

Proposed Amendments to the Ethical Standards in Public Life etc. (Scotland) Act 2000

The Ethical Standards in Public Life etc. (Scotland) Act 2000 (the Act) established an ethical standards framework to ensure that local authority councillors and members of certain public bodies in Scotland maintain the highest standards of behaviour.

The Act:

- introduced codes of conduct for councillors and members;
- established the Standards Commission for Scotland (SCS);
- established the office of the Chief Investigating Officer, whose role is now fulfilled by the Ethical Standards Commissioner (ESC).

The ethical standards framework covers councillors in all 32 local authorities across Scotland and members of public bodies listed under Schedule 3 of the Act. Individual councillors and members are obliged, under the framework, to comply with their respective codes of conduct. Complaints that they have failed to do so are assessed and, where admissible, investigated by the ESC. Following an investigation, the ESC will then refer the matter to the SCS. If the SCS then finds, at a Hearing, that a breach of the relevant code has occurred, it will impose a sanction.

As nearly 25 years have passed since the introduction of the Act, the SCS and ESC have undertaken a joint review of its provisions. The SCS and ESC are proposing that the following changes be made in order to enhance and improve the ethical standards framework. This is with a view to:

1. promoting high ethical standards and improvements in conduct;
2. providing public assurance that the framework is achieving its intended objectives, and
3. addressing issues that were not anticipated during the development of the legislation.

The SCS and ESC are also proposing changes to The Public Bodies (Joint Working) (Integration Joint Boards) (Scotland) Order 2014 and The Health Boards (Membership and Procedure) (Scotland) Amendment Regulations 2016. The proposed changes and reasons for these are outlined at page 5.

General Amendments to the Act

1. Inclusion of power to co-opt additional members to sit on SCS Hearing Panels / make decisions on cases referred by the ESC to ensure quorum of three (in case of Member incapacity, recruitment delays, unavailability or conflict of interest).
2. Inclusion of explicit power and clear mechanism / route for the Scottish Parliamentary Corporate Body to remove or replace an incumbent SCS Member or the ESC (in the event of a serious performance, conduct or attendance issue).

Amendments to Specific Sections in the Act

1. **Section 2(6)** - provides that “The members’ model code may, for the purposes of sections 3(5) and 25(5) below, distinguish between those of its provisions which are mandatory and those

which are optional”. This does not happen in practice, meaning that some boards have adopted Codes that are not sufficiently tailored to their circumstances and obligations. The SCS and ESC propose that the Act be amended so public body boards can, with Ministerial approval, adapt the Model Code to ensure that it is appropriate to the public body’s specific circumstances, role and remit.

2. Section 12(2) – provides that the ESC’s investigations “shall, so far as possible, be conducted confidentially”. It is proposed that this section be clarified to indicate:

- whether the requirement to maintain confidentiality also includes the admissibility stage of the investigative process (i.e. during an assessment to determine whether a complaint is eligible for investigation);
- what “as far as possible” means and who the onus is upon to maintain confidentiality (i.e. does it include parties to the complaint and members of the public as well as the ESC).

The ESC and SCS note that this Section could be amended to reflect Section 5(2) of the Scottish Parliamentary Standards Commissioner Act 2002, which provides, in respect of complaints about MSPs that “each stage of an investigation into a complaint shall be conducted in private” where ‘each stage’ covers both admissibility and investigation.

3. Section 12(6) – it is proposed that the requirement for complaints to be made in writing and signed be amended, as it is not considered that it is necessary for a complaint form that is completed and submitted online to be signed. The ESC and SCS note that the section could be amended to reflect Section 6(2) Scottish Parliamentary Standards Commissioner Act 2002, which requires complaints about MSPs to be made in writing; made by an individual with that person’s name and address stated; to name the MSP; and to set out the facts relevant to the conduct complained about, accompanied by any supporting evidence which the complainer wishes to submit.

4. Section 13 – this section gives the ESC powers equivalent to those of the Court of Session to enforce the attendance and examination of witnesses and the production of documents. It does not, however, address the issue of parties to a complaint who delay their responses and consequently extend the time taken to investigate a given complaint. It is proposed that this section be updated to make it clear that a failure to respond timeously can also be certified as a contempt of court to the Court of Session. It should also be made clear that this applies to all stages of an investigation, from the point of admissibility.

5. Section 13(3) – it is proposed that this section is amended to remove the erroneous reference to ‘the Chief Investigating Officer’, other references to which had been removed by the Scottish Parliamentary Commissions and Commissioners etc. Act 2010.

6. Section 14(1) – provides that it is for the ESC to decide whether to report to the SCS on the outcome of any investigation. It is proposed that this section be amended to state that the ESC will report to the Standards Commission on the outcome of all investigations. This reflects current practice following a Direction on the Outcome of Investigations issued by the SCS to the ESC (in terms of Section 10 of the Act). The requirement for the ESC to refer the outcome of all investigations to the SCS ensures there is a clear separation of the investigative and adjudicatory functions of the ESC and SCS. This approach ensures any concerns about fairness of process or inconsistencies between the two organisations as to how the codes of conduct should be interpreted are addressed. In addition, it allows any disputed evidence or representations on how the provisions of the codes should be interpreted to be tested fully at a Hearing, if appropriate, where evidence is taken on oath or affirmation, and where the participants and the Hearing Panel

can question and respond to submissions made. It also ensures there is an independent review of all complaints where the ESC has recommended that no breach has occurred (in addition to where the ESC reports a breach). This is considered important, as although parties could seek a judicial review, there is no right of appeal by a Complainer in respect of a 'no breach' decision by the ESC.

7. **Section 14(2)** – provides that the ESC should not refer a report to the SCS concluding that a councillor or a member of a devolved public body has contravened their respective code unless the councillor or member has been given an opportunity to make representations on the proposed report and alleged contravention. It is proposed that this section be amended to note that the ESC can report to SCS after a specific timeframe (possibly 14 or 21 days), regardless of whether representations on the proposed report have been received. This is to provide clarity, encourage timeous responses and prevent unnecessary delays which prolong the time before a report can be referred to the SCS. It should be noted that a Respondent will still have an opportunity to make representations and submit productions in support of their case, if the SCS decides to hold a Hearing.
8. **Section 15** – provides that the SCS can publish the ESC's referral reports. It is proposed this be amended to give both the ESC and SCS the power to publish the ESC's reports if they wish to do so. This is to promote transparency and clarity in respect of how decisions have been reached.
9. **Section 16** – provides that, on receipt of a referral report from the ESC, the SCS has three options, which are to hold a hearing, direct the ESC to undertake further investigation or do neither (which essentially means it decides no further action is to be taken on the matter). It is proposed that this section be amended to give SCS a further option, which is to find a breach of the Code without holding a Hearing. This would be only in circumstances where both the SCS and Respondent accept the ESC's finding that a breach of the applicable Code occurred. It is considered that this would be more proportionate than holding a Hearing in cases where the accepted breach is not particularly serious and was of limited duration and impact (such as where a councillor or member has registered an interest as required, but has failed to do so within the obligatory one-month period). It is proposed that, in those circumstances, the SCS can conclude that there has been a breach, in any manner it deems appropriate (including in writing). It is proposed that the Standards Commission could hold a hearing to determine the sanction to be imposed only.
10. **Section 19** – outlines the sanctions available to the SCS if it finds that a breach of a code has occurred. It is proposed, for clarity and transparency purposes, that the sanctions be amended to include information to the effect that the SCS can consider any previous breaches of similar provisions in the applicable code by the same Respondent within a five-year period, when determining the sanction to be applied for any new contravention.
11. **Section 19(1)** – the current wording of the provision requires the SCS to impose a sanction if a breach is found at a Hearing. It is proposed that this be amended to give the SCS the discretion not to impose a sanction if it deems it not appropriate to do so (for example in a case where there were compelling, extenuating or mitigating circumstances).
12. **Section 19(2)** – provides that a period of suspension imposed on a councillor, following a breach finding at a Hearing, ends on the beginning of the day after any local government election. It is proposed that this be amended to provide that any period of suspension imposed at a Hearing about a Respondent councillor will continue over an election period, or can be re-imposed, if the councillor concerned is re-elected. The current provision means that the length of any suspension a councillor has to serve may be dependent on when the conduct occurred and the length of the

investigation and adjudication processes. It is considered that this is potentially unfair, particularly given that the duration of the ESC's investigation may be partly dependent on the co-operation of the Respondent. It could lead to inconsistencies in the length of time councillors who have committed similar breaches have to serve, even if the SCS imposed the same length of suspension. The amendment would also be consistent with Section 21 which states, for interim suspensions, that a period of interim suspension imposed upon a councillor ends after an election, *but* that if the councillor is re-elected, the SCS may re-impose the suspension.

It is also proposed that the section should provide the Standards Commission with the power to take enforcement action, in the event that a council, public body or member of the public reports to it any non-compliance with a suspension (for example, if a suspended councillor tried to attend a meeting which they are not entitled to attend, in terms of the suspension imposed).

13. **Section 20** – provides that the SCS should 'give written notice' of its Hearing procedure and potential sanctions to the Respondent councillor or member. It is proposed this be amended to only require the SCS to draw a Respondent's attention to the procedures and potential sanction, by way of, for example, providing a link to the information on the SCS website, as the requirement to provide this information means the SCS's initial notification of Hearing correspondence can be lengthy and confusing.
14. **Section 21** – provides the SCS with the power to suspend a Respondent councillor or member for an interim period, while the ESC's investigation into a complaint alleging they have breached their respective code is ongoing. It is proposed that the word 'sanction' in this section be removed and replaced with 'measure' (or a similar word) to distinguish between sanctions imposed following a finding of breach at a Hearing and a 'measure' taken while an investigation is ongoing and no finding has been made. This is to reflect the fact that an interim suspension is a protective measure taken before any finding about whether the applicable Code has been breached has been made and, therefore, it is not intended to be a sanction or punishment.
15. **Section 22(4)** – outlines how appeals can be made about a SCS finding. It is proposed this be amended to provide clarity about the 21-day deadline for the submission of any appeal. It is proposed that the section be amended to make it clear that the 21-day period for the submission of an appeal begins from the date of SCS issuing its written decision (rather than from the date of the Hearing). It is considered this is fairer, as the written decision provides full reasoning for breach and sanction decisions.
16. **Section 24** – provides that the SCS does not make a decision on whether to hold a hearing, direct further investigation or do neither in the case of a referral about an *ex officio* or employee member of a board of a devolved public body (an *ex officio* member is one who is a member of a devolved public body by virtue of them holding an office in another organisation). It is proposed that this section be amended so that it only applies to employee members. Given a public body could take action about an employee under its disciplinary procedures, it is proposed that the section continues to apply to employee members of boards. It is proposed, however, that *ex officio* members be subject to the same provisions in the Act as other board members. This is to ensure action can be taken and a sanction applied should they be found to have breached the applicable code.

The Public Bodies (Joint Working) (Integration Joint Boards) (Scotland) Order 2014

The Health Boards (Membership and Procedure) (Scotland) Amendment Regulations 2016

Provision 8(e) of The Public Bodies (Joint Working) (Integration Joint Boards) (Scotland) Order 2014 states that an individual will be disqualified from being a member of a health and social care integration joint board if they have been subject to a sanction under section 19(1)(b) to (e) of the Ethical Standards in Public Life etc. (Scotland) Act 2000. The Health Boards (Membership and Procedure) (Scotland) Amendment Regulations 2016 contains an analogous provision, 2(5)(j), for members of health boards.

This means that if the SCS, at a Hearing, imposes any sanction, other than a censure, on any individual under Section 19 of the 2000 Act for a breach of a Code of Conduct, that individual will be disqualified from being a member of any health board or health and social care integration joint board (IJB). While it is understood that the Government wishes to ensure that individuals who do not meet certain standards are barred from being members of both types of bodies, it is nevertheless considered that these provisions are disproportionate and potentially unfair. The disqualification would automatically occur where the SCS has imposed a short suspension on an individual for breaching a Code of Conduct on a matter entirely unrelated to their suitability to be a member of a health board or an IJB. For example, if the SCS suspended a councillor from sitting on the Planning Committee of their Council for breaching provisions in the Councillors' Code of Conduct in respect of making decisions on quasi-judicial or regulatory matters, they would also be disqualified from being a member of a health board or an IJB.

The provisions in the Order and Regulations could potentially have a more significant and disproportionate impact on small local authorities, which have fewer councillors to appoint or nominate for membership or proxy membership of health boards and IJBs. In addition, the provisions in the Order and Regulations could be considered to fetter SCS' discretion under Section 19 of the 2000 Act in respect of any Respondents before it from a health board or IJB as, in essence, it could be considered to be disproportionate to suspend them, given that any sanction other than a censure would result in automatic disqualification from the health board or IJB in question. So, whilst a breach such as failing to declare an interest should in certain circumstances result in a Councillor or a member of another public body being suspended for a period of a month or so, a similar outcome would in effect result in disqualification if the case involved a Respondent from a health board or IJB. On the other hand, however, it would be unfair for a Hearing Panel to take the consequence of the provisions into account when determining any sanction to be applied under Section 19, as doing so could result in a situation where a Respondent who is a member of a health board or an IJB only gets a censure (to prevent them from being disqualified), whereas a Respondent who is not may receive a suspension.

It should be noted that Section 19 of the 2000 Act already gives a Hearing Panel the power to suspend or disqualify a Respondent from another public body (which would include a health board or health and social care integration joint board), if it deems it appropriate to do so.

The SCS and ESC propose, therefore, that the provisions at 8(e) in the Order and 2(5)(j) in the Regulations are unnecessary and should be removed.