



Date	10 January 2023
Agenda Item	8

Report to West Lothian Integration Joint Board

Report Title: Code of Conduct – Annual Report 2021/22

Report By: Standards Officer

Summary of Report and Implications	
Purpose	This report: (tick any that apply).
	- seeks a decision <input type="checkbox"/>
	- is to provide assurance <input type="checkbox"/>
	- is for information <input checked="" type="checkbox"/>
	- is for discussion <input type="checkbox"/>
	To inform the Board of developments and activity in 2021/22 in relation to the Board's Code of Conduct.
Recommendations	To note the summary of the work carried out in 2021/22 by the Commissioner for Ethical Standards in Public Life in Scotland and the Standards Commission for Scotland, and of other significant events in the ethical standards regime, including the successful adoption by the Board of its new members' Code of Conduct.
Directions to NHS Lothian and/or West Lothian Council	A direction is not required.
Resource/ Finance/ Staffing	N/A
Policy/Legal	Ethical Standards in Public Life etc. (Scotland) Act 2000; Board's Code of Conduct
Risk	IJB001, Governance Failure
Equality, Health Inequalities, Environmental and	The report has been assessed as having no relevance with regard to equality or the Public Sector Equality Duty. As a result, an equality impact assessment has not been conducted.

Sustainability Issues	
Strategic Planning and Commissioning	N/A
Locality Planning	N/A
Engagement	N/A

1 Background

- 1.1 The Ethical Standards in Public Life etc. (Scotland) Act 2000 established a statutory regime for promoting and enforcing ethical standards in public life in Scotland. The regime applies to councils and councillors and to devolved public bodies and their members. The Board is a devolved public body for the purposes of the Act. Statutory guidance contains additional requirements and expectations. Additional advice is issued by the Standards Commission.
- 1.2 The regime is built around a code of conduct and the statutory duty on members to comply with it. The Board's local Members' Code of Conduct must be based on a national Model Code for devolved public bodies. A revised Model Code was brought into effect on 7 December 2021. As a result, the Board had to adopt a revised Members' Code and have it approved by the Scottish Ministers. That process was successfully completed and the revised Members' Code became effective on 15 July 2022.
- 1.3 The Board'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. Members' obligations include familiarisation 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.
- 1.4 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 membership. The ESC and the Commission annual reports are published in or about October each year and summarise their activities. Those annual reports and the case reports from both bodies during 2021/22 have been used to inform the rest of this report. There have been developments since the end of the reporting year, but this report largely centres on what happened between 1 April 2021 and 31 March 2022.
- 1.5 By far the largest part of the work of both the ESC and the Commission relates to councillors and the Councillors' Code of Conduct. Lessons can though be learned from those cases. There is generally a far smaller small number (sometimes none) of complaints each year about members of other public bodies. That ratio changed in 2021/22. Of all complaints received by the ESC, 18% were against members of devolved public bodies, as opposed to 4% and 5% in the preceding two years. None of those found their way to the Commission in the reporting year, although they have been trickling through in this current year.
- 1.6 On 29 January 2017 the Board agreed arrangements to meet its duties under the ethical standards legislation and to assist members in meeting theirs. The actions agreed included the submission of a report each year to the Board on the way the ethical standards regime has operated during the year and to highlight and explain the more significant developments and events. They also include a session at a development day to go over the year's developments and refresh members' understanding. That session had not taken place in 2019/20 before

COVID-19 descended. A session was held at a development day on 27 May 2021 covering both reporting years. A training session was given at another development day on 29 September 2022, covering in the main the new Code's provisions but touching on a then-recent Commission decision in a case against an Aberdeen City IJB member. Members should consider if they wish to receive a short briefing before the end of this reporting year on Commission cases and its approach to its decision-making in 2021/22.

2 The ESC's year

- 2.1 The ESC's office remained in its troubled state but made substantial progress towards its return to being a functional public body. The Acting Ethical Standards Commissioner remained in office but recruitment to a permanent position started. An action plan was put in place to implement recommendations from a wider-scope audit carried out in 2020/21. Progress has been reported publicly with the majority of actions completed and only one still to be started. Governance arrangements were completely revised, including the adoption of corporate values/vision, a three-year strategic plan and supporting rolling biennial business plans. Handling of complaints and communication with complainers and respondents have been improved. Openness and transparency are the aims, including candour about the time taken to carry out even an initial assessment (currently up to 9 months) and bring them to a conclusion, and the reasons for delay.
- 2.2 The statutory Directions issued by the Commission remained in place. They have been or will almost certainly be renewed during 2022/23. That means that except in extremely limited circumstances all complaints must be investigated by the ESC and concluded investigations reported to the Commission, with the Commission retaining sole decision-making powers. Those arrangements have had a considerable impact on the ESC since they became effective in March 2021. The number of full investigations required has increased, even leaving aside the increase in the number of complaints received. With staff shortages the throughput of complaints has declined and the year-end backlog has increased.
- 2.3 Some of the problems mentioned in this year's ESC annual report are:-
 - Ever higher numbers of complaints received against MSPs, diverting resources away from complaints against councillors and members of devolved public bodies and requiring retraining of the whole investigations team
 - An increase in the number of complaints/cases against councillors (330/164) compared to the previous two years (301/165; 319/178)
 - A higher backlog of unresolved complaints/cases at the year end (146/184 compared to 24/8 and 63/35)
 - The need to continue engagement with and seek support from the Scottish Parliamentary Corporate Body (SPCB) in relation to audit, governance, resources and budgets
 - Difficulties in recruitment and staff retention, leading to impacts on complainers, respondents, councils, and devolved public bodies
- 2.4 The report describes actions already taken to address those problems and indicates improvements, both achieved and anticipated:-
 - Recognition by the SPCB that existing resources were inadequate for statutory duties to be discharged, and its agreement to provide additional resources to address both ongoing workload and the backlog of unresolved complaints
 - The development of a comprehensive Investigations Manual and supporting procedures and resources. That followed engagement with the Commission, Monitoring Officers and Standards Officers and will be subject to wider consultation in 2022/23
 - Continuing stakeholder engagement and improvement in relationships with them (Commission, Monitoring Officers, Standards Officers, SOLACE, SOLAR)
 - Prioritisation and early completion of workforce planning to address delays in investigations

- The overall positive shift in the way the office operates and deals with its customers. With increased resources now available, these will continue to help restore functionality and reputation

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

- The vast majority of complaints continue to be against councillors and not members of devolved public bodies. The balance has shifted slightly though, with an increase this year in complaints against the latter (18%, compared to 4% and 5% in the previous two years)
- The proportions of complaints from members of the public and from councillors against councillors remained much the same, with 83% from the public, compared to 71% last year and 80% the year before
- Planning/regulatory complaints increased slightly, following the previous year's decline (13% this time, 6% in 2020/21, 33% in 2019/20)
- Disrespect cases are again the largest category. The numbers of complaints of disrespect were both up on last year
- Registration and declarations of interest formed a small proportion of complaints (8% this year, 7% last year) and confidentiality complaints increased (up from 6 to 23)

2.6 With due regard to confidentiality and personal data, the ESC has helpfully provided some insight into the complaints it handled in the reporting year relating to members of devolved public bodies:-

- ESC received 59 devolved public body complaints (21 cases) in 2021/22
- Six of those 59 complaints (three of the 21 cases) were about integration joint board members (none of them here)
- The six integration joint board complaints were about disrespect to employees or members of the public and failure to register interests
- Under the present decision-making ESC/Commission relationship, the outcomes of all those complaints had to be referred to the Commission for determination. The detail of the referred cases remains confidential until the Commission makes its final determinations
- There were no devolved public body referrals made in 2020/21 for the Commission to determine. Those arising in 2021/22 have started to emerge from the Commission's decision-making processes. There have been three reported so far in 2022/23. They involved members of an integration joint board, a national park authority, and the children's hearings administration. The Commission decided not to hold a hearing in any of them

3 The Commission's year

3.1 This year's annual report is the first under the convenership of Paul Walker who assumed that role in September 2021. The Commission reported on progress towards the key aims in its Corporate Plan for 2020/24, the highlights including:-

- The implementation of the revised Code on 7 December 2021 after Parliamentary approval, accompanied by a refresh of its guidance and advice notes
- Continuing positive engagement with stakeholders through consultations, workshops and regular newsletters, and the use of its website and social media accounts
- The use of its statutory oversight powers through Directions and the contribution that has made to improvements in the ESC's operations and the throughput of cases
- The introduction of its policy on the use of its newly-assumed decision-making powers and its successful introduction and use in consistent decision-making. Its approach is around public interest and proportionality, and considers factors such as the seriousness

of the alleged breach, the reaction and attitude of the respondent, the views of the ESC, and the likelihood of Article 10 saving the day regardless

- The conclusion of repeated litigation against the Commission by a recidivist (now former) Renfrewshire councillor in relation to hearing procedures and sanctions. It culminated in an appeal to the Court of Session which reduced the disqualification period by an amount sufficient to allow them to stand for re-election in May 2022

3.2 Information about its decisions during the reporting year is in the appendix. Some of the themes, trends and highlights from the Commission's caseload are:-

- There were 26 cases remitted by the ESC for determination. Of those, hearings were deemed necessary in seven and in 19 no further proceedings took place. In two cases the ESC was instructed to carry out further investigation. When that was done and reported back no further proceedings were taken in either case
- Decisions as to whether hearings should take place were made very quickly after referral, and hearings were then convened at most 12 weeks after being instructed.
- A total of five hearings were held, all in relation to councillors, of which four were respect cases and one concerned alleged improper conduct in regulatory business. They resulted in one "breach" finding, one "no breach" decision, and three cases where a *prima facie* breach was negated by the application of the Article 10 protection in relation to free speech on matters political and of public interest
- The sanction applied in the sole breach case was disqualification. No new interim suspension reports were dealt with (temporary measures where substantial risks are present if a member is able to carry on regardless pending a hearing)
- Online/webcast hearings, used during the pandemic, were continued as an option, used where the alleged breach was minor or technical or where there was no significant disagreement over the facts of the case

3.3 As the reforms in the ESC's office and its increased resources take hold it is likely the Commission will be faced with a greater volume of cases for its final determination, either through hearings or through the preliminary decisions not to proceed further. It may find its workload prevents it matching the speed with which it has been disposing of cases over the last 18 months. The Commission's decisions on cases where no hearings are held are helpful in illustrating the types of allegations and conduct that led to "near misses". Complaints and decisions about words used in political debate and argument, whether at meetings, in emails or on social media, are useful in setting boundaries. It should be noted as well that the Commission has made well-timed attempts through blogs and social media to highlight standards in public life in Scotland at apposite moments in the colourful stories about ethical standards at Westminster.

4 The Board's year

- 4.1 No complaints were made against Board members in 2021/22, continuing an impressive perfect record. In light of the increase in complaints against members of devolved public bodies in general and integration joint boards in particular, members should not be complacent.
- 4.2 The revised Members' Code was agreed, approved by Ministers and implemented from 15 July 2022.
- 4.3 A training session was delivered at a Board development day on 27 May 2021, covering two years' worth of cases and decisions and statistics. Another session was held at a development day on 29 September 2022, concentrating on the provisions of the new Code.
- 4.4 Regular updates were provided to members by email, covering the quarterly Updates by SCS and other notable events. That practice will continue going forward, to try to keep things current and keep the Code and its provisions in members' minds.

5 Conclusions

- 5.1 Consideration of this report will ensure compliance with some of the steps agreed by the Board to keep members informed and reminded about their ethical standards obligations and to help the Board itself to discharge its statutory responsibilities.
- 5.2 Complaints against non-councillors are still rare, but becoming less so, and this Board in particular has not directly experienced any issues whereby the Code has been engaged. It is though important that Board members, voting and non-voting, and regardless of events elsewhere, are not complacent when it comes to the Code of Conduct.
- 6.3 Members are reminded to keep in mind the most significant duties imposed on them by the Code:-
- Review the Register at least twice a year (bi-annual prompts are sent)
 - Update the Register of Interests within one month of a change
 - Act in the Board's best interests when doing Board business
 - Keep confidential Board information confidential
 - Treat Board members, officers and members of the public with respect
 - Read the Code and be familiar with its requirements

Appendices	1. Summary of ESC and Commission complaints and cases
References	ESC Annual Report 2021/22
	Commission Annual Report 2021/22
	Board meetings on 13 January 2022, 17 March 2022 and 17 August 2022
	Board's Code of Conduct and Register of Interests
Contact	James Millar, Standards Officer 01506 281613, james.millar@westlothian.gov.uk

APPENDIX

Table 1 – ESC complaints and cases 2016/17 – 2021/22 ¹						
	16/17	17/18	18/19	19/20	20/21	21/22
Against everyone	174/106	146/80	174/118	284/154	238/130	330/164
Against councillors	165	134	167/111	274/146	225/121	272/143
Against public body members	9	3	6/6	10/8	13/9	58/21
From members of the public	110	123	148	213	169	273
From councillors	54	19	21	34	52	43
Planning (regulatory)	35	39	24	95 ²	14	42
Registering interests	6	4	10	4	4	8
Declaring interests	22	5	13	12	12	20
Disrespect	63	31	60	97 ³	110	126
Completed	224	176/90	162/113	256/143	277/157	190/82 ⁴
Dropped, not competent or did not proceed ⁵	111 (64%)	121/59 (83%/66%)	79 (51%)	214/116 (84%/81%)	227/132 (84%/86%)	125/56 (38%/34%)
No breach found	95/55	43/23	31/22	32/21	10/7	6/5
Breach found, SCS referral	18/14	12/8	17/11	8/4	39/17	69/21

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

² From 2019/20 onwards, an omnibus category of “quasi-judicial or regulatory”, not just “planning”

³ (Dis)respect was towards officers or members of the public in 99 complaints (96 last year), and was towards councillors in 27 complaints (14 last year)

⁴ The changes in figures in this row and the row beneath are traceable to the Direction in March 2021 requiring (almost) every complaint to be fully investigated and remitted to the Commission for determination

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. An external investigation took place, and was critical, but legal advice was that rejection decisions, however misguided, could not be re-opened

Commission cases

Table 2 – Full hearing cases concluded 2021/22			
Case	Facts	Decision	Reasons and sanction (if any)
Respect			
AC/3495	Disrespect to councillor. Comments at a council meeting about another councillor. Brought up (accurately) respondent's conviction for sexual assault on council business and suspension by the Commission. Stated that he was not welcome and that people thought he should not be a councillor	No breach	Article 10 ⁶ rights obviated a breach finding. On the face of it, offensive. Character of respondent found to be a matter of public interest for legitimate comment at a council meeting. Not sufficiently gratuitous to justify restricting freedom of expression on political/public interest matters
AC/3497	Disrespect to members of the public. Respondent went to location of long-running neighbour dispute to attempt to find a solution. Went unannounced and without an officer. Only aware of one side of the competing stories. From a recording, comments and questions asked found to be ill-advised, accusatory and confrontational	No breach	Article 10 rights obviated a breach finding. On the face of it, constituents were not treated with respect and courtesy. However, it did concern a matter of public interest, given the history, the public knowledge of the dispute and the council's previous involvement in relation to antisocial behaviour. Restraint on freedom of expression not justified
Mo/3516	Disrespect to members of the public. Online/social media comments of a personal nature about an MSP and their wife in relation to joining a different political party, and mocking the First Minister's experience of miscarriage	No breach	Article 10 rights obviated a breach finding. Some comments found to be personalised and offensive but most involved value judgments apparently made in good faith and were short of the gratuitous standard which might lead to a breach finding.
R/2257	Disrespect to councillors, officers and members of the public online and in emails. Prolonged, protracted, colourful and escalating campaign against another councillor and their family stemming from unfounded allegations of undue influence and improper advantage in housing allocation decisions	Breach	Disqualification (after litigation). Facts clearly indicated there had been a breach. Article 10 protection could not save the respondent. Breach accepted but disqualification period appealed to Sheriff Principal (unsuccessfully) and onwards to the Court of Session. Disqualification period reduced due to Commission not explicitly taking into account the resulting prevention of the respondent from being nominated in the May elections

⁶ "Enhanced protection of freedom of expression applies to all levels of politics including local. There is little scope under Article 10(2) for restrictions on political speech or on debate on questions of public interest. In a political context, a degree of the immoderate, offensive, shocking, disturbing, exaggerated, provocative, polemical, colourful, emotive, non-rational and aggressive, that would not be acceptable outside that context, is tolerated." ([Standards Commission Advice Note on Article 10 Rights](#))

Table 2 – Full hearing cases concluded 2021/22			
Case	Facts	Decision	Reasons and sanction (if any)
Regulatory (planning)			
PK/3477	Improper conduct in regulatory business. Planning application at committee. Respondent (not on the committee) stated to one of the parties in an email that he had colleagues on the committee who might be “persuaded to ask questions” on his behalf. Complaint by a councillor on the committee that words used gave the appearance of impropriety. ESC agreed, relying on an interpretation of “persuaded”	No breach	Monitoring Officer confirmed asking questions for colleagues was accepted practice and no impropriety was involved. No indication of any influence being exerted or of any impact on the committee’s proceedings. Objective test not satisfied so no improper conduct

Table 3 – Interim suspension cases 2021/22		
Case	Facts	Decision
None reported by ESC, SC's powers therefore unused		