

Ms Ariane Burgess MSP
Convener
Local Government, Housing and Planning Committee

By email only

10 January 2024

Dear Ms Burgess

Follow up to December 2023 Committee Appearance

Thank you for your letter of 8 January 2024 and for the opportunity to appear before the Committee last month. Please find below our views and comments on the follow up questions raised by the Committee.

Concerns that monitoring officers are local authority officials

We have attached the Standards Commission's Advice Note for Councillors on the Role of a Monitoring Officer, which provides information about the role and responsibilities of such officers in respect of the ethical standards framework. As you will see from this, we recognise that Monitoring Officers may have an investigatory role if an internal decision is made to attempt local resolution in respect of a complaint being made, or concerns being raised, about a councillor's conduct. The Advice Note acknowledges, however, that it may be inappropriate to attempt local resolution and that a complaint can, instead, be made directly to the Ethical Standards Commissioner (ESC).

Information published on the websites of both the ESC and Standards Commission makes it clear that anyone can make a complaint to the ESC about a potential breach of the Councillors' Code, regardless of whether they have been directly affected by the alleged conduct. Complaints can also be made to the ESC at any time, regardless of whether any local resolution or investigation is underway, has been attempted or undertaken.

We note that there could be a conflict of interest if a Monitoring Officer was to investigate a complaint about a councillor's conduct, in circumstances where the complaint is made by a fellow officer or where the behaviour is alleged to have had a negative impact upon the Monitoring Officer. It may also be the case that Monitoring Officers can be placed in a difficult position if they are asked to investigate a complaint from one councillor about another, particularly if the councillors concerned represent different political parties. In those circumstances, the Monitoring Officer may decide either to refer the matter directly to the ESC to investigate, or to advise the individual wishing to make a complaint of their right to make such a referral.

If a Monitoring Officer considers they may have a conflict of interest but are nevertheless of the view that the complaint could be resolved, there is nothing to prevent them from asking a colleague in another local authority to carry out an investigation. Whether that is an appropriate course of action would, of course, be a matter for the Councils concerned to take a view on. It should be noted, however, that a referral can still be made to the ESC even if some form of local investigation has been undertaken and the complaint has not been upheld. The ESC will investigate any complaints he receives (if the eligibility criteria are met), regardless of the outcome of any local investigation. A Monitoring Officer who is conflicted might well decide, therefore, that it is more appropriate for the matter to be referred to the ESC directly.

Undermining of the ESC's findings

The Committee has questioned whether public criticisms of the conclusions reached by the ESC following an investigation can potentially undermine public confidence in the role of the ESC and, if so, what can be done to address this.

We note that it is often the case, and sometimes inevitable, that one or other party to a complaint will be disappointed with the ESC's findings, given these involve him stating whether the factual basis of a complaint has been established and, if so, whether this amounts to a breach of the applicable Code of Conduct. Public criticisms arising from any such disappointment are not always reasonable or fair, so we do not consider that they will necessarily undermine public confidence.

In any event, the Standards Commission makes the final decision on the disposal of any complaint about a councillor or member of a devolved public body that has been investigated by the ESC. As such, any unfair or unjustified criticism should be addressed by the investigation conclusions being scrutinised by a separate and independent body. Both the ESC and the Standards Commission always provide reasons to complainants and respondents for the conclusions that they have reached. We accept it may be the case that, in some circumstances, criticism of the conclusions or decisions reached by the ESC, or subsequently the Standards Commission, may be fair and justified. We would not wish to prevent this being aired publicly as both organisations welcome feedback, both positive and negative, as part of our commitment to learning and improvement.

Councillors feeling that they are 'silenced' by the Code of Conduct

The Standards Commission's Guidance on the Councillors' Code notes that councillors are entitled, and indeed expected, to scrutinise the delivery of services. The Guidance notes, however, that in terms of the Code, councillors must refrain from making public statements which expressly or by implication criticise the performance, conduct or capability of an identifiable individual employee or group of employees (where individuals in that group are, or could be, identifiable).

We understand that some elected members are concerned that the way the provision is being interpreted within local authorities is restricting their ability to highlight issues. As discussed at the Committee meeting, the Standards Commission will raise this at its annual workshop with Monitoring Officers. The workshop is not due to be held until October so the Standards Commission will also write to both SOLAR and SOLACE, in the meantime, to highlight the concerns raised and to remind officers of the requirement and importance of

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scrutiny by councillors. The Standards Commission will update the Committee when this has been done and will advise it of any responses received.

We hope this is helpful to you and the Members of the Committee.

Please do not hesitate to contact us if the Committee has any questions about this response or wishes to raise any further issues.

Yours sincerely

Lorna Johnston

**Executive Director
Standards Commission**

Ian Bruce

Ethical Standards Commissioner