

DATA LABEL: PUBLIC



WEST LOTHIAN COUNCIL

COUNCILLORS' CODE OF CONDUCT – ANNUAL REPORT 2020/21

REPORT BY GOVERNANCE MANAGER

A. PURPOSE OF REPORT

To inform members of significant issues in 2020/21 in relation to the Code of Conduct.

B. RECOMMENDATIONS

1. To note the summary of the issues arising in 2020/21 in relation to the Councillors' Code of Conduct
2. To note that training sessions on up-to-date cases issues will continue, and that additional training will be required and delivered as part of the post-election induction programme in May and June 2022
3. To note that the revised Code of Conduct and related Standards Commission guidance and advice are due to take effect on a date yet to be determined and that training will be offered to and recommended for all members to cover the changes

C. SUMMARY OF IMPLICATIONS

I	Council Values	Being honest, open and accountable
II	Policy and Legal (including Strategic Environmental Assessment, Equality Issues, Health or Risk Assessment)	Ethical Standards in Public Life etc. (Scotland) Act 2000 and related regulations – members' duties to observe and uphold the Code; council's duties to promote the Code and assist members in its observance
III	Implications for Scheme of Delegations to Officers	N/a
IV	Impact on performance and performance Indicators	N/a
V	Relevance to Single Outcome Agreement	N/a
VI	Resources - (Financial, Staffing and Property)	N/a
VII	Consideration at PDSP	Not possible due to timing of annual reports publications, dates of meetings and reporting to council today

VIII Other consultations

Monitoring Officer; Depute Monitoring Officer

D. TERMS OF REPORT**1 Background**

- 1.1 The Ethical Standards in Public Life etc. (Scotland) Act 2000 created a statutory framework of ethical standards which applies to local authorities and to other devolved public bodies. There is a national statutory Code of Conduct for Councillors (the Code) backed up by statutory guidance and a substantial library of advice notes on specific issues. The Code is enforced through complaints to the Commissioner for Ethical Standards in Public Life in Scotland (the ESC) and onwards to the Standards Commission for Scotland (the Commission). Members found to have breached the Code may be censured, suspended or disqualified from being a councillor. Complaints alleging breaches of the Code can also be submitted to the council. Those are dealt with by the Monitoring Officer through an internal procedure which may divert an issue away from the more formal path. It does not provide a substitute for it and cannot prevent an external reference being made.
- 1.2 The council's duties are to raise awareness of the Code, to promote the observance by members of high standards of conduct, to assist members to comply with the Code, and to provide induction and training sessions.
- 1.3 Members' obligations include familiarisation with and compliance with the Code and its underpinning statutory rules, having regard to the statutory guidance; attending training and induction sessions, promoting and supporting the Code, and encouraging compliance by others. Being familiar with, understanding the Code and complying with it are the personal responsibilities of each member.

2 The ESC's year

- 2.1 The ESC's office remained in a troubled state. In 2019/20 the incoming Commissioner reported on operational shortcomings in the operation she inherited. She is currently on extended leave. An Acting Commissioner was appointed on 20 April 2021. He reports this year on the continuation of significant governance and staffing problems during and after the reporting year. A wider-scope external audit was instructed and carried out. External advice on the ESC's approach to assessing admissibility of complaints has resulted in changed practice and a review of all admissibility decisions made in 2019/20 and 2020/21. The outcomes of both those exercises are awaited.
- 2.2 The Commission has statutory powers to issue directions to ESC. The power was unused until 2019/20. A first direction was issued to try to address delays and shortcomings in investigation and reporting arrangements. That had limited effect. The Commission issued a second direction in November 2020. It required the reporting of the conclusion of every investigation into a complaint, outlining ESC's findings and conclusions as to whether or not there has been a contravention. The decision-making on whether or not to proceed to a hearing was thereby reserved to the Commission. There followed at least a perception that cases were being diverted by initial findings of inadmissibility. As a result, a third direction was issued in March 2021. It required a full investigation into every complaint unless the conduct could never possibly be a breach of the Code, or the councillor was deceased or *incapax*, or the alleged misconduct was more than a year old. The new relationship has started to take effect. The Commission's decisions in 2021/22 reflect the new arrangements. It has developed a policy to guide its decisions on whether or not to proceed to a hearing and has taken that line in approximately half of the cases reported in 2021/22. Those will be covered at training sessions later in the year and in next year's annual report.

2.3 Some of the problems mentioned in this year's ESC annual report are:-

- A huge increase in MSP complaints and the diversion of scarce resources
- Staff departures, recruitment issues and staff turnover leading to a reduction in capacity and a loss of experience, intellectual assets and corporate memory
- A diversion of scarce resources from key work and the imposition of "inappropriate" working methods
- Poor or no engagement with stakeholders
- The deterioration in relations with the Commission, leading to the statutory directions issued by the Commission to ESC in relation to investigation practice and decision-making (see D2.2, above)

2.4 The report describes actions already taken to address those problems and indicates improvements, both achieved and anticipated:-

- The building of bridges and resumed engagement with stakeholders on a routine basis, especially the Commission
- A one-year revision for 2021/24 to the ESC Strategic Plan 2020/24, recognising and addressing the immediate improvements required in consultation, engagement, transparency, and governance arrangements
- Improved recruitment and revised HR policies and procedures
- A new approach to determining admissibility of complaints
- Ensuring compliance with the Commission's statutory directions, including an acknowledgment of the circumstances which led to their promulgation

2.5 In terms of numbers and trends in the complaints received and cases handled (see also Appendix 1):-

- The vast majority of complaints continue to be against councillors and not members of devolved public bodies (96% in 2019/20 and 95% this year)
- The proportions of complaints from members of the public and from councillors remained almost the same
- Planning/regulatory complaints fell markedly, from 95 (33%) in 2019/20 down to 14 (6%) this year
- Disrespect cases increased significantly (14% last year and 46% in 2020/21). Complaints of disrespect towards other councillors were down and those towards officers and members of the public were up
- A catch-all category entitled "other complaints" shows an increase but an analysis and comparison of figures in that category has not been possible due to the "loss of corporate memory" described by the ESC and ascribed to the departure of experienced staff

2.6 The ESC's office and operations have therefore been troubled and troubling. However,

the open acknowledgment of the problems and the steps taken and to be taken towards their resolution give encouragement that more normal service may be achievable in the near future.

3 The Commission's year

3.1 This year's annual report is the last under the convenership of Kevin Dunion. He departed on 31 August 2021. He has been replaced from within by Paul Walker, a Commission member since 2018. The Commission reported on progress towards the key aims in its Corporate Plan for 2020/24, including:-

- Meeting performance targets. Examples are issuing written decisions within 5 working days of hearings, and holding hearings within an average of 15 weeks from an ESC referral (the extremes being 8 weeks and 22 weeks)
- Publications to help the public and to raise awareness of the Code and ethical standards, including a plain language guide to the Code, quarterly updates, blogs, press releases and social media presence
- An updating of advice notes and procedural rules and policies, including those for online hearings, the use of impact statements, sanctions, and guidelines for deciding not to take further action on an ESC referral
- Stakeholder engagement, including participation in the working group on the revised Code, regular meetings and workshops, and online training sessions for 4 councils
- Issuing directions to and the recasting of its relationship with ESC to bring all decision-making into the Commission (see D2.2, above)

3.2 Information about its decisions during the reporting year is in Appendix 2. The cases noted there were all digested in internal training sessions in December 2020, January 2021 and June 2021. Some of the themes, trends and highlights are:-

- A total of 14 hearings were held, all in relation to councillors, resulting in 13 breach findings and 1 "no breach" decision. The breach cases were about disrespect (5), declarations (5) and confidentiality (3)
- Sanctions applied were 6 censures, 1 full suspension, 5 partial suspensions and 1 disqualification
- Online/webcast hearings were introduced due to the pandemic and 12 of the 14 in 2020/21 were conducted in that way. Online hearings will continue for cases where the alleged breach is technical and/or inadvertent, and/or where there is little or no disputed evidence
- One case was appealed to the Sheriff Principal and resulted in a decision being quashed on procedural grounds (proceeding with a hearing in the councillor's absence despite a late request to adjourn the hearing). It was referred back and re-heard (again in the councillor's absence). The finding was again of a breach and the sanction was again disqualification (although this time lasting until after the council elections in May 2022). The most recent news on that case is that the councillor appealed to the Sheriff Principal against the length of the disqualification, and lost
- No new interim suspension reports were dealt with (temporary measures where substantial risks are present if a councillor is able to carry on regardless

pending a hearing). One pre-existing suspension was renewed pending a final determination which was duly made (suspension)

- 3.3 The Commission will revise its guidance and advice notes to reflect and support the revised Code of Conduct when it becomes effective. It consulted after the end of the reporting year on its proposed guidance. The revised Code started on its way through parliamentary procedures in October and will become effective on a date yet to be specified. Training and education will be offered to members if it comes into effect before the end of their term of office and in the post-election induction programme.

4 The council's year

- 4.1 The annual report for 2019/20 was given on 24 November 2020. It was delivered to full council, rather than to Council Executive. Similar reports were provided to the Governance & Risk Board and the Corporate Management Team to raise awareness of the Code amongst officers.
- 4.2 It was agreed by council that a different approach would be taken to training sessions for members. A set-piece annual presentation had been the norm for many years. It concentrated on the issues covered in the two annual reports and so did not cover up-to-date cases, decisions and other developments. Instead, separate training sessions were to be offered, at least twice in the year, to concentrate on passing on current and up-to-the-minute information. Sessions were delivered via Webex on 14 December 2020 and 14 January 2021 (cases from 1 April 2019 to date on registration and declaration, and on respect and confidentiality, 22 attendees in total) and on 10 June 2021 (update on all cases since December 2020, 11 attendees).
- 4.3 Members also continued to receive periodic emails passing on and digesting significant events and developments, such as Commission decisions and its quarterly bulletins. The aim is to pass on current and significant issues in a more immediate and digestible way other than through formal training sessions.
- 4.4 The council's response to the Scottish Government's consultation on a revised Code of Conduct was developed through PDSP on 4 December 2020 and approved at Council Executive on 19 January 2021.
- 4.5 The council's updated history of involvement with the ESC and the Commission, and under its internal procedures, is shown in Appendix 3.
- 4.6 Five complaints were made through the council's internal procedure, a number in line with those in recent previous years. The outcomes were as follows:-
- One alleged that social media posts were racially motivated. No breach was found in this case
 - One case related to a failure by an elected member to respond to a complaint relating to matters which were being dealt with by council officers. No breach was found. Whilst the Councillors Code of Conduct provides a general duty on elected members to be "accessible to all the people of the area for which you have been elected to serve and to represent their interests conscientiously", there is no requirement or prescription applied around communication or timeliness of responses to enquiries
 - One alleged that a councillor had used racist and abusive language in a council meeting. No breach was found in this case
 - One complaint alleged that a councillor was profiting from their role as a

councillor in their private business interests. No breach was found

- One complaint alleged that a committee chair had used disrespectful language towards members of the public in attendance at a meeting. No breach was found

4.7 No complaints against West Lothian councillors were investigated by ESC during the year.

5 Significant messages

5.1 There is still a high proportion of decided cases on respect. Social media is commonly to be found in those along with the Article 10 protection for freedom of expression on public interest and political issues. The Commission has warned about unwise and inappropriate language during online meetings where the proceedings may feel less formal. The move away from a high volume of complaints about planning cases is surprising and may be a temporary phenomenon.

5.2 The future contribution of ESC to the system is key to the continuing success of the complaints regime. The Commission has done what it can to ensure transparent and consistent decision-making but that still depends on an effective investigation function.

5.3 Becoming acquainted with and using the revised Code and related guidance and advice will be a significant task no matter when the revised Code takes effect. It will be something for current, returning and new elected members to master.

E. CONCLUSION

An up-to-date awareness of issues relating to the Code of Conduct will help members and council fulfil their respective obligations in relation to ethical standards.

F. BACKGROUND REFERENCES

- 1 Councillors' Code of Conduct and Guidance - <https://www.standardscommissionscotland.org.uk/uploads/files/1545151725181218CCfCouncillorsGuidanceDec2018.pdf>
- 2 Commission Annual Report 2020/21 - https://www.standardscommissionscotland.org.uk/uploads/files/1631262719SCS_Annual_Report_20202021_final.pdf
- 3 ESC Annual Report 2020/21 - <https://www.ethicalstandards.org.uk/publication/esc-annual-report-2020-21>

Appendices/Attachments:

1. ESC complaints and cases
2. Commission cases
3. Internal complaints and outcomes

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Date of meeting: 23 November 2021

APPENDIX 1
ESC complaints and cases (national)

Table 1 – ESC complaints and cases¹						
	15/16	16/17	17/18	18/19	19/20	20/21
Against everyone	245 (132)	174 (106)	146 (80)	174 (118) ²	284 (154)	238 (130)
Against councillors	202	165	134	167 (111)	274 (146)	225 (121)
Against public body members	33	9	3	6 (6)	10 (8)	13 (9)
From members of the public	202	110	123	148	213	169
From councillors	36	54	19	21	34	52
Planning (regulatory)	85	35	39	24	95 ³	14
Registering interests	4	6	4	10	4	4
Declaring interests	19	22	5	13	12	12
Disrespect	75	63	31	60	97 ⁴	110
Completed	214 (111)	224	176 (90)	162 (113)	256 (143)	277 (157)
Dropped, not competent or did not proceed [Percentage] ⁵	157 (82) [64% (63%)]	111 [64%]	121 (59) [83% (66%)]	79 [51%]	214 (116) [84% (81%)]	227 (132) [84% (86%)]
No breach found	49 (22)	95 (55)	43 (23)	31 (22)	32 (21)	10 (7)
Breach found, SCS referral	8 (7)	18 (14)	12 (8)	17 (11)	8 (4)	39 (17)

¹ The first figure is the number of complaints received. The second, in brackets, where relevant, is the number of cases dealt with after complaints are combined

² A review by ESC found minor inaccuracies in the reporting of some statistics in previous years. The corrected figures have been inserted in this Table and those are highlighted in yellow

³ From 2019/20 onwards, an omnibus category of “quasi-judicial or regulatory”, not just “planning”

⁴ (Mis)conduct was towards officers or members of the public in 96 complaints (64 last year), and was towards councillors in 14 complaints (33 last year)

⁵ The much elevated figures in 2019/20 and 2020/21 resulted in a serious complaint about and investigation of ESC practices on determining inadmissibility. Decisions in this category in both years are being revisited

APPENDIX 2

Commission cases (national)

Table 1 – Commission full hearing cases concluded			
Case	Facts	Decision	Sanction and reasons
Respect			
AC/3199	Councillor convicted of sexual assault at a function when acting as a councillor or reasonably perceived to be so. Disrespect, harassment, failure to appreciate impact of conduct	Breach	Suspension. Maximum penalty, short of disqualification, to reflect seriousness. Disqualification avoided due to the “leniency” of the sentencing decision taken by the Sheriff
ER/3271	Aggressive haranguing of fellow councillor in council office with insulting and offensive personal comment, continuing an angry exchange at a budget meeting	Breach	Suspension. One-off unpleasant incident of short duration in the context of allegations made at a public meeting
Fi/3075 and 3039	Inappropriate degree of involvement in local pressure group resulting in offensive language to and harassment of members of the public and supply of inaccurate council information about planning enforcement	Breach	Suspension. Inexperience led to unwise involvement and conduct. Failed to appreciate effect on others. Restricted to one occasion and one social media post
R/3262 and 2257	Series of emails to councillors and members of the public containing insulting, gratuitous and offensive language and characterisations of other members. Included threats to personal safety taken seriously by the police	Breach	Disqualification for set period of time. Recidivist. No insight or regret shown. After year end, decision quashed in court due to procedural failings by Commission. Case referred back, reheard and found in breach, disqualification imposed
WD/3016	Aggressive questioning of officer in presence of others, inferring dishonesty and inefficiency and questioning status and right to attend meeting. Involved deliberate confidentiality breach against advice too	Breach	Suspension. Scrutiny justified but in a respectful, constructive manner and in the correct forum. Personal criticism in public and breach of confidentiality undermined trust and respect and good public administration
Registration			
SI/3305	Failure to update registered interests as director and shareholder in a private company when name changed. Technical, but public would not be able to identify the interest without the name of the company being accurate	Breach	Censure. Accepted it had been registered and failure to update was accidental and not an attempt to conceal or secure personal gain
Declaration			
Fi/2268	Seeking support for a view held by the councillor on redrawing community council boundaries then not declaring and taking part in decision-making	No breach	No sanction. Not an “interest” at all. Councillor entitled to hold a view on a non-regulatory policy matter and seek support for it whilst still taking part in the decision-making
Fi/3125	Failure to declare registered unremunerated appointment to Body A associated with Body B applying for council funding and support which could affect the interests of both A and B	Breach	Censure. Was registered so no attempt to conceal it or seek personal gain. Objective test, if applied, would have been clear
H/3003	Failure to declare registered	Breach	Censure. Was registered so no

Table 1 – Commission full hearing cases concluded			
Case	Facts	Decision	Sanction and reasons
	unremunerated appointment to HITRANS when considering application for support and funding for project supported by HITRANS		attempt to conceal it or seek personal gain. If declared, could have stayed due to specific exclusion. Objective test, if applied, would have been clear
Mo/3132	Failure to declare a registered remunerated appointment to health board when considering a response to health board consultation on future of children's services at local hospital	Breach	Censure. Was registered so no attempt to conceal it or seek personal gain. If declared, could have stayed due to specific exclusion. Objective test, if applied, would have been clear
SL/2252	In dealing with a budget-saving measure at committee, failure to declare son's employment in service affected by cuts and potential job losses (financial) and TU rep promotion of opposition to it (non-financial)	Breach	Censure. No personal gain, decision was to defer a decision, no concealment. Objective test, if properly applied, would have been clear
Confidentiality			
AC/2276	Careless disclosure at community council meeting of information contained in a budget pack marked throughout as "confidential" and showing warnings against disclosure	Breach	Censure. One-off inadvertent disclosure of small quantity of information, but legitimate for budget preparations and advice to be kept confidential
Fi/3278	Conscious disclosure for political advantage of information acquired at ALEO meeting, against warning from the chair to maintain confidence until council had been briefed	Breach	Suspension. No insight or acceptance as to why information was legitimately confidential. Deliberate disregard of legitimate warnings
OI/3265	Repeated disclosure of confidential information in member briefings on COVID-19, and of personal and private news concerning a councillor's death. Latter point involved disrespect too	Breach	Suspension. No insight or acceptance as to why information was legitimately confidential, despite warnings and clear understanding by other members

Table 2 – Commission interim suspension cases		
Case	Facts	Decision
	None reported by ESC but SCS renewed/extended a previous interim suspension pending hearing taking place (LA/AC/3199, councillor convicted of sex offences while on council business or reasonably perceived to have been on council business)	

APPENDIX 3

Internal complaints and outcomes

Table 1 – Numbers of complaints to ESC	
2004/05	4
2005/06	6
2006/07	4
2007/08	1
2008/09	7
2009/10	6
2010/11	1
2011/12	2
2012/13	6
2013/14	3
2014/15	2
2015/16	4
2016/17	1
2017/18	0
2018/19	3
2019/20	0
2020/21	0
Total	50

Table 2 – Grounds of complaints to ESC	
Conduct in the Chamber	11
Payment of allowances	1
Respect	13
Principles of leadership & accountability	2
Planning applications/declarations	14
Use of council facilities	3
Declaring financial interests/withdrawal	4
Lobbying on planning applications	1
Other (matters not relevant to Code)	1
Total	50

Table 3 – Complaints handled internally	
2011/12	4
2012/13	6
2013/14	4
2014/15	1
2015/16	3
2016/17	1
2017/18	6
2018/19	8
2019/20	7
2020/21	5
Total	45