

Agenda Item	11
Report No	AC/25/24

The Highland Council

Committee: Audit

Date: 26 September 2024

Report Title: Commissioner for Ethical Standards in Public Life/Standards Commission: Councillors' Code of Conduct – Investigation into Complaints

Report By: Chief Officer - Legal and Corporate Governance

1. Purpose/Executive Summary

1.1 This Report provides information in relation to complaints dealt with by the Commissioner for Ethical Standards (ESC)/Standards Commission during the period 1st September 2023 to 31st August 2024 in relation to alleged breaches of the Councillors' Code of Conduct by Members of Highland Council and the outcome of the Commissioner's investigations into these complaints and any hearings of the Standards Commission.

2. Recommendations

2.1 Members are asked to note:-

- i. The ESC has investigated one complaint and, following investigation, the Standards Commission decided to take no further action.
- ii. Following investigation by the ESC the Standards Commission decided to hold a hearing in respect of :-
 - a) Councillor Maxine Smith in February 2024. On conclusion of the hearing the Commission found that Councillor Smith had breached the Code and imposed a sanction of suspension for one month and
 - b) Councillor Andrew Jarvie in April 2024. On conclusion of the hearing the Commission a formal finding of a breach of paragraphs 3.1, 3.8 and 3.10 of the Code could not be made.

3. Implications

3.1 Resource: There are no resource implications arising directly from this report.

- 3.2 Legal: There are no legal implications arising directly from this report. All members agree to adhere to the Councillors' Code of Conduct when accepting office as an elected member.
- 3.3 Community (Equality, Poverty, Rural and Island): There are no such implications arising directly from this report.
- 3.4 Climate Change / Carbon Clever: There are no such implications arising directly from this report.
- 3.5 Risk: There are no risk implications arising directly from this report.
- 3.6 Health and Safety (risks arising from changes to plant, equipment, process, or people): There are no such implications arising directly from this report.
- 3.7 Gaelic: There are no Gaelic implications arising directly from this report

4. Impacts

In Highland, all policies, strategies or service changes are subject to an integrated screening for impact for Equalities, Poverty and Human Rights, Children's Rights and Wellbeing, Climate Change, Islands and Mainland Rural Communities, and Data Protection. Where identified as required, a full impact assessment will be undertaken.

Considering impacts is a core part of the decision-making process and needs to inform the decision-making process. When taking any decision, Members must give due regard to the findings of any assessment.

This is an update report and therefore an impact assessment is not required.

5. Introduction

- 5.1 The Standards Commission are a statutory body established under The Ethical Standards in Public Life etc. (Scotland) Act 2000 (the 2000 Act). The 2000 Act established a framework whereby all Councillors in Scotland are required to comply with the Councillors' Code of Conduct (December 2021). The Standards Commission also publish Guidance to accompany the Code. The Guidance is updated regularly with the most recent version dated June 2024. Complaints about alleged breaches of the Codes are investigated by the Ethical Standards Commissioner (ESC) and thereafter adjudicated upon by the Standards Commission. The Standards Commission are also responsible for considering and issuing dispensations. In a number of very limited circumstances dispensations may be granted by the Standards Commission in relation to the existence of financial and non-financial interests which would otherwise prohibit participation in discussion and voting. Such a dispensation will allow the councillor concerned to continue discussing and voting on the matter, provided the relevant interest has been declared, where it is deemed to be in the public interest that they be allowed to do so.
- 5.2 The ESC is required to provide a report to the Standards Commission at the conclusion of every investigation into a complaint about a councillor outlining their findings and conclusions on whether or not there has been a contravention of the Code. On receipt of a report from the ESC, the Standards Commission has three options available (a) to direct the ESC to carry out further investigations; (b) to hold a hearing; or (c) to do neither.

- 5.3 In terms of the number of Councillors the Highland Council is one of the largest local authorities in Scotland. Historically the volume of complaints against Members of Highland Council has been low.
- 5.4 Training on the Code of Conduct was offered to all members as part of the Members' Induction Programme 2022. A follow up session for Members on governance was held in November. This included further training on registration and declaration of interests as well participation in quasi-judicial decisions. Further training opportunities will be included in the revised training programme. Members receive the Quarterly Updates from the Standards Commission and are reminded regularly of the need to ensure that their respective Registers remain up to date.

6. Complaints to the Commissioner for Ethical Standards – 2023/24

- 6.1 This report deals with the complaints concluded during the period 1 September 2023 to 31 August 2024.
- 6.2 During the period in question Commissioner completed one investigation into a complaint against a Member of the Highland Council - LA/H/3954.
- 6.3 The complaints alleged that the Councillor failed or delayed in updating his Register of Interest to record his appointment as an unremunerated director. In his investigation report, the ESC advised that it was not in dispute that the Councillor had been appointed as a director. Councillors have one month to record any new interest in their Register of Interests. It was not in dispute that the Respondent did not register the interest until over four months after their appointment. The ESC advised he had found, therefore, that the Respondent had breached the Code by failing to register the interest timeously. The ESC had also considered whether there was any failure to declare the interest at certain Council meetings. The ESC advised that the Councillor made transparency statements at the meetings, explaining that while they had a connection they did not consider it amounted to a declarable interest in respect of the specific agenda items to be considered. The ESC advised that he did not consider that a member of the public with knowledge of the relevant facts would reasonably regard the Respondent's directorship as being so significant that it would be considered likely to influence their decision-making on the specific agenda items at the meetings in question. Given the Councillor made transparency statements about their connection it was evident they were not trying to conceal the interest. The ESC advised that the Councillor had apologised and confirmed the failure to timeously register the interest was inadvertent.
- 6.4 The Standards Commission did not consider that it was necessary or appropriate to direct the ESC to undertake any further investigation into the matter. In making a decision about whether to hold a Hearing, the Standards Commission took into account both public interest and proportionality considerations. The Standards Commission noted that holding a Hearing (with the associated publicity) could promote the provisions of the Code and, therefore, there could be some limited public interest in holding a Hearing. The Standards Commission noted, however, that the option to take no action had been included in the 2000 Act. In considering proportionality, the Standards Commission noted that the ESC had reached the conclusion that the Councillor had breached the provisions in the Code that require councillors to register unremunerated directorships within a month of their appointment. Having reviewed the ESC's report, the Standards Commission noted that the Councillor had apologised for the failure to register timeously their directorship. The Standards Commission was satisfied that the Councillor had not tried to conceal his interest and, therefore, had no

reason to doubt the breach of the Code was inadvertent. The Standards Commission further noted that it was of limited duration. In the circumstances, and having taken into account the above factors, the Standards Commission concluded that it was neither proportionate, nor in the public interest, for it to hold a Hearing in respect of the complaints. The Standards Commission determined, therefore, to take no action on the referral. The Standards Commission nevertheless agreed that the Councillor should be reminded of the importance of adhering to provisions in the Code concerning the registration of interests as these allow for transparency and help ensure the public can have confidence that elected members are making decisions in the public interest.

7. Standards Commission Hearings

7.1 Councillor Maxine Smith – LA/H/3759

Following an investigation into a complaint received on 28 May 2022 about the conduct of Councillor Smith the ESC referred a report to the Standards Commission on 1 November 2023. On receipt of the referral report, the Standards Commission noted that the ESC had identified five issues of complaint. The ESC advised that he found that the allegations in respect of issues 2, 4 and 5, even if established, would be unlikely to result in a formal finding of a breach of the Code. The Standards Commission considered it had no evidence before it that would lead it to depart from this conclusion and determined, therefore, that it was neither proportionate, nor in the public interest, for it to consider issues 2, 4 and 5 at a Hearing. The Standards Commission determined, therefore, to take no action on the referral in relation to issues 2, 4 and 5. The two remaining issues of complaint, to be considered at the Hearing, concerned an alleged contravention, by Councillor Smith of paragraphs 4.20, 3.1 and 3.2 of the Code.

7.2 The Standards Commission decided, therefore, that it wished to hear evidence and submissions at a Hearing in order to determine whether the Code had been contravened. The Standards Commission convened a Hearing on 6 February 2024. The Hearing was conducted remotely and was available to view by the public through webcast. Commission heard submissions from both the ESC and Councillor Smith and her representative.

7.3 The Standards Commission Hearing Panel concluded that:

1. The Councillors' Code of Conduct applied to Councillor Smith.
2. Councillor Smith had breached paragraphs 3.1, 3.2 and 4.20 of the Code

7.4 The Standards Commission found Councillor Smith to have behaved discourteously and failed to advance equality of opportunity, in relation to another councillor, regarding nominations for a post on the North Planning Applications Committee of the Council. The Commission found that this was because the other councillor was pregnant, and Councillor Smith had assumed she was likely to take maternity leave. The Panel further found that Cllr Smith had failed to register certain interests timeously, as required by the Code.

7.5 The Commission accepted that Councillor Smith had not intended to discriminate against the councillor in question and noted that her aim had been to protect the Planning Committee (being the former Chair) and ensure its effectiveness. It was not in dispute that Councillor Smith failed to update her Register of Interests to detail her

shareholding in two limited companies after the Council elections in 2022. The Commission noted that it had no reason to consider the failure to register the interests properly was anything other than an inadvertent breach of the Code. It was noted that Councillor Smith had made no attempt to hide her interests and had apologised to all concerned for the failure to ensure her register of interests was updated and correct, in adherence to the Code.

- 7.6 The Commission considered that Councillor Smith's failure to advance equality of opportunity could have been detrimental to the other councillor concerned. The Commission further considered that it could have impacted adversely upon the effective functioning of the Council, as it could have the effect of preventing or discouraging certain groups from participating in local politics. The Commission noted, in mitigation, that Councillor Smith had co-operated fully with the investigation and Hearing processes, and this was the first time she had been before the Standards Commission. The Commission also noted the Councillor Smith's longstanding contribution to the Council and public life, as evidenced by the numerous character references provided in her support.
- 7.7 In the circumstances, therefore, the Commission concluded that a suspension of one month was the appropriate sanction.
- 7.8 The outcome was reported to full Council on 14 March 2024. A full copy of the decision of the Standards Commission can be found at www.standardscommission.org.uk
- 7.9 **Councillor Andrew Jarvie- LA/H/3838**
- 7.10 A complaint was made to the Ethical Standards Commissioner (ESC) alleging that Councillor Jarvie had failed to comply with the Code of Conduct, and, in particular, that he had breached paragraphs 3.1, 3.8 and 3.10
- 7.11 The Standards Commission for Scotland convened a Hearing on 2 April 2024. The Commission Hearing Panel heard submissions from both the ESC and Councillor Jarvie.
- 7.12 The Hearing Panel concluded that:
1. The Councillors' Code of Conduct applied to Councillor Jarvie.
 2. A formal finding that Councillor Jarvie had breached paragraphs 3.1, 3.8 and 3.10 of the Code could not be made.
- 7.13 The complaint arose from Councillor Jarvie's attendance at the full Council meeting on 8 December 2022. During consideration of agenda item 12, being the Chief Social Work Officer's Annual Report, he spoke about the closure of two children's homes (including one in Wick) and stated:
"I have two questions about this. Did the Council deliberately let standards slip so low at [the Children's home in Wick] that it ended up being closed so the Council didn't do it itself"; and
"And in view of this am I wrong in feeling the Chief Executive came to Caithness and lied to us" ..
- 7.14 The Hearing Panel heard it was not in dispute that Councillor Jarvie made the two

statements at the meeting. The Panel noted that Councillor Jarvie's position was that after a press release about the home was issued by the Council in June 2022, the then Chief Executive met local councillors in Caithness, stated that the press release was incorrect and promised the home would not close. The Panel accepted that when it was then reported in a local media outlet, on 7 December 2022, that the home was to close, Councillor Jarvie had a right to raise the matter and question why the position had changed.

- 7.15 The Panel was of the view that such a public attack on the then Chief Executive's character could have been highly damaging, not only to her reputation as an individual, but also to the Council itself, given she was its senior officer. The Panel accepted the question of whether the position in respect of the closure of the home may have changed between June and the Council meeting in December 2022, and that the then Chief Executive's position on the home, as outlined in June, may have been accurate and made in good faith at that time.
- 7.16 The Panel considered that Councillor Jarvie must have known that the making of such an accusation in the context of a discussion on such an emotive subject, had the potential to have a significant, detrimental impact on the then Chief Executive's reputation. The Panel noted that there had been nothing to prevent Councillor Jarvie from raising his concerns about the apparent change in position regarding the potential closure of the home in a respectful manner. As such, the Panel concluded that Councillor Jarvie had, on the face of it, contravened the requirements under the Code for councillors to treat council officers with courtesy and respect and to refrain from criticising their conduct, performance or capability in public. The Panel accepted, nevertheless, that Councillor Jarvie was entitled to the enhanced right to freedom of expression under Article 10 of the European Convention on Human Rights afforded to politicians commenting on matters of public interest. The Panel noted that the Courts have held that where a statement amounts to a value judgment, there must exist a factual basis to support it, failing which it will be excessive. In this case, the Panel accepted that the Councillor Jarvie's accusation that the former Chief Executive had lied was a value judgement made in good faith. In considering it was made in good faith, the Panel accepted that Councillor Jarvie was motivated by concerns about the closure of the home, rather than a desire to question the then Chief Executive's integrity in general.
- 7.16 The Panel further considered that there was evidence to demonstrate that, while not necessarily accurate, the accusation had a basis in fact, given it appeared the position had changed in respect of the potential closure of the home, despite the apparently categorical assurances that the then Chief Executive had given at the meeting in Caithness. The Panel was satisfied, therefore, that in the very specific and particular circumstances of the case, Councillor Jarvie's comment amounted to a value judgement that was not excessive.
- 7.17 The Panel found that, in the circumstances, Councillor Jarvie's comment was not sufficiently offensive, personally abusive or gratuitous as to justify a restriction on his enhanced right to freedom of expression, that a finding of a breach of the Code and imposition of a sanction would entail. The Panel took account of its finding that Councillor Jarvie had expressed an opinion in good faith. It also took account of the fact that Councillor Jarvie and others had sought information on the position in respect of the home in advance of the Council meeting on 8 December 2022, and that this had not been provided. The Panel was satisfied, therefore, that Councillor Jarvie had attempted to seek clarification about whether the Chief Executive's position, as outlined at the meeting in Caithness, was accurate or had changed.

- 7.18 In all the circumstances the Panel concluded, therefore, that a formal finding of a breach of paragraphs 3.1, 3.8 and 3.10 of the Code could not be made.
- 7.19 The outcome was reported to full Council on 9 May 2024. A full copy of the decision of the Standards Commission can be found at www.standardscommission.org.uk

Designation: Chief Officer - Legal and Corporate Governance

Date: 13 September 2024

Author: Stewart Fraser