessment.
59. However, where this occurs, a Complainer is open to make their Complaint to the ESC again, and provide the information in support of their Complaint. This will be considered a new Complaint and not a 're-opening' of the previously closed Complaint.

## C.7 Accepting a Complaint for Investigation

60. Upon assessment using the Complaint Assessment Form, a Complaint will be accepted for investigation when, on its face, the alleged conduct could amount to a breach of the applicable Code. The investigation stage 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 body of which the Respondent is a Councillor or Member.
61. 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 will be prepared for each of the following: the Complainer(s), the Respondent(s), and the Monitoring Officer (cc to the Chief Executive) or the Standards Officer. The Complaint Assessment Form and the draft letters, together with a copy of the Complaint, will be sent to the SIO or HIO for review. The SIO or HIO may discuss the

matter with the IO and/or revert with comments which the IO can incorporate into the Complaint Assessment Form and/or the letters. When this is complete, the IO will send a copy of the Complaint, the Complaint Assessment Form, and the draft acceptance 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 review and the IO may, at their own discretion, have the option of sending the documents to the ISO / SISO directly.

62. 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 or not to accept a matter for investigation.
63. The Commissioner may have comments or queries in relation to each Complaint Assessment Form or draft letter(s), which may be discussed with the IO, 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. The finalised version of the acceptance letters will be issued to the Complainer(s), the Respondent(s), the Monitoring Officer (cc the Chief Executive) or the Standards Officer, as applicable. The Case file will then be updated on CMS to reflect that the matter is now under investigation.

## C.8 Withdrawing a Complaint

64. No reference to the withdrawal of a complaint is made in the 2000 Act. 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.
65. When reaching our decision whether to accept the withdrawal request, we will take 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.
66. Requests to withdraw a Complaint should be made, or confirmed, in writing. If not already specified, the IO should:
  - a. Ascertain the reasons for withdrawal;
  - b. Obtain relevant documentary evidence if necessary;
  - c. Where an explanation is made, this will be noted (eg 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.

67. The IO 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?
68. If in doubt, the IO will discuss the request with the Commissioner (as the decision is ultimately for the Commissioner to make) and send appropriate correspondence to:
- a. Proceed with a Complaint despite the request for withdrawal – where the IO 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 IO will send correspondence to the Complainer setting out the reasons for accepting the withdrawal;
  - c. Where the Respondent and Council or Public Body have been made aware of the Complaint- the IO 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).
69. 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.
70. 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 demitted office or is not standing for re-election;

- information is received about a deterioration in the health of a Respondent or a key witness.
71. In some cases, a Complainer may wish to withdraw a Complaint where the Commissioner considers that it merits investigation in the interests of the public. The Complainer's request for withdrawal will be considered in accordance with this section C8 of the Manual, and where appropriate, will be accepted and the Complaint will be closed. 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 legitimate 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.
72. If the Commissioner decides to investigate a Complaint that has been withdrawn, 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.

73. If the withdrawal request relates to a Complaint which 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 and/or their representatives, any witnesses, the Council or Body, and the Standards Commission.
74. In all cases, the Commissioner will comply with the Directions issued by the Standards Commission in coming to a decision.

## C.9 Additional steps for Members' complaints

75. When a complaint is received about a Member of a Public Body, the IO should contact the Public Body to obtain a copy of the Model Code as adopted by that Public Body which is in place at the time of the events in question.

## C.10 Conducting the Investigation

76. 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)).
77. In an investigation, the standard of proof required to determine whether an allegation is substantiated is on the balance of probabilities. This means that, in order 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 to have occurred than not.

### C.10.a The Investigation Plan

78. 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. IOs are primarily responsible for managing the efficient and proportionate investigation of all Complaints allocated. 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 agreed targets 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 earlier decision of the Standards Commission or the Commissioner which appears to turn on similar facts and circumstances (such information will be provided on CMS);
  - f. any general domestic or European legislation applicable at the time of the incident, including the [Human Rights Act 1998](#)
  - g. any relevant guidance or dispensation issued by the Standards Commission (available [here](#)) including:
    - Guidance on the Councillors' Code
    - Guidance on the Model Code
    - Guidance on Dispensations
79. 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 with the SIO, HIO or the Commissioner where the IO is unsure of how to proceed with an investigation.
80. 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.
81. 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

82. It is a normal part of the investigations process to request further information. The Template correspondence in the Appendices of this Manual provide space and standard wording for requesting information (see Appendix 9 ). To help the IO with the investigation and requests for information, parties who have been contacted by the IO should inform the IO of any changes to their contact details (such as change of email address, home address, or contact number) as soon as practicable.
83. The information which is requested from parties can vary greatly depending on the Complaint. As standard, all Monitoring Officers or Standards Officers may be requested 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 Interest for that councillor or member.

84. Requests for information should be sent in a timely manner and allow the entity or individual providing that information ample time to respond. This is usually a two-week period from date of the ESC's request and may vary depending on the volume and nature of the material that is being requested. For instance, if there is a significant volume of information being requested, more than two weeks may be provided. In contrast, if the request is a straightforward query, the ESC may indicate a timeframe of 1 week for response. 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 in light of the Guidance on Extension of Time (Appendix 12 – Guidance on Extension of Time).
85. All parties should note that the time taken to respond to ESC requests for information will be recorded and may be reflected in a report upon concluding an investigation. 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. If no response is received despite a reasonable number of requests from the ESC or extensions of time granted by the ESC, the IO may complete consideration of the complaint and conclude the investigation without the input requested. Respondents should note that it could be open to the Commissioner to consider whether a negative inference could be drawn from any failure to provide a substantive response to the investigation.

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

86. Where information has been requested and received, the information should be saved as soon as possible into the CMS under the relevant Case reference number, under a file name that is consistent with the Naming Convention (see Appendix 1b – Naming Convention).
87. Where information is received by the SISO, ISO or CSO relating to a Complaint, they should notify the handling IO 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).

#### C.10.d Documentary evidence

88. 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.

89. 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 the CMS.
90. Documents received by post which 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, member(s) of the corporate services team attends the 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 sent to the relevant staff member. The hard copy is then stored in the office in a locked cabinet and shredded after the appropriate retention period. The ESC's Records Management Plan is available [here](#).

#### C.10.e Electronic evidence

91. Electronic evidence comprises Information and Communication Technology (ICT) resources and data, such as e-mails, screenshots (saved as a digital image file or similar) of social media posts, data on hard drives or other electronic storage devices, cell phones and other portable devices, SIM cards, digital files including photographs, audio recordings, CCTV / video footage and so forth.
92. Electronic evidence must be saved into the CMS using a file name that is consistent with the Naming Convention (as above).
93. 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 and so forth). 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

94. The scope and complexity of investigations necessarily vary on a case by case basis. A Complainer or Respondent or any other party to an investigation may wish to provide as much evidence and supporting information as possible, including witness evidence.

95. Due to the requirements on the ESC as a public body to utilise public resources proportionately and in the public interest, not all witnesses listed by a Complainer or Respondent or any other party to an investigation will necessarily be contacted. This is especially the case where multiple witnesses are provided to the IO but they all attest to the same fact without adding any relevant new information. Whilst it is helpful to corroborate the evidence where possible, corroborating the same evidence with multiple parties is not always a good use of public resources.
96. Where an IO 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 must be recorded on the case file in a file note.

## C.10.g Conducting Interviews

97. Interviews may or may not be conducted during an investigation. Again, 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 without the recourse to testimony gathered by way of interview.
98. 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.
99. Where an interview will be conducted, the interviewee must be provided with a copy of the Witness Policy (Appendix 11 – Witness Policy) and 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.
100. A request for an interview will be in writing in the form of Template correspondence (Appendix 10a – Template Correspondence (Request for Interview)).
101. 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, MS Teams, Skype or Zoom, unless there are special reasons why an interview must be conducted in person, such as in order to accommodate a request for reasonable adjustments. Where an interview will be conducted in person, the IO must inform the CST as soon as possible and liaise with the interviewee as to their preferred location and time.

102. 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 which 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).

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

- the authority 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.

104. In advance of the interview, the Respondent should already have been provided with details of the allegations and shown the supporting evidence, in anonymised 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 also has the opportunity to respond and to 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 document. The IOs must note full details of any additional potential, exculpatory information and, if necessary, seek the assistance of the Respondent or other parties. The IOs 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.

105. 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.

106. The IOs 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 the CMS.

107. The IO can conduct interviews with any parties at any time during the course of an investigation, bearing in mind the necessity to balance good use of public resources and proportionality against a fair and thorough investigation. Witnesses identified for interview should be prioritised having regard to the potential significance of the

information they possess, their availability and any logistical considerations. Individuals who would have general knowledge about the matter being examined but are more likely not involved in the alleged conduct could 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 witness or parties' availability.

108. Normally, the interview with the Respondent should 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. Investigating Officers 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.
109. 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 actually 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.
110. 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 in the matter under investigation.
111. The Respondent shall communicate to the ESC the identity of the Respondent's legal representative or other supporter in advance of the interview, so as 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.
112. 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.
113. The legal representative or other supporter cannot respond on behalf of the Respondent or otherwise intervene in the interview process in any manner.

114. 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.
115. Interviews will normally be conducted in English. If the interviewee is not fluent, they may bring an interpreter to the interview. The interpreter shall be required to respect the confidentiality of the investigation.
116. Throughout the interview process, all parties should be aware of the ESC's [Accessibility Policy](#). If there are specific needs which require reasonable adjustments, these will be made available wherever possible.

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

117. 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. Whilst 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](#).
118. 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. 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. A time period may be provided by the IO as to when the interview or witness statement should be signed and returned. The interview or witness statement will also be signed by the IO. Digital signatures will suffice. The original document will be retained by the ESC and the interviewee offered a personal copy which 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. 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).
119. The material referred to in the paragraph above will be saved to the relevant case file in the CMS.

120. All interview records or witness statements are confidential to the investigation and the ESC, in keeping with the statutory requirement to conduct all investigations, so far as possible, in a confidential manner. Interview records or witness statements will not be shared with any other party to the investigation.

121. 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 Standards Commission for Scotland. Where this happens, any witness called to give evidence at a Standards Commission 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 by way of further interview

122. The IOs 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 the CMS.

#### C.10.j Three Month Interim Reports to the Standards Commission for Scotland

123. The Progress Direction requires that the Commissioner provide an interim report to the Standards Commission providing:

- 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.

Further, the Progress Direction requires that the Commissioner 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. However, the ESC is aware that some parties may consider that three months is too long in between progress updates and can 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

124. An investigation may be considered completed upon the IO's opinion that there are no further possible lines of enquiry that can be reasonably explored in a proportionate

manner.

125. 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.
126. Under the Outcome Direction, all investigations undertaken by the Commissioner will be reported to the Standards Commission once completed. The Outcome Direction requires the ESC to report to the Standards Commission on the outcome of all investigations undertaken in respect of complaints about councillors and members of devolved public bodies, within seven days of the date on which an investigation has concluded, for the Standards Commission to make the decision on the disposal of each complaint.
127. 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 Standards Commission.

#### C.11.a Report Structure, Format and Style

128. All Reports will be in the structure, format and style prescribed in the Templates (see Appendices 14a and 14b – Template Reports). 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. To date, there are two Report Templates available:
  - Abridged Report – this is a Template appropriate for cases with one issue of complaint and where factual findings are straightforward (for example, no witness evidence required). A case which may be suitable for abridged reporting is, for instance, a complaint involving a social media post where it is not in dispute that it was posted by the respondent.
  - Full Report – this is a Template appropriate for complex cases with more than one issue of complaint and where factual findings are not straightforward (for example, multiple witnesses, weighing of evidence and assessment of credibility is required before any decision can be made on whether any facts have been established on the balance of probabilities). A case which may be suitable for this Template might, for example, involve an incident where there are no written, audio or visual records and only witness evidence of what occurred is available.

The ESC has been reviewing and updating the format of template reports, in consultation with the SCS, in the 2022/23 financial year. A revised template report that is more accessible has been used from around May 2022 onwards. As such, there will not be a distinction between the Abridged and the Full Report. However, there is scope for the Report templates to be revised so that team members can draft reports that are proportionate to the investigation and findings. If there is any doubt, IOs are welcome

to discuss with the SIO, HIO or the Commissioner as to which may be more appropriate for a case. For the purposes of this Manual, a Report refers to all the Reports described above based on Report Templates.

129. A Report should be an objective account of all the facts examined and supported by available evidence. It will normally contain:
- a. The names of the Complainer and the Respondent;
  - b. Background information;
  - c. Findings, which 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.

**All reports are referred to the Standards Commission 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 s 16 of the 2000 Act.** The Standards Commission 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

130. 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](#).

## C.11.c Report review

131. When an investigation is completed, the IO may then proceed to draft a Report covering the factual findings of the investigation and investigative outcomes. The draft Report will be sent to the SIO or HIO for initial consideration and review. It is normal for the SIO or HIO to discuss the Report with the IO. The IO may consider any suggested changes and input them into the draft Report. 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 to the ISO or SISO directly for consolidation into a weekly update for the Commissioner's review and approval.

## C.11.d Report approval

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

#### C.11.e Non Breach: Process of sending and referring a Non-Breach Report

133. Where the draft Report has taken the view 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 Non-Breach Report, and sent to the Standards Commission as an enclosure to the Template correspondence, issued in the event of a non-breach finding. Per custom and practice, the Complainer, Respondent and Monitoring Officer used to receive a summary of the non-breach finding. A copy of the correspondence sent to the Complainer, Respondent and Monitoring Officer was then sent to the Standards Commission together with the Non-Breach Report. However, this process was reviewed and changed subsequent to public consultation, which included the Standards Commission and SOLAR. All Non-Breach Reports together with any attendant appendices (with appropriate redactions per the Redaction Policy) are shared with the Complainer, Respondent and Monitoring Officer. Non-Breach Reports will always be shared with the SCS pursuant to the Outcome Direction. This new process will apply to all complaints received after 3 April 2023.

134. 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 in the course of the investigation. All parties should note that the Commissioner is not placed to provide any advice on this matter and parties may wish to seek their own independent advice. As set out above, the Non-Breach Report will be shared with all parties and with the Standards Commission. If there are any queries as to the contents of the Report or the Commissioner's reasoning or views taken in the Report, this should be handled as Post – Decision Correspondence (see section I.4 Handling PDC below).

135. The ESC understands that a Non-Breach Report may be a disappointing outcome for the Complainer. Where a Complainer receives the Non-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). Where a Complainer disagrees with the Commissioner's decision, the ESC is obliged to inform all parties that a person 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 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.

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

136. 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 Standards Commission unless that Councillor or Member has been given a copy of the proposed report and an opportunity to make representations on the alleged contravention and on the proposed report.
137. The Proposed Breach Report will be issued to the Respondent(s) and based on custom and practice, to the Monitoring Officer or Standards Officer (as applicable) for representations or further comments (see Appendices 16a – 16b). The Complainer will be provided an update, and the Standards Commission will be notified that a Proposed Breach Report has been issued for representations.
138. The ESC will usually provide a deadline by which responses or representations may be received. This is usually a date two 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 with the Report. 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.

#### C.11.g Breach: Receipt of responses from the local authority / devolved body

139. 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 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, 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.

140. 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.

141. In some circumstances, the response received from a Monitoring Officer or the Standards Officer may be such that the finding of breach cannot be supported. 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 non-breach outcome.

142. All responses received from the Monitoring Officer or the 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 Standards Commission will have every opportunity to review the entirety of any comments.

#### C.11.h Breach: Receipt of representations from the Respondent

143. 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 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.

144. Depending on the representations received from the Respondent, the Proposed Breach Report may not be significantly amended before being finalised for issue to the Standards Commission as the Report. If no representations are received after multiple reminders, the Proposed Breach Report may progress to be finalised without the representations. The attempts to obtain representations will be noted in the Report.

145. In some circumstances, the representation from the Respondent(s) may be such that the finding of breach cannot be 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 non-breach outcome.
146. 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 Standards Commission will have every opportunity to review the entirety of any representations.

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

147. The Proposed Breach Report will be finalised 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 require 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, corrected misquotes, will be highlighted to the Respondent and the Council or Body in the covering correspondence enclosing the Report.
148. The responses and representations received will require to be annexed to the Proposed Breach Report. Any reminders for responses and/or representations will also be noted in the Report.

## C.11.j Process of sending and referring the Report

149. Once the Proposed Breach Report has been updated as above, it will be sent to the SIO, HIO and the Commissioner for final consideration. The Commissioner will approve the draft and thereafter the Report, together with any attendant appendices, will be redacted in accordance with the Redaction Policy (Appendix 22 – Redaction Policy).
150. Per custom and practice, the Report would then be issued to the Respondent, the Monitoring Officer / Standards Officer and the Standards Commission 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, as a matter of custom and practice. As above with handling Non-Breach Reports, this approach was reviewed and changed in public consultation, including with the Standards Commission and SOLAR. Going forward, the Complainer will also receive a copy of the Breach Report. This new process will be in place for complaints received after 3 April 2023.

## C.12 Interim Reports

151. 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. The Standards Commission may also direct the Commissioner to submit an Interim Report.
152. If the Commissioner considers an Interim Report should be submitted, or where the Standards Commission 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 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 Standards Commission’s 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.
153. 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).
154. The Standards Commission will consider the Interim Report and make a decision pursuant to s 21 of the 2000 Act. A copy of the Standards Commission’s Interim Suspension Pending Completion of Investigation Policy is available from their website <https://www.standardscommissionscotland.org.uk/>.
155. The Commissioner may consider that an Interim Report is appropriate in the following circumstances (which are non-exhaustive):
- a. there is prima facie evidence of a breach; and
  - b. the alleged misconduct is so serious that there is on-going 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.

156. Where the Commissioner considers that an Interim Report is appropriate, that Interim Report will be prepared as soon as possible and in any event not more than two weeks after the Commissioner's decision. An Interim Report could be made either at the assessment stage or investigation stage of a Complaint, but will necessarily require more than an allegation that misconduct has taken place. The Standards Commission will be informed that an Interim Report will be referred as soon as possible after the Commissioner decides an Interim Report is appropriate.
157. The Interim Report will be shared with the Respondent by the ESC for comment prior to referral to the Standards Commission. The Complainer will be informed that an Interim Report has been referred.

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

158. The Commissioner and all ESC staff are very conscious that an efficient and timely complaint handling process is critical to trust and confidence in any ethical standards framework. 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 with measures in place (referred to elsewhere in this Manual) 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 preventable. 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 the Standards Commission, SOLAR and other stakeholders.
159. 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.
160. The ESC will aim to complete the investigation within three months of the date when the investigation began. However, this will depend on the complexity of the complaint, availability of information from, and the co-operation of, all parties involved. Overall, investigations will be completed as soon as possible consistent with a full and proper evaluation of each particular situation.
161. If it is not possible to complete the investigation within three months, the Commissioner is required by s 12(5) of the 2000 Act to advise the Standards Commission, the Council or Body, and the Respondent. In addition, the Progress Direction requires that the Commissioner provide an interim report to the Standards Commission providing:
- 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.

Further, the Progress Direction requires that the Commissioner provide written updates to the Respondent(s), Complainer(s) and the relevant Council or Body, every three months, on the progress of investigations in respect of a Complaint or Complaints about a Councillor or Member.

162. In normal circumstances, the IOs are expected to conduct complaint investigations and reporting in accordance with specific targets set out in relation to key performance indicators, as follows:

Stage	Action taken	Statutory Timescale	Office timescale	Target
Pre-assessment and Complaint assigned to an IO	<ul style="list-style-type: none"> <li>• Initial communication to Complainer upon receipt of complaint (i.e. acknowledge receipt)</li> <li>• Uploading the complaint to CMS</li> <li>• IO assigned to case reference on CMS</li> </ul>	None indicated	Within 1 - 2 weeks of being uploaded to CMS	85%
			Within 3 weeks of being uploaded to CMS	95%
			Within 4 weeks of being uploaded to CMS	100%
Complaint Assessment (Stage 1)	<ul style="list-style-type: none"> <li>• Gathering any information required from the Complainer to substantiate Complaint</li> <li>• Consider the information gathered</li> <li>• Complete the Complaint Assessment Form</li> <li>• Drafting attendant dismissal or acceptance letters, obtaining approval for the same and issuing to the Complainer (or Respondent and Monitoring Officer / Standards Officer)</li> <li>• Sending the decision letter</li> </ul>	None indicated	Within 1 - 3 months of case being assigned to an IO	50%
			Within 3 - 6 months of case being assigned to an IO	75%
			Within 6 - 9 months of case being assigned to an IO	95%
			Within 9 -12 months of case being assigned to an IO	100%

Investigation and Reporting  <b>(Stage 2)</b>	<ul style="list-style-type: none"> <li>• Conducting the investigation, including gathering evidence, contacting and interviewing witnesses, pursuing lines of enquiry</li> <li>• Drafting the report (whether Breach or No-Breach report)</li> <li>• Report is internally reviewed</li> <li>• Report is issued to the Respondent (if a Breach Report) or referred to SCS (if a No Breach Report)</li> </ul>	Statutory notice for investigation not concluded within 3 months from case being accepted for investigation (also in line with SCS Direction)	Within 1 - 3 months of case being accepted for investigation	45%
			Within 3 - 6 months of case being accepted for investigation	65%
			Within 6 - 9 months of case being accepted for investigation	85%
			Within 9 - 12 months of case being accepted for investigation	100%

163. 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 taken into account when the above KPIs and targets were set:

- responses to requests for information are not always received within the allotted period of time;
- there can be repeated requests for extensions of time to respond to ESC;
- we cannot assume normal workloads in circumstance 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.

164. 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 and others allocated to the IO;
- c. Scrutinising the list of Complaints on the 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.

165. 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 IO conducting the investigation is best placed to make a decision 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

166. In accordance with section 16(a) of the 2000 Act, the Standards Commission may direct the Commissioner to carry out further investigations on receiving a Report. Where this occurs, the Standards Commission 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 to provide an estimated timescale for how long the further investigation may take.

167. The handling IO will consider the Standards Commission's direction for further investigation and draft the response to the Standards Commission's 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 Standards Commission informs the parties to a Complaint that there is a direction for further investigation.

168. Upon the completion of the further investigation, the handling IO will prepare a written response to the Standards Commission which sets out the findings relative to each issue which required further investigation. The handling IO will follow instructions from the Standards Commission as to the parties to contact with the outcome of the further investigation (if any).

169. The Standards Commission will then make the final decision on the Complaint in accordance with s 16 of the 2000 Act.

## C.15 Post-Investigation: Standards Commission for Scotland Hearings

170. As above, all investigations result in a report which will be referred to the Standards Commission for their final disposal and decision under Section 16 of the 2000 Act and in accordance with the Outcome Direction. Section 16 of the 2000 Act gives the Standards Commission the power to hold a Hearing, require further investigation or take no action. Section 17 of the 2000 Act lets the Standards Commission decide what procedures to follow at any Hearing, known as the 'Hearing Rules' or 'Hearing Process Guide & Rules'. Members of the Standards Commission agree the content of the Hearing Rules. 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 Standards Commission 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.
171. The Hearing Process Guide and Rules are reviewed and updated on a regular basis. As such, staff will refer to the Standards Commission's current version of the Hearing Process Guide and Rules wherever possible (available at [this page](#) and periodically updated – please always ensure you are using the most updated version of the Hearing Process Guide & Rules).

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

172. Generally, within 7 days of the Standards Commission's decision to hold a Hearing, the Executive Director will write to the ESC providing notification of the Standards Commission's decision to do so. This is referred to as the 'Notification of Hearing'.
173. 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. the details of the names and contact details of any witnesses whom the ESC proposes to call;
  - b. any documents the ESC's representative intends to refer to at the Hearing;
  - c. any request for the Standards Commission 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 and
  - d. an indication of how long they will need to present the findings of the investigation and any submissions as to whether or not there has been a breach an applicable Code.
174. On receiving the Notification of Hearing from the Standards Commission, the IO must inform the SIO, HIO or the Commissioner 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 taken into account when considering the information to be provided to the Standards Commission under the Hearing Rules.

175. Custom and practice has established that a Pre-Hearing Meeting (PHM), which is normally attended by the SIO or HIO, be held. The PHM is a meeting held between the Standards Commission's Panel members, the Executive Director, the ESC (represented by the SIO or HIO) 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;
- d. Considering whether it would be appropriate to apply the Standards Commission's 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.

176. 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 which are in dispute. However, a signed and finalised version of the JSF is rarely achievable until there has been a discussion at the PHM.

177. The HIO, SIO or the Commissioner may prepare a written document containing agreed facts, with the IO's input where appropriate, and 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 will be sent to the Standards Commission at least 7 days in advance of the Hearing date.

178. Whilst 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.

179. The JSF may be prepared by the 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, input the comments into the draft JSF. Alternatively, the JSF may be prepared after the PHM when the Standards Commission's 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 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 the Respondent's authorised representative. Where possible, the JSF will be sent to the Standards Commission at least 7 days in advance of the Hearing Date.

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

180. A “Hearing Bundle” consists of all of the relevant written documentation to be provided to the Standards Commission 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).
181. 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 we recognise that redaction of private or sensitive data is a very time consuming and labour-intensive process. As such, this system has been put in place in order 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

182. The finalised and redacted Hearing Bundle will be sent to the Standards Commission for inclusion in its ‘Inventory of Productions’ or ‘IOP’, a numbered copy of which is sent by the Standards Commission to the parties.
183. Upon receipt of the numbered IOP, the ISO / SISO or IO should save it into the 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 Standards Commission. According to the Hearing Rules, all parties (including the ESC) may lodge further documents with the Standards Commission up until 7 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 and Witness Policy

184. Where the ESC has indicated to the Standards Commission that the ESC has witnesses to lead at the Hearing, the Standards Commission will contact witnesses which they intend to cite to confirm their availability at the Hearing. The ESC will confirm availability of the ESC’s witnesses, and the Respondent will be responsible for contacting their own witnesses to confirm availability. However, the ESC’s ISO / SISO should also be in touch with ESC’s witness(es) to check whether they have any queries or would like any further assistance before attending the Hearing. The ESC should also inform the witness(es) of the [ESC’s Witness Policy](#). It may also be helpful to refer to the SCS Guidance for Witnesses available [here](#).

### C.15.e Standards Commission Hearings

185. The Standards Commission will make all the arrangements for the Hearing and will issue 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 Executive Director will also give notice of the three Standards Commission members selected to form the panel at the hearing, and which of them will chair the proceedings. 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;
- in complex cases, preparing a chronology or summary of key issues;
- taking notes of submissions made and evidence heard;

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.

186. 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 that 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

187. After the Hearing, the Standards Commission will provide the ESC, the Council / Body, the Complainer(s) and the Respondent(s) with an update about the written decision after the Hearing in accordance with the Standards Commission's Hearing Rules (in its applicable version).

## C.16 Guidance on handling complaints backlogs

188. The Commissioner, the investigations team and ESC as an office recognises that, at times, it is unavoidable that a backlog of complaints could arise despite our best efforts to progress complaints timeously. This could occur due to varying reasons that are outwith the office's control, such as shortage of staff or 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.

189. 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:

- a. The number of complaints awaiting assessment is increasing rather than decreasing;
- b. These complaints have been awaiting assessment for a period of more than one month; and

- c. There is significant staff turnover or unavailability such that, despite full workloads of existing staff, there is no or very limited capacity to address the complaints awaiting assessment.

190. 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:

- i. 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 which do not require to be there due to being clearly inadmissible;
- ii. whether a complaint requires 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; and
- iii. whether it is a complaint which, on its face, matches the admissibility criteria but which does not match the criteria for advance consideration; and
- iv. 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 from passage of time whilst the complaint awaits assessment. A Council / Body may also be contacted in for transcripts or audio/video recordings.

191. For all complaints and particularly for the complaints described in category (iii) above, there are set templates for providing periodic updates (ranging from three to four weeks) to the complainer, so that they are aware of the backlog, the reasons for it, and what is being done to address it. The complainer will be informed up to what date the team is currently assessing complaints and what date the complainer's complaint was made, so the complainer can understand where their complaint is in the queue. 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.

192. 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.

193. If the backlog arose due to shortage of staff, 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. This may result in resource bids to the Scottish Parliamentary Corporate Body for approval and any attendant recruitment exercises to take place.
194. The Commissioner, the investigations team and wider ESC office understands how important it is for them, for parties and the wider public to have a timeous process in place. It can be very distressing and stressful to have complained about someone and to be complained about, and an on-going investigation or any prolonging of reaching a resolution is never desirable.
195. The impact of any complaints backlog is deeply felt. For this reason, the Commissioner, the investigations 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.

## D.MSP COMPLAINTS

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

197. 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

198. MSPs are required to abide by what the 2002 Act describes as the "relevant provisions". A "relevant provision" is defined in s 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*". 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.

199. The Commissioner and their team can look into a Complaint that a Member of the Scottish Parliament has not behaved properly in accordance with the relevant provisions for MSPs. More information is available from our website [here](#). Generally, in order for a Complaint to be able to be investigated by the ESC, the Complaint requires 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 s 12 of the 2002 Act to investigate it; and
  - it appears at first sight that, if all or part of the conduct complained about it established, it might amount to a breach of a relevant provision (see s 6(4) of 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, is made by an individual person and states that person’s name and address, the Complaint names the MSP concerned and the Complaints sets out the facts relevant to the conduct complained of.
- **Third Test** : that 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.

200. The Commissioner and their team will not be able to assist with Complaints relating to a public function which 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” in order for the Code’s provisions to apply. For instance, a MSP posting on their social media account may not be considered to be 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 staff will try to be of assistance, where possible, by signposting the appropriate office to which that complaint can be made. This will be indicated in any closure letter (see Appendices 24a – 24h - MSP Template Correspondence) issued to the Complainer.

201. The Commissioner and their team 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 which is excluded from the jurisdiction of the Commissioner 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 the 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

202. 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 s 4 of the 2002 Act, except as to whether or how any investigation is carried out.
203. The 2002 Act at section 5 (2) requires that investigations shall be conducted in private. Whilst 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 24a – 24h - MSP Template Correspondence).

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

204. 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

205. 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.
206. 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:
- whether the Complainer is / appears to be a vulnerable person;
  - any reasons given by the Complainer as to why the MSP should not be informed of the complainer's name;
  - whether informing the MSP of the Complainer's name would likely prejudice an investigation into the Complaint.
207. 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 para 3(1) and 3(2) of the Directions).

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

208. At times, a Complaint may be received which does not relate to an MSP or any other person under the Commissioner's statutory remit. When this type of correspondence is received, the process is to record it as an enquiry and issue template correspondence to the Enquirer explaining this.

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

209. 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 which 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 Template correspondence will be issued to the Complainer explaining this.

## D.4 MSP complaint handling process

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

211. The IO will handle the Complaint at both Stage One and Stage Two. Stage One of the process will be recorded in the Template MSP Stage One Form (Appendix 25 – MSP Stage One Form), which records a summary of the Complaint, steps taken by the 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.

212. 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.

213. It is the responsibility of IOs:

- a. to assess the Complaint material at this stage and fill in the Stage One Form;

- b. 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 provide assistance for 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.

214. If IOs are in any doubt as to whether personal data should be released, they should seek guidance from the HIO, SIO or the Commissioner in this regard. Similarly, if voluminous amounts of documentation are received which 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

215. 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 Third Tests as set out in the 2002 Act).

216. 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). 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.

217. All documents, 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 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.

218. 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 Complaint Assessment Forms and draft letters which 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 on whether or not to accept a matter for investigation.

219. The Commissioner may have comments or queries in relation to each MSP Complaint Assessment Form or draft letter, which may be discussed with the IO, HIO or SIO. The Commissioner's comments would be incorporated into the MSP Complaint Assessment Form or draft letter as appropriate and the finalised version of the closure or dismissal letter will be sent to the Complainer. The Case file will then be closed on CMS.

## D.6 Accepting a complaint for investigation

220. 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).

221. 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.

222. 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.

223. 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 or not to accept a matter for investigation.

224. The Commissioner may have comments or queries in relation to the MSP Stage One Form or draft letter, which may be discussed with the IO, HIO or SIO. The Commissioner's comments will be incorporated into the Stage One 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

225. Under section 11 of the 2002 Act, a Complainer may withdraw their Complaint up until the point a report is sent to the SPPAC. This withdrawal must be by notice in writing by the Complainer. If this withdrawal occurs during the assessment period 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 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 then the Commission 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

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

- a. making findings of fact in relation to whether the MSP concerned (whether or not named in the Complaint) 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.

227. Where a Complaint proceeds to Stage Two for investigation or 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 [s 8 of the 2002 Act](#) on investigations into admissible complaints.

228. 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

229. 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.

230. 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.

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

232. 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.

233. 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.

234. 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

235. 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.
236. 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

237. 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).
238. 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.
239. 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

240. 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 26 – 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.

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

242. 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.

243. Upon completing a Stage Two investigation, a Report shall be prepared pursuant to s 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 the 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.

244. The Report shall not express any view upon what sanction would be appropriate for any breach.

245. 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

246. 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 misconduct in 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 Strategic Plan.

## D.10.c Report review

247. 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 the HIO or SIO for initial consideration and review. It is normal for the HIO or SIO to discuss the Report with the IO. The IO may consider any suggested changes and input them into the draft Report.

## D.10.d Report approval

248. When the HIO / SIO and IO have no further comments on the draft Report, the draft Report will be sent to the Commissioner for 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 Non Breach: Process of issuing and sending a finalised Non Breach Report

249. 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 Non-Breach Report, and sent to the SPPAC as an enclosure to the Template

correspondence, issued in the event of a non-breach finding. The MSP will also receive a copy of the Non Breach Report.

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

250. 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.

251. Pursuant to s 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 (Appendix 27 – Template Correspondence (Proposed Breach 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.

252. 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. In so 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

253. 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.

254. 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 multiple reminders, the Proposed Breach Report may progress to be finalised without the representations. The attempts to obtain representations will be noted in the Report.

255. In some circumstances, the representation from the Respondent(s) 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 non-breach outcome.

256. Any representations from the Respondent(s) will be saved into the relevant case file on CMS. In line with s 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

257. 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 (Report- SPPAC)). A copy of the finalised Report will be sent to the MSP (Appendix 28b – Template Correspondence (Report- MSP)).

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

258. The IOs are expected to conduct Stages One and Two in accordance with the below Key Performance Indicators (KPIs) or targets for MSP complaints:

Stage	Work undertaken	Statutory timescale	Office timescale	KPI or Target
Pre-Assessment and Complaint assigned to an IO	<ul style="list-style-type: none"> <li>• Initial communication to Complainer upon receipt of complaint</li> </ul>	None indicated	Within 1 - 2 weeks from date of complaint	95%

	<ul style="list-style-type: none"> <li>(acknowledgement)</li> <li>• Uploading the complaint to CMS</li> <li>• IO assigned to case reference on CMS</li> </ul>		Within 3 - 4 weeks from date of complaint	100%
<p><b>Initial Investigation (Stage One - Straightforward complaints*)</b></p> <p>*Note: this refers to a Complaint that does not require any additional information to substantiate, does not fall within the Commissioner's remit (i.e. should be referred to the Presiding Officer or SPCB as appropriate) or otherwise does not reflect a breach of the MSP Code due to alleged conduct clearly not in the exercise of MSP duties</p>	<ul style="list-style-type: none"> <li>• Considering any information required to substantiate a complaint about one MSP, where that conduct is either already substantiated or can readily be substantiated</li> <li>• Completing the Stage One Assessment Form</li> <li>• Drafting attendant dismissal or acceptance letters, obtaining approval for the same and issuing to the Complainer, redaction and copy to the MSP</li> </ul>	2 months from date the complaint is received per s 7(11) of the 2002 Act	Within 1 - 4 weeks from date the complaint is received	65%
			Within 4 - 6 weeks from date the complaint is received	85%
			Within 8 weeks (or 2 months) from date the complaint is received	100%
<b>Initial Investigation (Stage One)</b>	<ul style="list-style-type: none"> <li>• Gathering any information required from the Complainer to substantiate</li> </ul>	2 months from date the complaint is received	Within 1 - 4 weeks from date the complaint is received	55%

	<p>Complaint about one or more MSP(s)</p> <ul style="list-style-type: none"> <li>• Consider the information gathered</li> <li>• Completing the Stage One Assessment Form</li> <li>• Drafting attendant dismissal or acceptance letters, obtaining approval for the same and issuing to the Complainer, redaction and copy to the MSP</li> </ul>	per s 7(11) of the 2002 Act	Within 4 - 6 weeks from date the complaint is received	85%
			Within 8 weeks (or 2 months) from date the complaint is received	95%
			Within 3 months from date the complaint is received	100%
Further Investigation <b>(Stage Two)</b>	<ul style="list-style-type: none"> <li>• Conducting the investigation, including contacting and interviewing witnesses pursuing lines of enquiry</li> <li>• Drafting the report (whether Breach or No-Breach report)</li> <li>• Report is internally reviewed</li> <li>• Report is issued to the Respondent if a breach report (for representations)</li> <li>• Report issued to SPPAC</li> </ul>	6 months from date of the Commissioner finding complaint to be admissible per s 5(1)(b) and s 8(3) of 2002 Act	Within 3 - 6 months of finding complaint to be admissible	85%
			Within 6 – 9 months of finding complaint to be admissible	95%
			Within 12 months of finding complaint to be admissible	100%

259. 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 taken into account when the above KPIs and targets were set:

- responses to requests for information are not always received within the allotted period of time;
- there can be repeated requests for extensions of time to respond to ESC;
- we cannot assume normal workloads without 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.

## D.12 SPPAC Hearings

260. 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.

261. 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 or not 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

262. 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) 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 <http://www.legislation.gov.uk/asp/2003/4/contents>. The procedures used for investigating complaints or conducting such examinations are set out in this section of the manual.
263. 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.
264. 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 complaining to the Scottish Government may be seen at <http://www.appointed-for-scotland.org/Complaints/> and <http://www.scotland.gov.uk/Contacts/Have-Your-Say/Making-Complaints>.
265. The Commissioner will investigate all complaints relating to appointment rounds within his remit which 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/).
266. 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 that the office has had no direct oversight of. The decision to conduct such examinations is statutorily discretionary for the Commissioner.
267. Following completion of the investigation of a complaint, the Commissioner will not enter into protracted discussion with you about the outcome of the investigation and will not reopen the investigation unless relevant new evidence comes to light.

268. 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

269. 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 A19 of the Commissioner's Code of Practice.

270. 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.

271. This part of the Manual sets out the methodology, used by the office of the Ethical Standards Commissioner, 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 public 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.

272. 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 or not 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 not 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.

273. It is always for the Commissioner to determine how the code is to be interpreted.

274. 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.

275. Depending on the nature and complexity of the complaint, the Commissioner may seek specialist advice or comment from relevant experts.

276. 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.

277. 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.

278. A final determination will be made by the Commissioner when they are satisfied that sufficient material from all relevant sources has been obtained and examined. There is no right of appeal.

279. 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.

280. A typical investigation will follow these steps:

- a. The Commissioner will write to the relevant head of directorate, chair of the Scottish Government Complaints Group and / or minister outlining her concerns regarding the appointment process and indicating that the concerns were sufficient to merit further investigation. For internal complaints, the relevant staff member or sub-contractor will be advised that they are the subject of an investigation.
- b. 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 taped and, if so, the party or parties to be interviewed will be advised that this is the case. The purpose of this is to ensure that an accurate record of the discussion is obtained.
- c. The same parties will be required to produce a copy of the audit trail relevant to their part in the appointment process or issue under examination or investigation and provide this to the Commissioner. Electronic or original versions are to be provided, for example if an e-mail formed part of the audit

trail the Commissioner will require the original e-mail to be provided to her 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.

- d. The Commissioner's team will establish a case file. This will contain all of the information gathered pertinent to the investigation or examination.
  - e. 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.
  - f. 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 tape 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.
  - g. 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 her 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 of 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.
281. 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

282. 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.

283. 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 investigations team will use the assessment form (see Appendix 29 – Assessment Form (Lobbying)).

284. 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
- 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.

285. Where a Complaint is inadmissible due to being irrelevant, the Commissioner is statutorily required to dismiss the Complaint. The handling IO should draft a dismissal letter for the Commissioner's approval, together with the Complaint and reasons for why the Complaint is considered irrelevant.

286. In order to be admissible, a Complaint that is both relevant and meets the conditions above would also require to warrant 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 in order to assess whether a Complaint is admissible or not.

287. 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 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 mentioned in section 23(3) or should be treated as if it had met all of those conditions, and
- any other matters which the Commissioner considers appropriate.

288. 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).

289. [The Lobbying \(Scotland\) Act 2016 \(Reporting Procedures\) Resolution 2017 \(legislation.gov.uk\)](#) 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.

290. 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, as soon as possible thereafter, make a report to the Parliament on the progress of the investigation. The handling IO will draft the report and send the draft to the HIO or SIO for review, prior to sending to the Commissioner for approval.

291. 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.

292. Complaints made under the 2016 Act will be progressed in accordance with the KPIs or targets set out in this Manual for Councillor and Member Complaints. The same assumptions to the KPIs or targets set out there apply.

## **G. SEXUAL HARRASSMENT COMPLAINTS**

293. 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 same process for receiving, logging, assessing and investigating Complaints containing 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.

294. However, given the very serious nature of this type of Complaint, there are special considerations which the Commissioner and the ESC staff will account for 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 survivors,
- best practice in trauma informed approaches in supporting survivors through the complaints process, and
- an understanding of the support available from Rape Crisis Scotland and the Scottish Women's Rights Centre.

295. 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 survivor, 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.

296. 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. As culture-bearers, managers and leaders are key to the success of trauma-informed systems and approaches. The Commissioner and the ESC staff are wholly committed to those principles and values.

297. The Commissioner and all ESC staff, when working with survivors 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 survivors;
- give ample time for survivors and other parties involved to make their statement or give information about the Complaint;
- help the survivor 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 whom the survivor 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 survivor and other parties on progress with the Complaint and any investigation, such as frequency and format in which the update is provided;
- keep the survivor and other parties informed about the progress on the Complaint and the investigation in a way which suits that individual best.

298. The Commissioner and all ESC staff, when working with survivors, will **always**:

- try to validate the survivors' 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.

299. The Commissioner and all ESC staff, when working with survivors, 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.

## H. HANDLING “SUPER COMPLAINTS”

300. There may be occasions on which the conduct of one or more councillors, board members or 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.
301. 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 which apply to our “super-complaint” handling only.

### Triage

302. The staff who log complaints to our CMS on a day to day basis require to be mindful of the fact that certain complaint types which we receive are likely to be repeated by other members of the public and which will, as a consequence, 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 to the 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.

303. 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 requires to be investigated but also the likely resources required to complete each stage of the investigation and the

anticipated timescales for doing so. Some of the resources will be required 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 of the work required to complete the investigation to members of the investigatory team to ensure that the work is evenly distributed and that the investigation can be conducted timeously.

304. 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

305. 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

306. 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 shared drive folder (O:\Administration and Communication\2021-22\Press Coverage);
  - b. Indicate on the CMS that a press enquiry has been received relating to that particular Complaint under the case file reference number.
307. 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 (Appendix 18 – Template Correspondence (Response to Press Enquiry))

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

308. 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 which the ESC office may hold about you. If IOs receive a FOI or SAR request, please send the FOI or SAR request 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 FOI or SAR 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 FOI or SAR request.
309. FOI or SAR requests are very time-sensitive. When the ESC receives a FOI 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 to include a message in your out of office message directing people to the general office inbox for FOI/SARs.

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

310. 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.
311. 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 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 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 review of the Commissioner/IOs work or decisions during the enquiries/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).
312. 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

313. 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).

314. 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.

315. Responses to PDC should contain reference to and a copy of the Post Decision Factsheet (Appendix 21 – Post Decision Factsheet).

316. All PDC are to be recorded in the PDC log, saved in the Standards Team shared drive.

## I.5 Handling CAU

317. 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 the frontline, 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 SPSO to assess whether there is evidence of maladministration not identified by the Commissioner.

318. All CAUs are to be recorded in the office CAU log available internally in the shared drive (location: O:\Corporate Governance\Critical Documents\Complaints handling procedures (about us)\Complaints Database).

## I.6 Unacceptable Behaviour Policy (UBP)

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

## J. OFFICE PROCESSES

320. 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

321. The Standards team meets every Tuesday and Thursday morning to discuss workload and case work. The meeting time and dates may shift in accordance with work capacity and annual leave arrangements.

322. 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 learnings, in accordance with the ESC's commitment to supporting staff and building resilience.

323. Notes will be taken of each meeting and saved to the shared internal drive (see below) for the team's ease of reference at any time. The contents of the notes will reflect what was discussed by the team and, as it contains information relating to investigations, must not be shared with anybody external to the ESC.

### J.2 Standards team weekly updates to the Commissioner

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

325. IOs will send the completed assessments, any attendant draft correspondence, and draft reports together with the Complaint form, to the ISO / SISO. 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.

326. 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

327. 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 at busy times.

### J.4 Operating the CMS

328. All documentation and material relevant to a case file must be saved to the CMS using file names consistent with the Naming Convention. At times, the ISO / SISO may be asked to save material to the CMS on the IO's behalf.

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

### J.5 Operating the Shared Drives

330. The Standards team has a shared drive "S:Drive" in the ESC's internal drives. This is accessible by staff members only. The S:Drive 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

331. 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.
332. This Manual will be reviewed on an on-going basis to reflect feedback, ensure it remains up to date and reflects the Commissioner and the ESC's current processes and policies.

## **L. LINK TO APPENDICES**

**Please note: Link to appendices to follow in early April 2023**

- L.1a Appendix 1a – CMS Operations Manual
- L.1b Appendix 1b - Naming Convention
- L.2 Appendix 2 - Enquiry Outwith Jurisdiction
- L.3a Appendix 3a – Template Correspondence (Whistleblowing)
- L.3b Appendix 3b- Template Correspondence (Requesting Anonymous Evidence)
- L.4 Appendix 4 – Complaint Assessment Form
- L.5a Appendix 5a- Template Correspondence (Closure - Out of Time)
- L.5b Appendix 5b – Template Correspondence (Closure - Service Complaint)
- L.5c Appendix 5c- Template Correspondence (Closure)
- L.6a Appendix 6a – Template Correspondence (Acceptance – Complainer)
- L.6b Appendix 6b – Template Correspondence (Acceptance – Respondent)
- L.6c Appendix 6c – Template Correspondence (Acceptance Council / PB)
- L.7a Appendix 7a – Template Correspondence (Closure -Withdrawal Request)
- L.7b Appendix 7b – Template Correspondence (Accept Withdrawal Request)
- L.7c Appendix 7c – Template Correspondence (Advising of Withdrawal Request - Respondent)
- L.7d Appendix 7d – Template Correspondence (Advising of Withdrawal Request- Council/Public Body)
- L.8 Appendix 8 – Investigation Plan
- L.9 Appendix 9 – Template Correspondence (Requests for Information)
- L.10a Appendix 10a – Template Correspondence (Requests for Interview)
- L.10b Appendix 10b – Template Interview Record
- L.10c Appendix 10c – Interview Information Factsheet
- L.11 Appendix 11 – Witness Policy and Guidance
- L.12 Appendix 12 – Guidance on Extension of Time
- L.13a Appendix 13a – Template Correspondence (3 Month interim report- Complainer))
- L.13b Appendix 13b – Template Correspondence (3 Month interim report- Respondent))
- L.13c Appendix 13c – Template Correspondence (3 Month interim report- Council/Public Body))

- L.13d Appendix 13d – Template Correspondence (3 Month interim report- Standards Commission for Scotland))
- L.14a Appendix 14a – Templates Report (Draft Report (Breach or No Breach))
- L.14b Appendix 14b – Template Report (Draft Report (Abridged))
- L.15a Appendix 15a – Template Correspondence (Report- Complainer)
- L.15b Appendix 15b – Template Correspondence (Report- Respondent)
- L.15c Appendix 15c – Template Correspondence (Report- Council/PB)
- L.15d Appendix 15d – Template Correspondence (Report – refer to SCS)
- L.16a Appendix 16a – Template Correspondence (Proposed Breach Report - Respondent)
- L.16b Appendix 16b – Template Correspondence (Proposed Breach Report – Council or Public Body)
- L.17 Appendix 17 – Bundle Preparation Guidance
- L.18 Appendix 18 – Template Correspondence (Response to Press Enquiries)
- L.19 Appendix 19 – Complaint Handling Procedures (CAUs)
- L.20 Appendix 20 – Unacceptable Behaviour Policy
- L.21 Appendix 21 – Post Decision Factsheet
- L.22 Appendix 22 – Redaction Guidance
- L.23 Appendix 23 – Style Guide
- L.24a Appendix 24a –Template Correspondence (Inadmissible – Conduct in Parliament)
- L.24b Appendix 24b –Template Correspondence (Inadmissible – Constituency Work)
- L.24c Appendix 24c –Template Correspondence (Inadmissible – Expenses, Facilities, CPWGs)
- L.24d Appendix 24d –Template Correspondence (Inadmissible – Acting as a Minister)
- L.24e Appendix 24e –Template Correspondence (Inadmissible – Not re Parliamentary Duties)
- L.24f Appendix 24f –Template Correspondence (Inadmissible – Private Life or Political Views)
- L.24g Appendix 24g –Template Correspondence (Inadmissible – Respect, Bullying or Harassment)
- L.24h Appendix 24h – Template Correspondence (Closure to MSP)
- L.25 Appendix 25 –Stage One Form
- L.26 Appendix 26 – MSP Template Report

L.27 Appendix 27- Template Correspondence (Proposed Breach Report- Respondent)

L.28a Appendix 28a – Template Correspondence (Report - SPPAC)

L.28b Appendix 28b – Template Correspondence (Report – MSP)

L.29 Appendix 29 – Complaint Assessment Form (Lobbying)