

MINUTES

Meeting date: Monday, 25 April 2022

IN ATTENDANCE ONLINE

Members:

- Paul Walker (Convener)
- Ashleigh Dunn
- Mike McCormick
- Suzanne Vestri
- Tricia Stewart

Executive Team Members:

- Lorna Johnston (Executive Director)
- Richard Wilson (Caseworker)

ITEM	CONTENT	ACTION
STANDING ITEMS		
1.	<p>APOLOGIES No apologies were received.</p> <p>DECLARATIONS OF INTEREST Ms Dunn declared an interest and took no part in the discussion on item 11A. Mr Walker declared an interest and took no part in the discussion in item 11B. Mrs Vestri declared an interest and took no part in the discussion on item 12A.</p>	
2.	<p>MATTERS ARISING All matters arising were complete or due to be discussed, either at the meeting or at the next one, which was scheduled to take place on 30 May 2022.</p>	
CONSENT ITEMS		
3.	<p>DRAFT MINUTE OF PREVIOUS MEETING Members reviewed and approved the minute of the meeting on 29 March 2022.</p>	
STRATEGIC MATTERS		
4.	<p>ARTICLE 10 OF THE ECHR AT THE INVESTIGATION, SECTION 16 DECISION-MAKING AND SANCTION STAGES Investigations: Members noted that the Executive Team had discussed with the Acting Ethical Standards Commissioner (ESC) the approach his office took to considering freedom of expression under Article 10 of the European Convention on Human Rights, when investigating complaints that alleged a councillor or member of a devolved public body had breached their respective Code of Conduct. Members noted that the Acting ESC had confirmed that he would reach a conclusion, following investigation as to whether on the face of it, the facts as established on the balance of probabilities, amounted to a breach of the Code. If so, he would state this conclusion clearly in the investigation report, before going on to consider the application of Article 10.</p> <p>Members queried whether the Acting ESC was obliged, under Section 14 of the Ethical Standards in Public Life etc. (Scotland) Act 2000, to send a proposed report to the councillor or devolved public body member and give them the opportunity to make representations on the alleged contravention in cases where he concluded, on the face of it, there had been a breach of the Code, but where he also concluded that Article 10 might afford protection to a formal finding of breach and application of a sanction. Members asked the Executive Team to raise this query with the Acting ESC and advise them of his response.</p>	Executive Team

Section 16: Members discussed the extent that the Standards Commission should be considering Article 10 when making a decision under Section 16 of the 2000 Act about whether to: (a) hold a Hearing; (b) direct further investigation; or (c) do neither.

Members noted that no restriction on the Respondent's right to freedom of expression can be imposed at either the investigation stage (by the ESC) or the Section 16 decision-making stage (by the Standards Commission). That was because such a restriction can only be made by the finding of breach at a Hearing and the imposition of a sanction.

Members noted, nevertheless, that the question of whether Article 10 might afford protection could be relevant to the questions of whether it was in the public interest and proportionate to hold a Hearing. Members agreed, therefore, that in cases alleging a breach of the respect, courtesy or bullying and harassment provisions in a Code, the Standards Commission should, at the section 16 decision-making stage, firstly consider whether there was, on the face of it, a breach of the Code, regardless of any potential protection the Respondent might enjoy under Article 10.

If the answer was **no** because the Standards Commission was satisfied that the evidence found by the ESC contradicted the complaint / exonerated the Respondent, there was no need to consider Article 10. If the answer was no because the Standards Commission did not consider the conduct as alleged could meet the threshold of amounting to disrespect, discourtesy or bullying and harassment, then this should be stated in the written decision. The Standards Commission could nevertheless consider Article 10 and, if applicable, state that it was likely, in any event, that it would apply and provide protection, meaning a breach could not be found.

If the answer was **maybe** and the Standards Commission considered the conduct, as alleged, was bordering on being disrespectful, discourteous or bullying and harassment, it would consider Article 10 and, if applicable, state that it was highly likely, in any event, that it would apply and provide protection, meaning a breach could not be found. It was agreed, however, that the Standards Commission should only do so in cases where it is very clear that Article 10 would provide protection, for example, in cases where:

- it was evident that the Respondent would attract enhanced protection as their comments were made or the conduct occurred in a political setting or related to matters of public concern; or
- it was evident any comments were value judgements that appeared to have some basis in fact.

If the answer was **yes**, the Standards Commission would proceed to consider other public interest and proportionality issues as outlined in the Section 16 Policy. If it was otherwise proportionate and in the public interest to hold a Hearing, then it would be appropriate to discuss and determine the question of whether Article 10 protection arose at a Hearing (and not as part of the Section 16 decision).

Members agreed that the Section 16 Policy should be updated to reflect this.

Sanction decision-making: Members noted that Hearing Panels were required to consider Article 10 at the sanction decision-making stage (as well as the breach decision stage) in respect of any complaints that concern freedom of expression, as any sanction imposed was an interference with this right. Members noted that the Hearing Panels currently considered Article 10 when imposing a sanction in such cases, when they considered whether the sanction being proposed was a proportionate restriction.

Members noted that the current version of the Standards Commission's Section 19 Policy on the Application of Sanctions contained the following provisions:

4.1 The Standards Commission notes that any sanction it imposes in relation to a contravention of a Code of Conduct that, on the face of it, interferes with the

**Executive
Team**

	<p>Respondent's right of freedom of expression under Article 10 of the European Convention on Human Rights (ECHR), as enshrined in the Human Rights Act 1998, can also be an interference with the right under Article 10.</p> <p>4.2 Therefore, any restriction involved by a finding that a Code of Conduct has been contravened and the imposition of a sanction will require to be justified by Article 10(2), which allows restrictions on the freedom of expression that are necessary in a democratic society for the protection of the reputation or rights of others. Any such restriction must be for relevant and sufficient reasons; and must be proportionate to the legitimate aim being pursued.</p> <p>4.3 In considering applying a sanction in cases where the application of Article 10 may apply, the Standards Commission will consider:</p> <ul style="list-style-type: none"> • firstly, whether the interference (i.e. the proposed sanction) is the minimum necessary, or whether less restrictive means could be employed; and then • secondly, whether the benefit of that least necessary measure outweighs its adverse impact on the Respondent's right to freedom of political expression. For example, whether any benefit in applying a sanction in respect of protecting the mutual bond of trust and confidence between elected members and officers (which enables local government to function effectively), will outweigh any impact on the Respondent. <p>Members agreed that written decisions should highlight this approach, under the 'Reasons for Sanction' section. The Hearing Panel should then articulate why it considered the sanction to be imposed to be the minimum interference necessary with the appellant's Article 10 right to freedom of expression, while achieving the aims of maintaining standards in public life.</p> <p>Members noted that the Executive Team were due to provide Members with refresher training on Article 10 on 25 July 2022.</p>	<p>Hearing Panels</p>
<p>BUSINESS MATTERS</p>		
<p>5.</p>	<p>UPDATE ON ETHICAL STANDARDS COMMISSIONER'S ROLE, RESPONSES TO SECTION 22 REPORT AND DRAFT INVESTIGATIONS MANUAL</p> <p>Members noted that there were no updates in respect of the ESC's role or in relation to any further responses to Audit Scotland's Section 22 report on the ESC's Audit for 2020/21.</p> <p>Members noted that the Acting ESC had now been in post for over a year. Members expressed concern about the ongoing uncertainty that arose from the temporary nature of this appointment, and asked the Executive Team to seek an update from the Scottish Parliamentary Corporate Body as to whether they expected the ESC to return or whether they anticipated making a new permanent appointment (and if so, when).</p> <p>Members were pleased to note that the Acting ESC had consulted with the Executive Team on the proposed new investigations manual. Members noted that the Acting ESC had advised that the majority of the suggestions made by the Executive Team had been accepted. The Acting ESC had advised that he now intended to consult more widely on the draft manual.</p>	<p>Executive Team</p>
<p>6.</p>	<p>RENEWAL OF STATUTORY DIRECTIONS ISSUED TO THE ETHICAL STANDARDS COMMISSIONER</p> <p>Members discussed the timescales for considering the renewal of the Directions previously issued to the Ethical Standards Commissioner (ESC) under sections 10 and 11 of the Ethical Standards in Public Life etc. (Scotland) Act 2000.</p> <p>Members agreed that the Standards Commission should consult with stakeholders on the Outcome of Investigations Direction in August 2022 so that they could consider any responses received as part of the review at their meeting on 26 September 2022. Members agreed that stakeholders should be reminded of the reasons for the issuing of the direction</p>	

	<p>in November 2020 and should also be advised that, as part of its review, the Standards Commission would be considering whether it added value in terms of:</p> <ul style="list-style-type: none"> • consistency in decision-making; • transparency; • clarity in respect of the different roles of the ESC and Standards Commission; and • consistency in terms of process, regardless of any individual postholder in place at any given time. <p>Members agreed to review the Progress of Investigations Directions at the same meeting.</p> <p>Members agreed that, following consultation with ESC, the review of the Eligibility Direction would be undertaken at the Standards Commission meeting in February 2023.</p> <p>Members asked the Executive Team to include the deadlines outlined above in the workplan.</p>	<p>Executive Team</p>
<p>7.</p>	<p>GOVERNANCE ARRANGEMENTS</p> <p>Members discussed the possibility of holding all or some of Standards Commission meetings in public. Members noted that any meetings held online could be livestreamed on the Standards Commission’s website.</p> <p>Members noted that the Standards Commission was currently transparent about its business, in that it published full minutes of its meetings on its website and held its Hearings in public. Members agreed, nevertheless, that holding at least one meeting a year in public would help promote the key principles of transparency, accountability and openness. Members noted that the agenda for the February 2023 meeting would include discussions on the business objectives and risk register for the following year and agreed, therefore, that holding that meeting in public would present a good opportunity to promote the principles identified. Members asked the Executive Team to reflect this decision in the workplan and to make the necessary arrangements nearer the time.</p>	<p>Executive Team</p>
<p>8.</p>	<p>SURVEYS OF MONITORING OFFICERS AND COUNCILLORS</p> <p>Members reviewed the detailed analysis documents prepared by the Executive Team on the responses to the Standards Commission’s surveys of Monitoring Officers and Councillors (issued in February 2022) that had been prepared and are attached at Appendices 8A and 8B, respectively.</p> <p>Subject to a few minor amendments being made, including identifying which actions were to be prioritised, Members agreed that the documents should be circulated to Monitoring Officers and published on the Standards Commission’s website.</p> <p>Members further reviewed the potential improvement actions to be taken, as identified by the Executive Team in light of the responses, which were outlined at the end of both documents, under the headings ‘Next Steps’. Members agreed that the actions should be added to the workplan.</p>	<p>Executive Team</p>
<p>9.</p>	<p>SURVEYS OF STANDARDS OFFICERS AND MEMBERS OF DEVOLVED PUBLIC BODIES</p> <p>Members noted that it had been agreed, as part of the Business Plan for 2022/23, that the Standards Commission would survey members and Standards Officers of devolved public bodies in the first quarter of the year. The intention was to capture the views and experiences of members, and any suggestions for improving the Standards Commission’s training and educational material. Members noted that the surveys formed part of the Standards Commission’s strategy to obtain and undertake detailed analysis of qualitative and quantitative evidence on its work to promote the Codes of Conduct so that the impact of that work could be evaluated in a meaningful way.</p> <p>Members reviewed and, subject to some minor changes, agreed the content and format of the draft surveys prepared by the Executive Team. Members agreed that the surveys should be issued.</p>	<p>Executive Team</p>

10.	<p>RECORDING AND MONITORING OF MEMBERS' TIME</p> <p>At the Audit & Risk Committee meeting on 26 January 2022, it was proposed by the Internal Auditor that the focus of this year's internal audit should be on the Standards Commission's governance arrangements, including a review of how Members' time was recorded and monitored.</p> <p>Members noted that the Convener was contracted to work three days per month (7.5 hours per day) plus additional days, as and when required, for Hearings. Other Members were required to work two days per month (7.5 hours per day) plus additional days, as and when required, for Hearings.</p> <p>Members noted the data on Members' hours collected for January, February and March 2022. Members agreed to continue to provide data, each month, on the hours they had worked so that this could be analysed over the full year and any trends identified. Members asked the Executive Team to record, as part of the data collection, how many Section 16 decisions had been made, and how many meetings (either full Standards Commission meeting or committee) and training events or workshops had been held, each month.</p>	Executive Team
CASES UPDATE		
11.	<p>REPORTS FROM THE ESC & SECTION 14 LETTERS</p> <p>(a) LA/Fi/3544: Members noted that a 'do neither' decision had been made on a report received from the Acting ESC about a Fife councillor.</p> <p>(b) LA/DG/3514: Members noted that, following receipt of new information, a 'do neither' decision had been made on a report received from the Acting ESC about a Dumfries and Galloway councillor (a decision made previously had been taken to hold a Hearing).</p> <p>(c) LA/E/3542: Members noted that a 'do neither' decision had been made on a report received from the Acting ESC about a City of Edinburgh councillor.</p> <p>(d) LA/AN/3546: Members reviewed a report from the Acting ESC about an Angus councillor. Members agreed they required more information in order to decide whether to hold a Hearing or to take no action. Members agreed to direct the Acting ESC to undertake further investigation in order to obtain the information required.</p>	
12.	<p>CASES</p> <p>(a) LA/D/3580: Members noted that a Hearing was scheduled to take place in person on 1 June 2022. Pre-Hearing meeting to take place on 11 May 2022.</p> <p>(b) LA/AC/3600: Members noted that a Hearing was scheduled to take place in person on 7 June 2022. Pre-Hearing meeting to take place on 23 May 2022.</p> <p>(c) LA/AN/3561: Members noted that a Hearing was scheduled to take place in person on 15 June 2022. Pre-Hearing meeting to take place on 27 May 2022.</p>	
13.	<p>INVESTIGATION EXCEED 3 MONTHS – INTERIM REPORT</p> <p>(a) LA/NL/3596: Members noted the contents of a report from the Acting ESC advising that an investigation into a complaint about a North Lanarkshire councillor had taken more than three months.</p> <p>(b) LA/R/3579: Members noted the contents of a second interim report from the Acting ESC advising that an investigation into a complaint about a Renfrewshire councillor had taken more than three months.</p>	

	(c) LA/SL/3588: Members noted the contents of a second interim report from the Acting ESC advising that an investigation into a complaint about a South Lanarkshire councillor had taken more than three months.	
14.	FEEDBACK INCLUDING ANY HEARINGS SURVEY RESPONSES Members noted the feedback email from the complainer on the decision in respect of case LA/DG/3514.	
ANY OTHER BUSINESS		
15.	<p>REQUESTS FOR TRAINING AND INDUCTION SESSIONS</p> <p>Members noted that Mr Walker and Mr McCormick were to facilitate a training roadshow on the Councillors' Code for elected members of Stirling Council on 16 May 2022.</p> <p>Members noted that Aberdeen City Council had asked whether the Standards Commission could provide training for its elected members on the Councillors' Code in late June 2022. Members agreed to accommodate this request, provided any training event was held online.</p> <p>Members noted that the Executive Director had been invited and agreed to present on the revised Model Code of Conduct to NHS Forth Valley Health Board Members at a board seminar on 9 August 2022.</p> <p>Members noted that, following a request to do so, the Executive Director had agreed to provide a brief overview of the key changes to the Model Code to Crofting Commission members. Members noted that the date for this was yet to be finalised.</p> <p>Members noted that Highlands and Islands Enterprise had asked whether the Standards Commission could provide training for its members on the Model Code. Members agreed to accommodate the request if the event could be held online.</p> <p>Members noted that the Executive Director had been invited to speak at the SOLAR Autumn 2022 conference.</p> <p>AGENDA ITEMS FOR NEXT MEETING</p> <p>Members agreed to advise the Executive Director of any further items to be added to the agenda for the next meeting.</p>	Members
16.	<p>2022 DIARY DATES AND WORKPLAN</p> <p>Members noted the diary dates and updated workplan for 2022</p> <p>DATE OF NEXT MEETING</p> <p>Members noted that the next meeting of the Standards Commission was scheduled to take place in person at the Scottish Parliament on Monday, 30 May 2022.</p>	<p>Members</p> <p>Executive Team</p>