



INTEGRITY IN PUBLIC LIFE

## **THE STANDARDS COMMISSION'S RESPONSE TO CONSULTATION ON THE ETHICAL STANDARDS COMMISSIONER'S INVESTIGATIONS MANUAL**

### **1. Introduction**

The Standards Commission welcomes the opportunity to provide comments on the draft Investigations Manual produced by the Ethical Standards Commissioner (ESC).

This response is sent on behalf of the Standards Commission. The Standards Commission is content for the ESC's office to make it public. The ESC is invited to contact the Standards Commission if any of the answers below are unclear or if further information is required.

As the Standards Commission's remit only covers councillors and members of devolved public bodies, it has not provided a response to the questions in the consultation that concern the handling of complaints made about Members of the Scottish Parliament.

### **2. Issues on which Views were Invited**

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

Yes, councillors and members should be notified when a complaint against them is dismissed as inadmissible.

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

The Standards Commission considers that a separate letter, addressed to the councillor or member, is much more appropriate.

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

Q1 - In the interests of openness and transparency, the Standards Commission considers that councillors and members who have been the subject of a complaint should be notified when a complaint against them is dismissed having been assessed as inadmissible. Above all, the concepts of procedural fairness and natural justice require that individuals who are the subject of a complaint are advised accordingly.

The Standards Commission notes that if a councillor or member is not notified, the first time they could be aware that a serious complaint has been made against them (and, for example, has been 'dismissed' as ineligible on the grounds of time bar), could be when it is reported in the media (if the complainer refers the matter to the press or raises an action for judicial review). This would seem distinctly unfair.

Q2 – The Standards Commission considers that receiving a copy of the letter addressed to the Complainer could be construed as impersonal. The Standards Commission suggests that a redacted version of the

complaint form or a summary of information provided by the Complainer during the eligibility stage of the process is sent to Respondent councillor or member, along with the ESC's eligibility decision and reasoning. Preparation of a separate letter would also reduce the risk of a data protection breach that could arise if the copy of the letter to the Complainer was not redacted properly.

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

Yes, the Standards Commission considers that where there is significant public interest in investigating and determining the merits of the complaint, the ESC should proceed to investigate the complaint and refer the matter to the Standards Commission, at the conclusion of the investigation, even if a request to withdraw the complaint is received.

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

The Standards Commission considers that the following factors should be considered by the ESC in determining whether to investigate and report on withdrawn complaints:

- the impact and consequence, or potential impact and consequence of any alleged breach;
- the nature of the allegation/seriousness of the alleged conduct;
- whether there has been any benefit/gain or intended benefit/gain to the Respondent;
- whether the Respondent has previously been found to have contravened the Code of Conduct in respect of a similar or related matter;
- whether there is any evidence that the Complainer has been pressured to withdraw their complaint;
- whether it appears the alleged conduct may have been of a deliberate nature;
- whether the alleged conduct was a "one-off" or whether it was repeated, or part of a course of conduct;
- whether failing to investigate the complaint would have the potential to undermine the ethical standards framework, for example if the details of the complaint were already public knowledge;
- whether the alleged breach had been rectified, how long that rectification took and the nature of the rectification; and
- whether an apology had been proffered, how long that apology took, and the nature of the apology.

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

The Standards Commission considers that a failure by the ESC to proceed to investigate a 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 Code are already in the public domain.

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

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

While the Standards Commission considers that the parties to a complaint should, as a minimum, be advised every three months on any progress, it considers that the timescales for any further updates will depend entirely on any engagement the ESC's investigative team has already had with the parties and on what progress has been made. The Standards Commission would suggest, therefore, that this is a matter for the individual Investigator to determine, taking account of the particular circumstances of each individual investigation.

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

Again, the Standards Commission would suggest that this is a matter for the Investigator's discretion, depending on the individual facts and circumstances of each case and whether, for example, they have been advised that the party may not be able to respond for a certain amount of time due to being on holiday or where they are aware that collating the information sought may take considerable time. The Standards Commission notes that it may be appropriate to provide a short deadline if only a confirmation, short answer or easy to obtain document is required, whereas a longer deadline might be required if the party may be reliant on obtaining the information from another source.

The Standards Commission considers that the Investigator, when deciding on the amount of time to allow, should always balance the need to expedite investigations, in the interests of fairness to all parties, with the requirement to undertake a thorough but proportionate investigation.

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

Yes. The Standards Commission does not consider that the ESC's office should allow investigations to continue indefinitely. Not only is this unfair to the parties, it will also erode confidence in the ethical standards framework.

The Standards Commission is further of the view that repeated requests to an individual should only be sent if the ESC's office considers that the information being sought will be both relevant and material to the question of whether there has been a breach of the relevant Code.

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

See above.

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

The Standards Commission again considers that whether it would be helpful for a witness to sign a statement confirming the accuracy of any statement taken should be a matter for the Investigator to determine. The Standards Commission is of the view that while a signature may be of value, it is not necessary. It may be that the Investigator considers such a step is not appropriate if, for example, the statement is short and can be read back to the witness at the interview, for the witness to confirm verbally that it is accurate. On the other hand, an Investigator may consider it would be helpful to ask the witness to sign the statement if they are uncertain about what was said or think there is a chance that the witness may dispute what was recorded. The Standards Commission notes that any witness called to give evidence at one of its Hearings will be required to take an oath or make an affirmation as to the truthfulness of their testimony.

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

No. The Standards Commission does not consider that all witnesses should be provided with each other's statements. The Standards Commission considers that this could lead to a situation where one witness seeks to amend their witness statement based on the evidence provided by another witness. The Standards Commission notes, in any event, that the majority of witnesses will not be parties to the complaint. While the Standards Commission considers that a Respondent has a right to know the details of the complaint made

against them, it does not consider that there are necessarily any fairness issues that would require statements from one witness to be shared with other witnesses who are not parties to the complaint.

The Standards Commission considers that it is sufficient for a summary of any relevant and material evidence obtained at interview to be included in the investigation report. The Standards Commission further notes that, if appropriate, the Investigator could simply verbally advise other witnesses or the Respondent of what another witness has said, if they consider it would be helpful to obtain a different witness/the Respondent's views on this.

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

See above.

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

Yes. The Standards Commission considers that all investigation reports, whether recommending breach, no breach, or having no recommendation as to breach should be sent to all parties to a complaint and to the council and devolved public body. The parties should be advised that the matter will be referred to the Standards Commission for it to make a decision on the disposal of the complaint (please see the response to question 16 below).

**Q13– Please give reasons for your views.**

The Standards Commission considers that copies of investigation reports should be sent to all parties to ensure fairness, openness and transparency. The Standards Commission considers, for the reasons outlined elsewhere in this response, that the Respondent has a right to know about the complaint. The Standards Commission considers it is only fair that they are also advised of the ESC's investigation findings and views on whether the applicable Code has been breached. The Standards Commission notes that as it may decide to hold a Hearing on investigation reports where the ESC has recommended 'no breach', it would seem unfair for the process to reach a stage where a Hearing is being held based on an investigation report that the Respondent has neither seen nor had an opportunity to comment upon. Similarly, the Standards Commission considers that if an individual has gone to the effort of making a complaint, then it is only fair that they are advised of the ESC's investigation findings and views on whether it has merit or otherwise.

The Standards Commission further considers that openness and transparency at this stage benefits not only the parties to the complaint, as detailed above, but also serves to strengthen the ESC's process. This is because it gives the parties the opportunity to identify and raise any issues with, or inconsistencies in, the proposed investigation report. The parties may be able to identify and factual errors or potential weaknesses in the investigation that can then be challenged before the Standards Commission makes a decision on the disposal of the complaint.

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

The Standards Commission considers it would be appropriate to adopt much shorter timescales and targets.

**Q15– Please give reasons for your views.**

The Standards Commission considers that, for the vast majority of cases, the overall complaint process (including the adjudication stage it undertakes) should take no longer than 15 months. The Standards Commission considers that a failure to dispose of complaints in a timely manner could reduce confidence in

the ethical standards framework and result in poor (and potentially damaging) behaviour continuing unchecked. The Standards Commission notes that being the subject of a complaint can be extremely stressful and, as such, does not consider it is fair to a Respondent for them to have a complaint against them open for longer than 15 months. Similarly, the Standards Commission does not consider it is fair for Complainers (and particularly those who have been the subject of bullying, harassment or other disrespectful behaviour) to have to wait longer than 15 months for their concerns to be addressed fully.

The Standards Commission further notes that the quality of evidence deteriorates over time, as memories fade, and documents and recordings are potentially lost or not retained.

The Standards Commission's targets for disposing of cases, following receipt of reports from the ESC are as follows:

- To make and notify parties of decision to take 'no action', to direct the ESC to undertake further investigation or to hold a Hearing - five working days of receipt of report from ESC.
- To hold Hearings between six and 12 weeks after the date on which the Standards Commission decides to hold a Hearing (this timescale gives the parties time to prepare for the Hearing).

As such, the Standards Commission target for completing its adjudication process is just over three months. The Standards Commission suggests, therefore, that the ESC should aim to complete the majority of investigations (95%) within 12 months.

In general, the Standards Commission does not have any difficulty with the suggested timescales for stage two of the ESC's process, being the investigation stage. The Standards Commission suggests, however, that the target timescales for both the pre-assessment/assignment and assessment stages should be greatly reduced.

The Standards Commission is of the view that the ESC should aim to acknowledge all complaints within three working days, given that such an acknowledgement can be provided by way of a template letter or email. The Standards Commission suggests that allowing a timescale of five weeks to acknowledge a complaint could potentially result in extra work in responding to Complainers who may contact the ESC's office within that timeframe to query whether their complaint has been received.

The Standards Commission is further of the view that the ESC should aim to complete the eligibility assessment on all complaints within three months. The Standards Commission notes that its Direction to the ESC on Eligibility provides that all complaints about councillors and members of public should be investigated unless:

- the councillor or member of a devolved public body has died prior to the complaint having been made, or is an incapable adult within the meaning of the Adults with Incapacity (Scotland) Act 2000;
- the conduct that has or is alleged to have contravened the applicable Code of Conduct occurred (or in the case of a course of conduct ended) more than one year before the complaint was received; or
- where, on the face of it, the conduct referred to in the complaint would not, even if it could be established to have occurred, constitute a contravention of the applicable Code of Conduct.

The Standards Commission considers, therefore, that the criteria for assessing whether complaints are eligible for investigation are limited and, even if the ESC requires more information from the Complainer or any other party, it should be possible to obtain this and undertake such an evaluation on all cases within three months.

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

Yes, as outlined below.

**1. Disposal of Complaints about Councillors and Members of Devolved Public Bodies**

The Standards Commission is concerned that the draft Investigations Manual does not fully reflect the process for the disposal of complaints about councillors and members of devolved public bodies, as outlined in the statutory Direction on Outcome of Investigations that it issued to the ESC under Section 10 of the Ethical Standards in Public Life etc. (Scotland) Act 2000. The 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.

The Standards Commission is of the view that the references to the ESC issuing ‘final’ non-breach reports, to ‘issuing a no-breach finding’ and ‘sharing’ reports with the Standards Commission could create an impression that the ESC is responsible for making the final decision on complaints where they consider the applicable Code has not been contravened. In order to avoid this, and to manage expectations appropriately, the Standards Commission strongly suggests that the language used is amended to make it clear that the ESC is only reaching a view and/or making a recommendation in respect of the disposal of complaints about councillors and members of devolved public bodies, and that the final decision is a matter for the Standards Commission.

The Standards Commission therefore considers that, in the interests of transparency and accuracy, it should specifically state, in Section C.11, that all reports are referred to the Standards Commission for it to make a decision on the disposal of the complaint, either by deciding to take no action, hold a Hearing or direct that further investigation is undertaken. The Standards Commission additionally considers that it should be made clear that the Standards Commission may well come to a different view to that of the ESC and, as such, may make a finding of breach at a Hearing even if the ESC is of the view that there has not been one (and vice versa).

## **2. Definition of ‘Complaint’**

The Standards Commission is concerned about the proposed (and possibly existing) way that complaint numbers are calculated, particularly if the method outlined in the draft Investigations Manual is the one used for reporting purposes. In particular, it states under paragraph 27, that:

‘1 Complaint with 17 signatures from 17 Complainers against 1 Councillor = 17 Complaints’

The Standards Commission understands this to mean that one complaint form, that has been signed by 17 different individuals will be accepted as 17 complaints, even if it concerns the same Respondent and same event. The Standards Commission consider this is misleading and potentially unfair to Respondents (who may face an allegation from, for example a political opponent, stating that 17 complaints have been made about their conduct when it is simply the case that 17 members of the same family, for example, have all signed one complaint form). The Standards Commission further considers that this method of calculation will result in undue discrepancies. For example, if only one individual in a couple had signed the complaint form on behalf of both, it would be calculated as one complaint; whereas if both signed it would be counted as two complaints. The Standards Commission is concerned that this method of calculation will create a misleading impression, with the total number of complaints received essentially being over-inflated.

## **3. Investigative Approach**

The Standards Commission questions the order in which investigations in respect of complaints about councillors and members of devolved public bodies are to be undertaken, as outlined in the draft Investigations Manual at paragraph 99. The Standards Commission considers that it could potentially create unnecessary work, and be disproportionate, to interview individuals who may only have general knowledge about a matter first. This is because there may be no need to interview them if those who have direct knowledge are in a better position to supply relevant and material information. This will particularly be the case if the facts of the matter (i.e. what is alleged to have occurred) are not in dispute. The Standards Commission notes that memories fade over time and considers it is essential, therefore, that any eyewitnesses to an event are interviewed as soon as is reasonably practicable.

In addition, the Standards Commission considers that it may be unfair to interview individuals who may only have a general knowledge of a matter before the Respondent is afforded the opportunity to respond to the complaint. The Standards Commission is of the view that the Respondent should be given an early opportunity

to outline their position and, if applicable, to admit any breach of the Code. The Standards Commission notes that an admission of breach or an acceptance of the factual position as outlined in the complaint may render other investigative work unnecessary. The Standards Commission notes that the Respondent can be interviewed again if required, for example, to give them an opportunity to comment on information provided by other witnesses or to clear up any ambiguity in a previous answer or statement.

The Standards Commission notes that the approach it suggests is reflected in the flowchart at Section C.2 of the draft Investigations Manual.

The Standards Commission further suggests that the number of reviews to be undertaken by senior staff both at the eligibility and investigations stages of the process could be disproportionate and, as such, could lead to undue delays. The Standards Commission would suggest, for example, that it may not be necessary for the ESC to be required to review all eligibility decisions, particularly when the decision is being made by an experienced Investigator about a straightforward case. The Standards Commission suggests, therefore, that a greater degree of flexibility and discretion be incorporated into the process.

#### **4. Eligibility Criteria**

The Standards Commission notes that paragraph 36 of the draft Investigations Manual states

*‘A Complainer should normally make a Complaint about an event or behaviour within 12 months of the event or behaviour occurring. Where a Complaint is within the 12-month period but the date of the Complaint is on or close to the anniversary of the alleged event/behaviour happening, the Commissioner may decide that a meaningful investigation cannot be conducted or that it is no longer proportionate or in the public interest to investigate the Complaint. In any event, complaints that are outwith time are an exception set out in the SCS Direction dated 1 March 2021 and are not directed for investigation.’*

As noted in the response to question 15 above, the Direction on Eligibility requires the ESC to carry out an investigation into every complaint about a councillor and member of a devolved public body unless:

- the councillor or member of a devolved public body in respect of whom the complaint has been made died prior to the complaint having been made or is an incapable adult;
- where, on the face of it, the conduct referred to in the complaint would not, even if it could be established to have occurred, constitute a contravention of the applicable code; or
- the conduct that has or is alleged to have contravened applicable Code occurred (or in the case of a course of conduct ended) more than one year before the complaint was received.

Contrary to paragraph 36, the Direction does not provide the ESC with the discretion to choose not to investigate a complaint, that would otherwise be eligible, where a complaint is within the 12-month period but ‘is on or close to the anniversary of the alleged event/behaviour happening’. The Standards Commission requests, therefore, that the paragraph be amended to reflect accurately the requirements of the Direction.

#### **5. Inclusion of Detailed Information about Internal Processes**

The Standards Commission questions whether the inclusion in the draft Investigations Manual of detailed information about internal processes, such as:

- the naming convention;
- how matters are entered or recorded on a case management system;
- how tasks are assigned to individual staff members; and
- internal reviewing processes

is helpful, if the intention of the Manual is to provide clarity on the investigative process to external stakeholders, parties and members of the public. Examples of such detail can be found at paragraphs 120 and 121. The Standards Commission suggests that, in order to avoid providing detail that is unnecessary (and potentially confusing) and to reduce the length of the Manual, the ESC should consider whether some of the matters outlined above could instead be detailed in supporting process documents for internal use only. The

Standards Commission considers that a focus on providing an external explanation of procedures would make the Investigations Manual more accessible and user friendly.

## **6. Case Management Approach**

The Standards Commission suggests that it may be helpful to include more information, or to have more of a focus, in the Investigations Manual about how the ESC's staff (as opposed to the Complainer, Respondent, any witness or other party) will manage and take charge of the eligibility assessment and any investigation, in terms of being in control of timescales and what information is being sought and considered as relevant and material information.

## **7. Terminology**

The Standards Commission notes that there are some minor inconsistencies with terminology in the draft Investigations Manual in that on occasion the ESC is referred to as 'the ESC', whereas at other times they are described as 'the Commissioner'. In addition, reference is sometimes made to the ESC's 'office' or to individual roles such as the 'IP' or 'IO'. The Standards Commission suggests that, in order to make the Investigations Manual more user friendly and accessible, a standard approach should be taken with the ESC's office and team simply described as the 'ESC' or 'Commissioner' and all references to individual roles removed.