Annex 2

Appendix 29 – Joint Standards Committee Procedures

CASE HANDLING PROCEDURE
COMMENTS IN RED

These arrangements are made under section 28(6) of the Localism Act 2011 and set out how City of York Council ("the Authority") will investigate and determine allegations that an elected or co-opted member of the Council, or of a parish council within the Authority's area (the "Subject Member"), has failed to comply with the adopted Code of Conduct.

- Changed "consider" to "investigate and determine" as statutory language of s28(6)
- Changed "councillor" to "member" because co-opted members statutorily defined more broadly than just councillors at s27(4))
- Removed "town councils" as York doesn't have any
- Code is 'adopted' (s27(2)) by Principal Council (CYC) and Parishes have option to adopt same or use their own (s27(3)) – Gov currently considering removing this privilege but not yet done so

Monitoring Officer

1) All allegations will be received by the Authority's Monitoring Officer ("MO") who may, at any time, nominate a deputy to carry out any of their functions listed in this procedure.

2) Where the MO is the complainant, a relevant witness, or otherwise has a conflict of interest, and where the matter cannot be properly dealt with by a deputy for any reason, the MO will refer the allegation to the Chair and Vice-Chair of the Joint Standards Committee ("JSC") who will together take over the MO's role in the procedure.

- MO role currently mixed into general text at various points. Moved to start for clarity

- LGA Guidance states (at p26) that "MO's are at the heart of the standards framework, they provide support and advice to members, ensure the highest of conduct standards and are expected to handle the majority of the procedure themselves"

- In current procedure a sub-committee acts as MO throughout the process in (admittedly rare) circumstances of both MO & DMO's being conflicted. This is unnecessary, cumbersome and time consuming (making the set time-limits impossible to use, for example). It also requires some MO/DMO support despite the conflict. It is a more streamlined approach for Chair/Vice Chair to act independently of the JSC to take over the role instead.

Independent Person

3) The Authority will appoint an Independent Person ("IP") whose views may be sought at any stage of the procedure but ***must*** be sought, recorded, and taken into account, before it makes a decision on an allegation that it has decided to investigate.

4) The appointed IP's views can also be sought at any stage by the Subject Member against whom an allegation has been made.

5) Save in exceptional circumstances, once appointed the IP will remain the IP to be consulted throughout the procedure.

- Statutory requirement - s28(7) - to appoint at least 1 IP. CYC constitution Art 10, para 1.1 states "..will appoint 3 IPs who will each serve no more than 2 consecutive 4-year terms". Currently CYC has only 1, but is recruiting

- Current wording of IP role inadequate -
  - *"recorded*" added following Teignbridge DC falling foul of Ombudsman in 2022 when they kept no written record of the IP views
  - " *and taken into account*" added because is statutory wording of s.28(7)(a)
  - "*Makes a decision*" is statutory wording of s28(7)(a) but meaning has been limited by caselaw to mean only 2 things: (1) the decision as to whether a breach has occurred and (2) the choice of sanction (see R(Harvey) v Ledbury [2018] at p129). LGA guidance and Committee on Standards in Public Life both recommend IP also be involved in initial assessments to encourage consistency.
- The IP is consultant only and they cannot vote - s.13 LGHA 1989

- NEW: IP also being available to Subject Member is statutory requirement - s28(7)(b), but this should not also be extended to complainant or other interested parties (it is currently at para 22)

- For clarity, para 5 moved here from current para 7 – is academic as currently only have 1 IP. "*exceptional circumstances"* refers to illness or other impediment to continue but, in very complex cases, it may be helpful to seek views of more than 1 IP, but would not be correct to assign 1 IP to the JSC and 1 IP to the Subject Member.

The Allegation

6) All allegations *must* be made in writing. A form is available on the Authority's website and in the reception of West Offices for this purpose. Assistance in completing the form can be provided.

- Not all complaints are actually complaints - statutory language is "allegation" (defined at s.28(9)) Allegations can include investigations for clarification and even self-referrals (see case facts of R(Harvey) v Ledbury [2018] in which a subject member asked the MO to investigate following vague rumours that she had been bullying and harassing officers)

- Conducting an investigation into a Code breach without a written allegation resulted in Teignbridge DC being found guilty of maladministration.

- NEW: statutory requirement to be in writing - s28(9) - however there is no obligation to use a prescribed form.

- This can cause conflict with the obligation to provide reasonable adjustments under Equality Act 2010, so added provision to offer assistance, which may involve an officer completing a form on behalf of the complainant (there is no legal requirement that the complainant actually write or sign the allegation themselves, but some form of agreed verification will be necessary.)

7) Within *3 working days* of receipt, the MO will contact the complainant to acknowledge their allegation and to outline this procedure and the timescales involved.

8) Every allegation will be treated on its own merits, but multiple allegations may be consolidated where they relate to the same alleged misconduct.

9) Where an allegation identifies criminal conduct, or a regulatory breach, the MO may refer the matter to North Yorkshire Police (or other relevant Regulatory Authority) for consideration. In such cases the MO may pause this procedure until the outcome of the referral is known, but is not obliged to do so.

- 3 day time limit retained as keeps process moving quickly, although self-imposed limit provides fertile ground for Ombudsman criticism

- LGA guidance recommends providing procedure summary and timescales to complainant (p8)

- NEW: para 8 added to reflect current practice of consolidating multiple allegations concerning the same allegation. Whilst sometimes this is merely practical case management, at other times (especially when the allegation is denied) multiple accounts provide evidential corroboration and help decisions regarding veracity

- NEW: para 9 added following caselaw to clarify that delays will be avoided wherever possible; *"only where there is a REAL danger of a miscarriage of justice ought the breach investigation be delayed pending the outcome of a criminal investigation/proceedings"* – see NW Anglia NHS Trust v Gregg [2019] & Greenslade v Devon CC [2019] (where a councillor was only charged by police with various sexual offences AFTER the Committee's breach findings had already been made)

10) An anonymous allegation will not generally be accepted unless the MO concludes that there is a compelling public interest in doing so.

11) Where a complainant requests their identity be withheld from the Subject Member, and the MO believes there is a genuine risk of intimidation, serious harm or distress, or an adverse impact on employment, the complainant's identity may be so withheld. The complainant must be informed of the reasons for the decision.

12) A Subject Member has no automatic right to confidentiality but may request that an allegation remain confidential whilst it is investigated. The MO will consider the procedural fairness of such a request, balancing the public interest against the risk of the Subject Member (and/or to persons associated with them) suffering serious harm or distress were the allegation to become known, before deciding whether the investigation ought to remain private.

- Anonymity mirrors existing procedure (para 3). There is no statutory requirement that a complainant be identified, but natural justice would require it and it is a fundamental tenet of common law that a defendant know his accuser. Art 6 of HRA 1998 (fair trials) does not actually apply to Code breach allegations but remains persuasive. There are extremely limited circumstances at court when people giving evidence can be (for example) screened from a defendant. Anonymity goes against the principles of transparency and fairness and can make investigating complaints more difficult or even impossible. For these reasons the LGA guidance (p7) states anonymous complaints should only be accepted in exceptional circumstances

- "*A person must be afforded an understanding of what is alleged against him and be given a fair opportunity to answer it*" (Ex P Harry [1998] & Supreme Court in JR17[2010]. Further, in R(Greenslade) v DevonCC [2019] this amounted to knowing the names of the 4 officers accusing the councillor of sexual harassment. "Compelling public interest" is judicial wording and is fact-specific. (In some cases, the name of the complainant may be irrelevant and it would not prejudice a subject member to be unaware.)

- Complainant confidentiality is not the same as Anonymity because the MO will be aware of their details and is asked to withhold identity for a specific reason. The legal test to apply is 'transparency and procedural fairness' (R(Greenslade) v Devon CC [2019]. Currently the MO in consultation with the IP must find 'reasonable grounds'. The LGA guidance (p6) makes clear that confidentiality, as for anonymity, should only be granted in exceptional circumstances. The example circumstances given here are expanded from existing procedure at para 8 and reflect barrister's advice on the point (Cornerstone Chambers 2024)

- NEW: Allegation confidentiality preserves the integrity of an investigation and for this reason the LGA guidance recommends the procedure ought to remain confidential unless the public interest outweighs privacy concerns (pp29 & 35) FOI requests are subject to exemption under Sched 2, para 7 of DPA 2018 and may be refused, but there is legally nothing to prevent councillors or members of the public from publishing details. A Subject Member would then need to consider the difficulties of seeking Injunctive relief or an action in defamation, neither of which can be prosecuted by CYC on their behalf. Barrister's advice is to spell out intent clearly in the procedure (which is currently silent). The LGA acknowledges it is almost impossible to control or police publication, especially in a political context, and rather weakly suggests all documents be marked "confidential". By bringing in a specific MO decision at the outset, it is hoped this will act as a stronger deterrent.

A – Jurisdiction

13) The MO will apply an initial filter to an allegation to check:

a. it is against an elected or co-opted member,

b. they were in office at the time of the allegation,

c. it relates to when they were acting, or purporting to act, in their capacity as an elected or co-opted member,

d. that, if proven, the matter could be capable of being a breach of the adopted Code.

- "jurisdiction" is the terminology of the Committee on Standards in Public Life report 2019 (at p53), since adopted by LGA guidance 2021 (at p10), replacing "in-scope", "filtering" and "gatekeeping".

- The 4 mandatory considerations are set out more clearly here than in the current procedure (para 4). If all 4 are not met, then an allegation cannot legally be considered. LGA guidance (p10) recommends the filter sit with the MO (as legal advisor) alone, as currently.

- Changed "councillor" to "member" again because co-opted members statutorily defined more broadly than just councillors at s27(4))

- "*purporting to act*" used because, although statute expressly excludes a member's private life from the application of the Code (s27(2)), behaviour giving the impression of acting in the capacity of a member can still be caught (Livingstone v Adjudication Panel of England [2006])

- Changed "would" to "could" be capable of breach. This is a lower bar, and prevents the MO having too much dismissal power at the first step (a noted previous incident raising this concern)

B – Initial Assessment

14) Where jurisdiction is established, the MO will notify the Subject Member (and in the case of parish councillors also the parish clerk) of the allegation and provide a copy of it, together with any supporting evidence.

15) The Subject Member will then be given *10 working days* from date of notification to respond to the MO with any comments they wish to make.

16) At the end of this period (whether or not a response is received from the Subject Member) the MO, in consultation with the IP, will decide whether to:

- take no further action,
- seek to resolve the matter informally,
- refer the matter for deeper investigation,
- refer the matter to a committee hearing.

17) Where the Subject Member is the Leader, opposition Leader, a member of the Executive or a Shadow Executive, and the initial assessment decision is to take no further action, the initial assessment must first be referred to the Chair and Vice-Chair of the JSC who may, if they both agree, substitute an alternative decision.

- NEW: removed the 3-day notification time limit because the issue of jurisdiction can sometimes be a little thorny, especially when more information is required to properly understand an allegation before a decision can be made. A self-imposed time limit here could be difficult to comply with for reasons beyond the MO's

control but then become an obvious Achilles heel with the Ombudsman

- Retained the 10-day response time limit to prevent stalling, the matter going cold or harder to investigate, and to keep unnecessary delays to a minimum. This is also the LGA recommended timescale (p8)

- NEW: the initial assessment is currently considered by the MO, IP, Chair and Vice-Chair (paras 7& 9) although historically this has not always been followed. LGA guidance suggests (p14) the MO, in consultation with IP, is preferred and would help resolve simple or minor cases quickly, suggesting "*decision delays at this early stage have a clear damaging effect on trust in the system and are unfair for both the complainant and subject member*".

- Statutory power to resolve informally (s28(11)) – LGA guidance (p3) indicates that formal investigations should be a "last resort" and the Localism Act is designed to provide a quick and proportionate response to standards allegations.

- **It should be noted that initial assessment decisions and informal resolutions mean that no finding of a breach is being made** (see R(Hussain) v Sandwell MBC [2017]). The desire to resolve matters quickly and efficiently must be balanced against the public interest in an allegation being upheld**,** a complainant's trust in the framework and in a subject member being afforded the chance to publicly clear their name.

- NEW: referral direct to a hearing. Some matters require little or no additional investigation but are serious enough to be referred for a formal finding and subsequent sanction decision. There is no obvious reason why this isn't currently an option at this stage and an obvious costs and timescale disadvantage requiring all formal decisions to have to go through a lengthy investigation and report-writing stage first.

- NEW: there is no such thing as a shadow executive at CYC currently, but the concept is included in the current procedure (para 5) and is included here for discussion.

- NEW: no current veto. Instead a full investigative sub-committee is being used for all allegations against a member of the executive or shadow executive, or against any chair or vice chair of any committee. This seems overly cumbersome, contrary to the government's intended "light touch approach", and unnecessary to address the actual underlying concern. There is no legal requirement for this use of a sub-committee, only that it is in response to an historic incident at CYC where no further action was taken against an Executive Member in circumstances that did not hold up under scrutiny.

➢ **No Further Action**

18) Where it is decided not to take any further action, the matter will be immediately closed. Examples of when this might occur include:

a. there is insufficient evidence to demonstrate a Code breach,

b. an alternative remedy ought to be explored first,

c. the allegation describes a trivial breach, is intended to cause annoyance frustration or worry (vexatious), is intended to cause harm (malicious), has little or no substance (frivolous), or is petty tit-for-tat (retaliatory),

d. the allegation is made by one councillor against another in circumstances amounting to robust political debate,

e. the allegation is merely a delay, or failure to respond to a constituent request, not in itself capable of amounting to disrespect,

f. the relevant conduct took place over six months previously without good reason for a delay in making the allegation,

g. the allegation relates to a decision of the Authority (or parish council), rather than conduct of an individual,

h. the allegation is the same or substantially similar to one which has recently been considered, and no new material evidence has been submitted,

i. if proven, the allegation would warrant no sanction, or

j. the Subject Member has stood down or is seriously ill.

19) The complainant and Subject Member will be notified of the decision in writing and the outcome reported to the JSC.

20) There is no internal right of appeal.

- These examples are taken from the non-exhaustive list suggested in the LGA guidance and develop those used in the current procedure (para 10). They are tailored here specifically to provide clear, unbiased guidance to both complainants and subject members and are drawn intentionally to ensure confidence that allegations will be taken seriously, have clear parameters and will be dealt with appropriately (p11)

- There is a positive duty on the MO (in the interests of procedural fairness) to chase a complainant for additional information where an allegation's detail is insufficient to make a decision. The complainant must be advised that the matter will be discontinued if they don't provide anything further within a reasonable timeframe (LGA guide at p12)

- An "*available alternative remedy*" might be where a member has already taken steps to apologise and remove the impact of a breach but a complainant's response to these steps is not yet known

- The decision to investigate an allegation costs public money, and significant member and officer time, which will detract from their other duties. The LGA guidance makes clear that these costs must be considered, and investigations should not be undertaken for minor or petty matters and, when considering seriousness, the motive of the complainant should generally be disregarded (see pp11 & 13)

- "*Robust Political Debate*" is a concept legally referred to as '*enhanced protection'* and amounts to the application of Article 10 of Human Rights Act 1998 (freedom of expression). There is a vast array of domestic and ECHR caselaw where it is continually summed up like this: "*In a political context a degree of lampooning and of immoderate, offensive, shocking, disturbing, exaggerated, provocative, polemical, colourful, emotive, non-rational and aggressive words and behaviour, that would not be acceptable outside of a political context, is to be tolerated*." (Robinson v BuckinghamshireCC [2021], Heesom v Ombudsman for Wales

[2014], Calver v Wales [2012], De Haes v Belgium [1997] & Mamere v France [2009]) - *This includes being untruthful, so long as there is an element of reasonableness* (Lombardo v Malta [2009]) *but the line is drawn before gratuitous personal attacks* (Thorgeirson v Iceland [1992]) *and expressions of abusive anger* (Sanders v Kingston [2005]) Politicians are expected to have thick skins and their 'enhanced protection' is generally considered an essential part of a healthy democracy.

- NEW: Delay or failure to respond to enquiry is a popular additional example not found in the LGA guidance or CYC's current procedure but is repeated in numerous other council's standards procedures and, it is suggested, is a reasonable addition to help clarify the meaning of 'disrespect' under the Code.

- There is no '6 month time bar' as is sometimes described, but the passage of time hinders proper investigation, and affects the memories of those involved, so it is a significant consideration in most cases. There may, however, be good reason for a delay (eg. hidden behaviours not coming to light immediately or intimidation of witnesses) so it is just one factor to consider rather than being a 'guillotine'.

- NEW: Removed the LGA example that an allegation "has already been submitted and accepted" because, in reality (as per para 8 above), it is more likely that such an allegation would be consolidated with the existing allegations and investigated together. Whilst in some cases the repetition has no additional value (eg. 2 identical copies from the same complainant), it cannot be overlooked that multiple accounts of what has happened may provide corroborative evidence and make it more likely that something actually happened.

- To "*warrant no sanction*" the circumstances indicate a good reason why a breach has occurred which significantly mitigate any harm or culpability

- Where a member is seriously ill, or has since stood down, there is very little scope for sanction and questions the public interest in an investigation being conducted

- There is no legal or general duty to provide reasons for this decision. Some councils in the past have been penalised by the Ombudsman for failing to do so, after they had provided reasons once or twice they create a 'legitimate expectation' that they will do so in every case. This is to be avoided.

- As the entire framework is intended to be efficient, proportionate and a 'light touch', there should be no right of appeal at any stage of the procedure (LGA guidance at p71) An aggrieved party may still judicially review a decision at the High Court or seek assistance from the Ombudsman

➢ Informal Resolution

21) Where a Code breach is relatively minor, a one-off, or a genuine mistake, a proportionate outcome in the public interest might include:

a. suggesting the offer of a written apology,

b. suggesting the withdrawal of the offending remark,

c. suggesting the Subject Member undertake relevant training,

d. convening a meeting (with or without a mediator present), between the complainant and Subject Member, to try to resolve the issue(s),

e. inviting a response from the Subject Member's political group (where they are a member of such a group), or

f. a written warning as to future conduct.

22) The complainant and Subject Member will be notified of the decision in writing and the decision reported to the JSC.

23) If, after a reasonable time, the suggested informal resolution has not taken place, or any party refuses to engage with the proposal, the MO in consultation with the IP will decide whether further action is necessary in the public interest.

24) There is no internal right of appeal.

- Informal resolutions should not be used for consistent patterns of behaviour, or where a member's honesty or integrity is called

into question (due to potential reputational damage to both member and CYC) - LGA guidance at p20

- These proposed outcomes (save for points (b) and (f)) are in the current procedure at para 14. However, the broad "*any other action the MO deems appropriate*" outcome is now removed as there is little else the MO might consider and its inclusion removes the clarity and value of making and including the list here

- A subject member cannot be compelled to apologise

- NEW: withdrawing an offending remark is an obvious addition to the list

- Mediators carry additional cost and so proportionality and available resources need to be carefully considered. Parish council's cannot be compelled to contribute to these costs

- NEW: the purpose of a written warning is to create a document that can be referred to in later allegation investigations, particularly where a pattern of behaviour is being recognised, which might exclude a further informal resolution being considered

- Where a recommended informal resolution has not happened, the consideration is now shorter and clearer (previously found in paras 15 and 16). No need to involve chair and vice chair in the decision "*in the event that MO and IP disagree*" because the IP role is in consultation only and cannot be part of the decision itself (LGHA 1989 s13). Given the passage of time, changing relationships, other events overtaking, additional cost in the face of a minor or one-off event, or a lack of enthusiasm from the complainant, it doesn't automatically follow that in the face of a failure of a proposed informal resolution the matter must proceed to a formal one

C - Referral for Investigation

25) Where a deeper investigation is warranted, it must be carried out fairly and reasonably by the MO, an officer appointed by them, or in being contracted to an external agent.

26) The investigation will be limited to matters raised in the written allegation.

27) An investigation report will then be prepared *within 3 months* of referral. This time limit may be extended only where the MO agrees that it is necessary, proportionate and reasonable to do so.

28) Where a Subject Member becomes seriously ill, or ceases to be a member or co-opted member, or some other exceptional circumstance occurs before the investigation is complete, the MO in consultation with the IP may decide to halt the investigation and take no further action.

29) The written report must outline the investigator's findings of fact, on the balance of probability, and indicate in its conclusion whether the investigator believes a breach of the Code has occurred.

- The manner of the investigation is entirely at the discretion of the investigator appointed by the MO and the only legal requirement is that it must be conducted fairly (Re Pergamon Press [1971]) No technical rules of investigation or evidence gathering apply (eg under Police And Criminal Evidence Act 1984 (PACE)) but the investigation must still be fact-focused and evidence-based. Where specific evidence is being considered, the investigator must give all parties the chance to comment on it and to adduce additional material of probative value which might challenge it. This can be by way of an interview, meeting or other fact-finding enterprise (Mahon v Air New Zealand [1984])

- The investigation can only consider matters raised in the written allegation itself (s28(9)) regardless of what new information is discovered in the course of the investigation - any new information, discovery, or potential breaches of the Code would need to be addressed by way of a second written allegation. An investigator can refer new findings to a senior/chief officer who may then provide the MO with a second written allegation based on them

- The 3-month timeframe is retained and mirrors that recommended by LGA but the current requirement to consult with Chair and IP about an extension is removed. 3 months is already a significant period, any extension would need to be clearly justified (with

strong grounds), the decision is purely administrative and applications are likely to be very rare.

- NEW: Removed para 23 from current procedure which would allow either subject member or complainant to seek an informal resolution after a deeper investigation has started. This would amount to a 'back-door appeal' of the earlier decision to formally investigate and undermines the procedure.

- The IP MUST be consulted before any investigation is stopped - LGA guidance at p19. (There is no caselaw on whether a discontinuance might be considered a "decision", and therefore the sole power of the JSC, but barrister's advice is against this assumption)

- On "*balance of probability*" is known as the civil standard of proof and is the standard to be used for these investigations (see Heesom v Ombudsman for Wales [2014])

- NEW: the requirement that the report clearly state whether the investigator believes a breach of the Code has occurred prevents 'sitting on the fence' which would undermine the cost, delay and purpose of the investigation and report.

- The report is only advisory because the investigator has no authority to make a decision as to whether a breach has actually occurred. Only the JSC can make such a finding - s28(7) and (11) - this power is not delegated to the MO in Appendix 1 of CYC's constitution

30) The report will be provided to both the complainant and Subject Member who may, within 5 working days of receipt, comment on it. The investigator will then be given 5 working days to indicate whether these comments affect the report's conclusion.

- This is known as 'Maxwellisation' and is a standard feature in England of all inquiries producing a public report - as confirmed before Supreme Court in Treasury Committee Review report 2016. The current procedure also requires (at para 24) all witnesses to be allowed to comment but this has been removed as unnecessary, given their evidence is expected to be explored challenged and cross-referenced during the enquiry stage leading

to the first draft, and where they have been misquoted or misunderstood in the report, the complainant or Subject Member are able to point this out.

31) The report, and any comments, will then be considered by the MO in consultation with the IP, before deciding whether to:

- take no further action,
- seek to resolve the matter informally, or
- refer the matter to a committee hearing.

32) There is no internal right of appeal.

- IP consultation at this stage is not a statutory requirement, but is recommended by LGA guidance (p38)

- NEW – changed wording as currently (para 27) incorrectly states "MO may conclude there has been no breach". Neither the MO nor the investigator has the authority to make a decision on whether a Code breach has actually occurred (s28(7)&(11) and CYC constitution appendix 1).

- Taking *no further action* is not the same as a formal decision and, although unlikely after a formal investigation, it is possible if the investigation has found new and convincing evidence that no breach of the Code occurred. This would still be subject to the veto at para 17 above.

- NEW: removed the requirement to issue a public decision notice at this point (or indeed publish the report) because this is inconsistent with the approach to taking no further action at other junctures, and is contrary to LGA guidance at p39 (because the report is advisory and not a decision)

- Informal resolution can be considered regardless of whether a formal finding of a breach has occurred - R (Hussain) v Sandwell MBC [2017], applying s.28(11) of Localism Act 2011-

- NEW: removed requirement to seek the complainant's view about a proposed informal resolution at this juncture because it is inconsistent (not required anywhere else when the option is proposed) and unnecessary (they may well be invited into the proposed informal resolution anyway)

- NEW: removed duplication of arrangements where informal resolution recommended but not followed

D - Referral to a Hearing

Pre-hearing

33) A hearing will be held before the JSC *within 6 weeks* of a referral.

34) The MO will manage the hearing procedure, and advise the JSC throughout the hearing process, but ***must not*** take part in the decision itself.

35) The MO will write to the complainant, the Subject Member and any investigator not later than 10 working days before the hearing to confirm the hearing date, its location, and to provide a copy of this procedure.

36) Neither the complainant, Subject Member nor investigator can be compelled to attend the hearing and the hearing need not be an oral hearing.

- NEW: 6-week timescale is reduced from 2 months in current procedure - by this point a 2 week initial assessment and 3 month investigation have already taken place. 6 weeks to convene a meeting of JSC is possible, reasonable and attempts to contain the entire procedure under 6 months to meet the objective of being a 'light touch' approach (noting that the LGA guidance (2021) suggests a hearing should occur no later than 3 months from the end of the investigation - p60)

- The LGA recommends the MO appoint a deputy where the MO themselves have been involved in the prior investigation process, because their vital role of providing independent advice might otherwise be compromised (p62)

- The MO is a legal and procedural advisory role and the MO is not part of the decision making process as there is no such delegated power in appendix 1 of CYCs constitution (Appendix 1, part 4, para

15(g) authorises the MO to "*contribute through provision of support*" only) The decision making power sits with the JSC alone - s28(7) and (11)

- NEW. 10 working days is reasonable notice and preparation time to allow for a fair hearing. No timescale is provided in current procedure (neither at para 30, nor annex 5 at para 5 or 7)

- NEW – clarifies that parties cannot be compelled to attend. (Only hinted at in annex 5, para 7 of current arrangements)

- NEW - paper hearing option is not in the current procedure but has obvious benefits. It is entirely lawful for the JSC to consider the matter 'on the papers' only - see Army Board Ex P Anderson [1992]

37) Irrespective of whether the MO decides that an oral hearing is necessary, or a party has indicated that they do not wish to attend, the complainant, Subject Member and investigator ***must*** all be invited to provide, *no later than 3 working days before the hearing*, written submissions and/or any evidence that they would like the JSC to take into account.

38) The Subject Member will also be invited to confirm whether they accept the findings of any investigation report, to identify any areas of dispute, and (if they intend to attend the hearing) to indicate whether they would like someone to accompany them.

39) Any submissions and/or evidence received will be circulated to all parties before the hearing. Late submissions or evidence will not be considered at the hearing, unless all parties have been invited to comment on the procedural fairness of doing so and where the Chair agrees that it may be considered.

40) If a party wishes to call a witness to the hearing, they must advise the MO of this no later than 3 working days before the hearing, explain why the witness is necessary, and provide the witness' contact details.

41) Only the parties themselves and any relevant witnesses, whose attendance has been agreed with the MO in advance of the hearing, may address the JSC at the hearing.

- Failure to opportune written submissions would render the hearing manifestly unfair - Ewing v Dept Constitutional Affairs [2006]

- NEW: the additional questions of the Subject Member are not found in the current procedure but are mentioned in annex 5 at para 5. It assists with MO consideration of whether an oral hearing is actually necessary, aims to save time and costs, to narrow the issues in dispute and (where appropriate) to acknowledge admissions and assist with culpability assessment before the JSC consider what sanction(s) might be appropriate. The Subject Member can, of course, refuse to answer them.

- NEW: the subject member should be permitted to attend with a legal representative (LGA guidance at p65) or emotional support. In the latter case, the support would not have any speaking rights at the hearing, unless agreed with the MO under paras 40 and 41

- NEW: the prohibition on late submissions deliberately intends to stop parties unfairly ‘ambushing’ each other at the hearing itself (eg. by preventing time to properly consider or rebut new evidence)

- NEW. The MO is performing an advisory function and is not involved in decision making at the hearing. Therefore, it seems appropriate for the MO to also manage witness suitability decisions. The management of witnesses currently sits with the appointed JSC chair (Annex 5 para 8). However, where a decision maker is required to speak to witnesses in advance of the hearing, it carries a risk of the appearance of evidence interference.

- NEW: CYC constitution at Appendix 7 para 1.2 states that the JSC (when “considering or reviewing an allegation”) is exempt from Access to Information Procedure Rules (which require a 5 working day timscale). The parties are given hearing details 2 weeks beforehand (para 35) so ought to be afforded as much time as possible to prepare any written submissions/evidence whilst still allowing time for it to be shared amongst parties and considered. It makes sense for the timescale for advising the MO of intended witnesses should mirror that of any other intended submission/evidence (para 37)

42) The hearing must be open to the public, save where either:

a) it is likely that *confidential information* will be disclosed, within the meaning of section 100A(3) Local Government Act 1972

or

b) it is likely that *exempt information* will be disclosed, as defined in schedule 12A to Local Government Act 1972 and the JSC resolves that the public interest in maintaining the exemption outweighs the public interest in disclosure.

43) Where a hearing, or part of a hearing, remains open to the public the Public Participation Protocol will not apply: members of the public may not ask questions of any party or address the JSC at any point.

- Almost all hearings will be in private due to the statutorily scheduled exemptions. (This is not clearly stated in the current procedure at para 32 and only half-explained in annex 5 para 3)

- NEW: Currently IP views are required to be sought and publicised in advance of the hearing (para 33) This is removed as clearly inconsistent with concept of fair hearing and with s28(7) Localism Act 2010 as well as duplicating procedures when the IP has to consider and advise again during the hearing. In any event, the decision will be published after hearing, with reasons, which will include the IP's opinions

- Public Participation Protocol is currently disapplied (annex 5 para 4) and backs up evidence management in paras 41 to 43 above

44) The appointed IP must be present at the hearing, whether or not it is an oral hearing, and their views taken into account before the JSC comes to a decision. The IP may not take part in the decision itself.

- Statutory requirement for the IP to be present (s28(7)(a)) and it is unlikely that any previous written comments would be sufficient. The IP is judicially described as a "*vital safeguard in the process*" and there may well be more information before the JSC at the hearing, or material is presented differently, or in person (allowing for non-verbal impressions to be considered). For the IP to be an

effective '*vital safeguard'*, their presence at the hearing is essential.

- IP is forbidden by statute to take part in any decision making - LGHA 1989 s13

45) The hearing may be adjourned at any time but only when it is necessary and in the public interest, for example, to allow production of additional evidence, to secure a party's attendance, or where there is insufficient time to conclude the hearing on a single day.

- NEW- There is currently no express provision for adjournments. These are frequently encountered in all types of decision-making committee, and it benefits everyone to have a declared position, and specific test to apply, set out in the procedure

At the hearing

46) At the commencement of the hearing, the JSC members will appoint a Chair. No member of the JSC may act as Chair unless they have received the relevant training to be able to do so

47) All JSC decisions are made on the balance of probabilities. The technical rules of evidence applicable to civil and criminal courts will not apply. Hearsay evidence may be considered, and it will be a matter for the JSC to decide how much weight to attach to it.

- NEW: Since the chair is no longer responsible for witness management, they can be appointed on the same day or at the start of the hearing itself - allowing greater flexibility for JSC member attendance

- As mentioned above, the balance of probabilities is the established standard of proof - Heesom v Ombudsman for Wales [2014]

48) Order of presentation:

a) the complainant will be invited to present their allegation,

b) the investigator will then present their report,

c) the Subject Member will then be invited to present their response,

d) each party will be given 5 minutes to sum up their position,

e) the IP will then be invited to indicate their views on both breach and, if found, appropriate sanctions.

Where any party is not present, their written submissions and any evidence submitted in support will be read out.

- This order largely mirrors the existing one (annex 5 para 9) and is consistent with the Hope & Glory v Westminster judgement (ibid)

- There is no time limit given for addressing the JSC in the current procedure - It is assumed Appendix 6 (committee procedure rules) apply, which at para 6 adopts the Ordinary Meeting rules (from Appendix 3) and gives a time limit of 3 minutes each for speeches. Perhaps this might not be appropriate, or fair, in the context of a JSC hearing?

- NEW. Given the IP is expected to comment over the totality of the evidence at the end of the procedure, it would be unbalanced in the face of live evidence, for submissions not to be read out.

49) Questions and witnesses:

a) Once each party or witness has presented their case, they may be asked any relevant questions first by the JSC, then the complainant, the investigator, the IP and finally the Subject Member

b) Any witness *must* remain outside the room until called to address the JSC, but may then choose to remain or to leave the hearing once they have done so.

- It should be noted that both national and European courts have decided that, by the disciplinary nature of these hearings, they ought not to attract the formal processes of a court and can (if they wish) adopt a round-table enquiry format instead (see R(B) v Headmaster of St Michaels School [2007] and Marusic v Croatia [2016])

Decisions

50) The JSC will decide:

- the facts, on balance of probability, upon which it will base its decision,
- whether these facts amount to a breach of the Code of Conduct and, if so,
- what sanction (if any) would be appropriate.

51) The JSC will then announce its decision and give reasons, and each party invited to comment, before the hearing ends.

52) A Decision Notice will be published *within 5 working days of the hearing* and a copy, with reasons, provided to the complainant and the Subject Member and, in the case of a parish councillor, to the parish clerk.

53) There is no internal right of appeal.

- Technically, there is an additional step: the enhanced protection afforded to members under Art 10 HRA 1998, once a breach is found the JSC must go on to decide if the conduct was still within the bounds of tolerable political behaviour. (see note above on *robust political debate*) The MO would advise the JSC of this at the hearing, in appropriate cases, so it does not need to be spelled out in the procedure

- NEW: Inviting parties to comment <u>after</u> the decision is currently (sort of) included in annex 5 paras 13, 14 and 15, but is not exactly on point. The intended purpose here is to allow any technical errors to be pointed out, for example where the JSC has relied on an incorrect fact when coming to its decision. It is not an opportunity for a party to challenge an adverse decision (effectively an immediate appeal). The High Court has confirmed this as good administrative practice in R (Westminster CC) v Marc Merran [2008]

- NEW: Current procedure breaks up the hearing into 2 hearings, one for finding a breach and one for deciding sanctions. This is unnecessary and has been removed.

- The decision notice publication timescale is retained from existing procedure (para 36)

- NEW – now deliberately restricting access to the reasons to the parties in the matter, (which is consistent with LGA guidance at p71) as they would need to consider these carefully before deciding whether to refer to the Ombudsman or seek judicial review. This allows for press releases or other public notices to be as brief or detailed as an individual case requires

➢ **Formal Sanctions**

54) In order to promote and maintain the highest of standards of members and co-opted members at the Authority, the JSC may consider one or more of the following sanctions:

- ➢ Report its findings to full council and/or the relevant parish council

- ➢ Recommend to full council that it restrict the Subject Member's access to specific facilities and resources, including any premises, or to restrict contact with named individuals, for a specified period

- ➢ Issue, or recommend a parish clerk issue, a formal reprimand

- ➢ If the Subject Member is also a member of a political group, to recommend to that group's leader that the Subject Member be removed from any or all committees and sub-committees

- ➢ If the Subject Member is the leader of a political group, to recommend to that group's secretary or other official that they be removed from that role

- ➢ Recommend to the Leader that the Subject Member be removed from positions of authority or, if the Subject Member is the Leader, to recommend to full council that they be removed from that post

- ➢ Instruct the MO to offer the Subject Member specific training, or assist the parish council to offer such training

- Recommend to full council that the Subject Member be removed from all outside appointments and nominations

- The procedure has little in the way of “teeth”, but these “typical sanctions” are taken from the LGA Guidance at p68 (currently adopted at annex 5 para 19)

- Sanctions may only be imposed after a formal investigation is conducted and/or a formal finding (not necessarily at an oral hearing) of a breach made - R (Hussain) v Sandwell MBC [2017] However, under the Code, failure to comply with an imposed sanction may itself be considered a breach of the Code of Conduct (at para 8(d) of Code)

- The power to suspend or disqualify a member as a result of a breach of an adopted Code of Conduct was abolished in 2011 with the introduction of the Localism Act. Further, the JSC cannot ‘interfere with local democracy’ by removing a member from a particular committee (Heesom v Ombudsman for Wales [2014], nor can it order a member to undertake training, but may only recommend it - R (Taylor) v Honiton TC [2016] at paras 40-43. The current government is reviewing this position following heavy criticism in 2019 from Committee on Standards in Public Life.

- Restricting access to facilities or resources must be proportionate and not prevent the Subject Member from performing their essential duties as a member. See Greenslade v Devon CC [2019], where a member accused of sexual assault was prevented from accessing council buildings where named female staff were present. - Misuse of IT might also encourage restricted facilities being offered. This sanction cannot be indefinite as it is a restriction on liberty and must balance proportionality against the human rights of the Subject Member (Art 11 and art 1 of first protocol, HRA 1998)

- Leader’s power to appoint/remove executive member is s9C LGA 2000 and Article 6 of CYC’s constitution

- A leader may be removed from that role by resolution of full council – s9ID LGA 2000

- The subject member cannot be compelled to undertake training

- A Parish Council cannot be compelled to pay to implement any sanctions imposed by its principal authority, nor may it impose any sanctions of its own - Taylor v Honiton TC [2016]