



INTEGRITY IN PUBLIC LIFE

# HEARING PROCESS GUIDE & RULES

Effective from 27 October 2022

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## 1. INTRODUCTION

- 1.1 These Rules apply when the Standards Commission decides to hold a Hearing in accordance with Section 16(b) of the Ethical Standards in Public Life etc. (Scotland) Act 2000 (the 2000 Act).
- 1.2 These Rules have been agreed by the Standards Commission in terms of Section 17 of the 2000 Act and outline the procedures to be followed by the Standards Commission, the parties and anyone else who attends a Hearing.
- 1.3 The Hearing Panel may follow a different procedure to that outlined in these Rules, but only if it considers it is fair to do so. If so, the Hearing Panel will advise the parties of the procedure to be followed and the reasons for the change.
- 1.4 The Hearing Panel may choose, in exceptional circumstances, to discontinue the Hearing process and refer the matter back to the Standards Commission to reconsider any decision it has made under Section 16 of the 2000 Act. Such exceptional circumstances may include, but are not limited to, the following:
  - (a) there is evidence that the Respondent (being the person whose conduct is being considered at the Hearing) is incapacitated in the long term; and
  - (b) the Ethical Standards Commissioner (ESC) advises the Standards Commission of new evidence that demonstrates no breach has occurred.
- 1.5 All references to 'days' and 'weeks' mean calendar days and weeks, unless otherwise stated.

## 2. HEARING RULES

### General Information

- 2.1 The Standards Commission will advise the parties (being the Respondent and the ESC), the applicable council or devolved public body and the Complainer of its decision to hold a Hearing within five working days of that decision.
- 2.2 The Respondent can rely on written submissions and documentary evidence in the event that they choose not to appear or be represented at the Hearing.
- 2.3 The Standards Commission will normally hold the Hearing at the headquarters of the Respondent's local authority or public body.
- 2.4 The Standards Commission may decide to hold the Hearing online and livestream it, for example in cases where it appears there is little dispute between the parties and no witnesses (other than the Respondent) are to be called.
- 2.5 Hearings will normally be held between six and 12 weeks after the date on which the Standards Commission decides to hold a Hearing.
- 2.6 Hearings will be conducted by a Hearing Panel comprising of three Members of the Standards Commission, with one Member acting as Chair.
- 2.7 The standard of proof to be applied by a Hearing Panel is the balance of probabilities. This means the Hearing Panel will consider whether it is satisfied, from the evidence and submissions before it, that something being alleged is more likely than not to have occurred.
- 2.8 The Standards Commission or the Hearing Panel may conjoin and consider the following at the same Hearing:

- complaints about the same Respondent in respect of the same or related matters;
- complaint(s) about different Respondents in respect of the same or related matters; and/or
- complaint(s) about the same Respondent in respect of different matters.

- 2.9 Notification of the Hearing will normally be sent by email. It will be deemed as having been received if the email is sent to the Respondent's council or public body email address. If the Respondent is no longer a councillor or member of the public body, notification of the Hearing may also be sent by post. It will be deemed as having been received if an acknowledgement is provided (in writing or by telephone) or the notification is:
- sent to the Respondent's address by recorded delivery post; or
  - delivered to the Respondent personally or left with someone at their address.

### Adjournment Requests

- 2.10 In accordance with the Standards Commission's Policy on Hearing Adjournment Requests, a copy of which can be found on the 'Cases' page of the Standards Commission's website, the Hearing Panel may, at its own discretion or on the application of any of the parties, postpone or adjourn a Hearing. Before any postponement or adjournment is granted, the Hearing Panel will consider:
- the public interest in the prompt disposal of the case; and
  - any inconvenience or prejudice to the parties and to any witnesses.

### Pre-Hearing Meetings

- 2.11 The Chair may invite the parties and any representatives to an online pre-Hearing meeting. The purpose of a pre-Hearing meeting is to resolve any procedural issues in order to ensure the Hearing runs as smoothly as possible.

### Productions

- 2.12 The 'productions' are any documents submitted by the parties (or their representatives) to be considered by the Hearing Panel both in advance and at the Hearing. These include a copy of the ESC's report and any case law.
- 2.13 Any productions, including any case law that either party wishes to rely on, must be submitted to the Standards Commission at least 14 days before the Hearing. The relevant paragraphs in any case law must be highlighted. The Standards Commission will send any productions received to the Hearing Panel and the other party at the earliest available opportunity.
- 2.14 The Hearing Panel may decide not to accept any productions submitted less than 14 days before a Hearing, if it considers it would be unfair to the other party to do so. In considering fairness, the Hearing Panel may seek the view of the other party.

### Appointment of legal advisers by the Standards Commission

- 2.15 The Hearing Panel may at any time appoint its own legal adviser to provide assistance in leading any relevant case law and questioning witnesses.

### The Hearing

- 2.16 The Hearing will normally be held in public unless the Hearing Panel determines otherwise.
- 2.17 The Hearing Panel may, at its own discretion, or following a request from a party or witness, decide to hold the Hearing, or part of it, in private. If the Hearing is held online, any part held in private will not be livestreamed. To hold a Hearing or part of it in private, the Hearing Panel would have to be satisfied that:

- (a) the decision to exclude the public causes no prejudice or unfairness to either party; and
  - (b) the particular circumstances of the case outweigh the public interest in holding it in public.
- 2.18 The Hearing Panel will seek representations from both parties and will also take into account the need to protect any sensitive, personal and confidential material or information when determining:
- (a) what evidence can be led, and how, and;
  - (b) whether or not to hold the Hearing or part of it in private.
- 2.19 The Hearing Panel may, at its own discretion or following a request from a party or witness, exclude any person whose conduct is disruptive from the Hearing or part of it.
- 2.20 If any party fails to attend or be represented at a Hearing, the Hearing Panel may:
- (a) proceed to hear the complaint if it is satisfied that notice of the Hearing was properly given; or
  - (b) adjourn the Hearing to another date if it considers it is appropriate and fair to all parties to do so.
- 2.21 The Hearing Panel may seek parties' representations if it forms a preliminary view that there may have been a breach of the applicable Code of Conduct for reasons that are different to any identified before the Hearing, if it considers that it would be fair and proportionate to do so.

### Representation and Support at Hearings

- 2.22 Both the Respondent and the ESC are entitled to be represented. The Respondent's representative can call the Respondent to give evidence as a witness. If either party is represented, all questions must be put to, and answered by, the representative (unless they are put to the Respondent when the Respondent is giving evidence as a witness). If a party is represented, only the representative will be entitled to make submissions.
- 2.23 Where a Respondent attends the Hearing and is unrepresented, they can be accompanied by an individual to support them, known as a 'supporter'. The supporter will not be entitled to make representations, provide evidence or question witnesses.
- 2.24 The Standards Commission must be provided with the name of any representative or supporter at least 14 days before the Hearing. The Hearing Panel may refuse to allow an individual to represent or support a party, if it has concerns that such an individual may disrupt the proceedings.
- 2.25 Anyone appearing as a witness cannot represent or support a party at the Hearing.

### Witnesses

- 2.26 The parties are entitled to call witnesses to give relevant evidence. The Hearing Panel may decline to hear any evidence that is irrelevant to the question of whether there has been a breach of the applicable Code of Conduct, or that is not in dispute. The Hearing Panel may also decline to hear from a witness if the Standards Commission has not been provided with notice as required by Section 3 below.
- 2.27 Witnesses are not allowed to be in the Hearing room until after they have given evidence. If the Hearing is held online, witnesses will not be allowed to join or watch the meeting until after they have given evidence.
- 2.28 In terms of section 17(5)(a) of the 2000 Act, the Hearing Panel may on its own account or after a request by either party, require an individual to:
- (a) Attend as a witness and answer questions.
  - (b) Produce any documents or other evidence.

- 2.29 All witnesses, including the Respondent (if applicable), will be required to swear an oath or make an affirmation before giving evidence.
- 2.30 While giving evidence, all witnesses will have access to the productions and will not be allowed to access any other paperwork or notes. Both parties (or any representatives) can refer to their own notes or paperwork while making submissions.
- 2.31 Witnesses will be questioned by the party calling them and may then be cross-examined by the other party. The party calling the witness may then re-examine the witness, but only on new matters raised during cross-examination. The party calling the witness should not put leading questions (i.e. questions which invite a witness to give a particular response) to the witness, unless they are on introductory matters or facts that are not in dispute. The Hearing Panel can choose to disregard any evidence obtained from a leading question.
- 2.32 The Hearing Panel, or any legal adviser it appoints, may question witnesses at any point. Parties may question witnesses on matters arising out of any question asked by the Hearing Panel or its legal adviser. If a witness has been called by the Hearing Panel, the Panel will question the witness first, before inviting the parties to then question them.
- 2.33 The parties will not be allowed to ‘badger’ a witness, for example, by:
- asking argumentative or sarcastic questions;
  - deliberately antagonising them;
  - asking insulting questions in an attempt to provoke an emotional response; or
  - asking repetitive questions or a variation of a question over and over.
- The Hearing Panel will ask any party doing so to stop and may prevent them from asking further questions of the witness or may decide to excuse the witness.
- 2.34 If either party believes any witness is vulnerable and/or may need particular assistance because of any impairment, language difficulty or any other reason, they should advise the Standards Commission at least 14 days before the Hearing. The Hearing Panel will consider all the relevant information and will ensure that, so far as is reasonable, appropriate supportive measures are put in place.

### **3. PROCEDURE PRIOR TO THE HEARING**

#### **Information the Respondent is required to provide**

- 3.1 The Respondent is required, within 21 days of the date of the notification of Hearing, to complete and send to the Standards Commission the Respondent’s Information Template, which advises:
- (a) Whether they accept the facts in the ESC’s report and if not, which facts are in dispute.
  - (b) Whether they accept the conclusions reached by the ESC.
  - (c) Whether they will attend the Hearing, give evidence, and/or be represented or supported.
  - (d) The names and contact details of any witnesses they propose to call, and confirmation that they have been contacted and will be attending the Hearing.
  - (e) Any request for the Standards Commission to require an individual to give evidence and/or produce documents, including the reasons why.

#### **Information the ESC is required to provide**

- 3.2 The ESC is required, within 21 days of the date of the notification of Hearing, to advise the Standards Commission:
- (a) Whether they will be represented.
  - (b) The names and contact details of any witnesses they propose to call, and confirmation that they have been contacted and will be attending the Hearing.

- (c) Any request for the Standards Commission to require an individual to give evidence and/or produce documents, including the reasons why.

#### **Information to be provided by the Standards Commission**

- 3.3 The Standards Commission will, within five days of receipt, advise the other party and Hearing Panel of any new and relevant information received from a party and will also provide them with any documents added to the productions. The Standards Commission will also advise the parties of any decision to require any person to attend the Hearing, give evidence and produce documents, within five days of such a decision being made.
- 3.4 The Standards Commission will advise the Respondent and the ESC, as soon as practicable, of any relevant information, including case law, the Hearing Panel may rely on that has emerged between receipt of the ESC's report and the Hearing. If there is no time to do so before the Hearing, the parties will be advised of the information and given an appropriate amount of time to consider it at the Hearing.

#### **Failure by the Respondent to make submissions or provide evidence**

- 3.5 No adverse inference will be drawn in respect of a failure by a Respondent to make submissions, or to provide evidence at a Hearing unless the Hearing Panel is satisfied:
  - (a) there is a factual dispute about the Respondent's conduct; and/or
  - (b) there is, on the face of it, a case to answer (for example, if the ESC has concluded in their report that there has been a breach of the applicable Code).

### **4. PROCEDURE AT THE HEARING**

- 4.1 References to the ESC and the Respondent in this section should be taken to mean any representative, if applicable.
- 4.2 At the start of the Hearing, the Chair will outline the procedure to be followed, being:
  - 1. The Chair will ask the parties whether they have any preliminary matters they wish to raise.
  - 2. After any such matters have been raised and addressed, the Chair will invite the ESC to present the findings of the investigation, to lead any witnesses and to make any submissions they wish to make as to whether there has been a breach of the applicable Code of Conduct.
  - 3. The Chair will then ask the Respondent to present their case by leading any witnesses and making submissions as to whether there has been a breach of the applicable Code of Conduct.
  - 4. When all evidence has been heard, the ESC and then the Respondent will be given an opportunity to sum up what has been presented, if they so wish.
  - 5. The Hearing Panel may put questions to the ESC, the Respondent and any witnesses at any time.
  - 6. The Hearing Panel will deliberate in private to determine whether, on the balance of probabilities, a breach of the applicable Code of Conduct has occurred.
  - 7. If the Hearing Panel find that the Respondent has not contravened the applicable Code of Conduct, the Chair will announce this decision verbally and conclude the Hearing.
  - 8. If the Hearing Panel find that the Respondent has contravened the applicable Code of Conduct, it will proceed to consider mitigation and determine sanction.
  - 9. The Hearing Panel will deliberate in private to determine the sanction to be applied.
  - 10. The Chair will announce the sanction decision verbally and conclude the Hearing. The Chair will advise of any right of appeal.

It should be noted that steps 7 and 10 listed will only occur on the day of the Hearing if time permits. If time does not permit, the Standards Commission will advise the parties of the decision the following working day.

- 4.3 A flowchart which provides an overview of the Hearing process is provided at the end of this document.

### **Mitigation and the determination of sanction**

- 4.4 If the Hearing Panel finds there has been a breach of the applicable Code of Conduct, the Chair will ask the Respondent to make any submissions in respect of mitigation.
- 4.5 The Respondent is entitled to call witnesses and submit written representations and character references in respect of mitigation. These will only be provided to, and considered by, the Hearing Panel if a breach of the applicable Code of Conduct is found.
- 4.6 After giving evidence in respect of mitigation, the Respondent and any witnesses called may be questioned by the Hearing Panel.
- 4.7 The Hearing Panel may also consider any impact statement provided by those affected in cases concerning a breach of the respect and/or bullying and harassment provisions in the applicable Code. The Respondent will be provided with any such information at the mitigation stage, before they are given the opportunity to make submissions on mitigation or on the sanction to be applied.

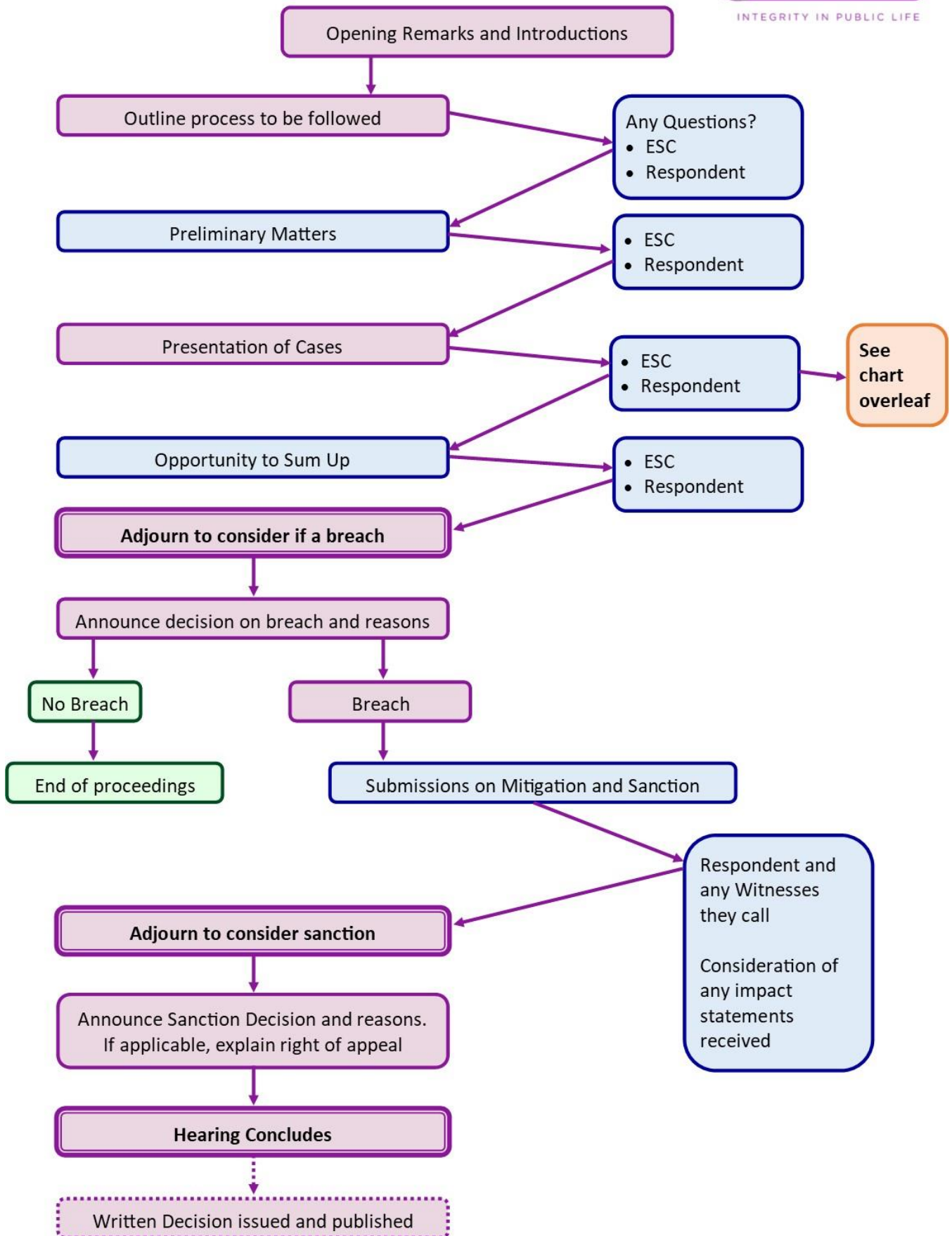
## **5. AFTER THE HEARING**

### **The Decision of the Hearing Panel**

- 5.1 The Standards Commission will issue and publish a full written decision within 14 days of the Hearing. The written decision will be sent to the Respondent, the ESC (and any representatives), the Chief Executive of the Respondent's council or devolved public body, and the Complainer.
- 5.2 In the event that the Hearing Panel determines that a sanction is to be imposed on a person who has been appointed to a devolved public body by the Crown, the Standards Commission will submit to the First Minister a recommendation in relation to the level of sanction determined by the Hearing Panel within 14 days of the Hearing, as required by Section 23(2) of the 2000 Act.
- 5.3 On issuing the written decision the Standards Commission will ask the Chief Executive of the council or devolved public body to note that in terms of Section 18 of the 2000 Act:
- (a) the council or devolved public body is required to consider the decision within three months of receiving written notice of it (or such longer period as the Standards Commission may determine); and that
  - (b) such consideration can only be discharged by the council or devolved public body and not by a committee, sub-committee or an officer.



# Hearing Process



## Presentation of Cases

**ESC:** Outline background to complaint and outcome of investigation

Lead any witnesses

Opportunity to cross examine witnesses by Respondent/Respondent's representative

Any questions from Hearing Panel

Opportunity to re-examine by ESC

Any submissions as to whether there has been a breach of the Code

Any questions from Hearing Panel

**Panel:** Question any witnesses Standards Commission has cited, opportunity to cross examine by Respondent / Respondent's representative

### **Respondent:**

Outline background

Lead any witnesses

Opportunity to cross examine witnesses by ESC

Any questions from Hearing Panel

Opportunity to re-examine by Respondent/Respondent's representative

Submissions as to whether there was a breach of the Code

Any questions from Hearing Panel

## DOCUMENT CONTROL

Data control and version information				
Date	Action by	Version Updated	New Version number	Brief Description
26/01/21	LJ	2020v4.0	2021v1.0	Amendments made to Section 4 in respect of the information the Standards Commission is to provide to the Respondent in the initial notification of Hearing letter.
14/07/21	JS	2021v1.0	2021v2.0	Rules amended to remove gender specific references.
29/09/22	LJ/RW	2021v2.0	2022 v1	Rules revised to remove any unnecessary guidance and repetition.
27/10/22	LJ/RW	2022 v1	2022 v2	Addition to end of s4.2 to clarify decisions may be provided on next working day.



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