

# Procedures for the Adjudication of Cases referred to the Northern Ireland Public Services Ombudsman in her role as the Local Government Commissioner for Standards

## Background

1. Part 9 of the Local Government Act (Northern Ireland) 2014<sup>1</sup> (the 2014 Act) introduced a new ethical standards framework for local government based on a mandatory code of conduct for Councillors. The Northern Ireland Local Government Code of Conduct for Councillors (the Code) was approved by the Northern Ireland Assembly and came into effect on 28 May 2014 (the parts relating to planning matters came into force on 1 April 2015).
2. The 2014 Act gives the Northern Ireland Public Services Ombudsman (the Ombudsman), in her role as the Northern Ireland Local Government Commissioner for Standards (the Commissioner), the authority to investigate, and to adjudicate on, complaints that Councillors have, or may have, failed to comply with the Code. Copies of the Code are available at <http://www.nipso.org.uk>.
3. Where any person is of the opinion that a Councillor has contravened the Code he or she may make a complaint in writing to the Commissioner, and that complaint may be investigated in accordance with sections 55 to 58 of the 2014 Act. The procedures for investigating and reporting on complaints are the subject of separate guidance which is available on the Commissioner's website.

## Introduction

4. This document sets out the procedures to be followed by the Commissioner in exercising her powers to adjudicate on complaints alleging that a Councillor has breached the Code.
5. The Commissioner has delegated<sup>2</sup> to the Deputy Commissioner (and to the staff of the Local Government Ethical Standards (LGES) Directorate of the Northern

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<sup>1</sup> As amended by section 62 and Schedule 7 of the Public Services Ombudsman Act (Northern Ireland) 2016 (the 2016 Act)

<sup>2</sup> Under the 2016 Act, Schedule 1, article 14(1), "Any function of the Ombudsman may be performed by any member of staff of the Ombudsman authorised by the Ombudsman for that purpose."

Ireland Ombudsman's Office) the authority to conduct investigations and to report on the outcome of those investigations in accordance with sections 55 to 58 of the Act. A Protocol<sup>3</sup> setting out the respective roles and responsibilities of the Commissioner and the Deputy Commissioner in respect of the investigation and adjudication of complaints is published on the Commissioner's website.

6. The Commissioner has no involvement in the investigation of individual complaints.
7. The purpose of an investigation, as set out at section 55(5) of the 2014 Act, is to determine which of the following three findings is appropriate:
  - a. that there is no evidence of any failure to comply with the code of conduct ;
  - b. that no action needs to be taken in respect of the matters which are the subject of the investigation;
  - c. that the Commissioner should make an adjudication on the matters which are the subject of the investigation.

Where the Deputy Commissioner determines that the appropriate finding is that the Commissioner should make an adjudication, the Deputy Commissioner will make a referral to the Commissioner.

8. The Commissioner will adjudicate on matters referred to her by the Deputy Commissioner. In special circumstances, for example where there is a potential conflict of interest, the Commissioner may appoint a suitable person<sup>4</sup> (excluding the Deputy Commissioner and staff of the LGES Directorate) to adjudicate.
9. Section 56A of the 2014 Act states that, where the Commissioner proposes to make an adjudication, she may first hold an adjudication hearing (an Adjudication Hearing). An Adjudication Hearing will be held in public unless the Commissioner determines that this would not be in the public interest.
10. The procedure for an Adjudication Hearing will be such as the Commissioner considers appropriate in the circumstances of the case. To this end the Commissioner had prepared a general adjudication procedure which is incidental and conducive to, and which will facilitate, the lawful discharge of her powers under the 2014 Act. This procedure is intended to provide justice and fairness both for the councillor who is the subject of the investigation ("the Respondent") and the person making the complaint. It is also intended to fulfil the wider public

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<sup>3</sup> available on the Commissioner's website at [www.nipso.org.uk/nilgcs](http://www.nipso.org.uk/nilgcs)

<sup>4</sup> Under the 2016 Act, Schedule 1, article 14(2), "Any function of the Ombudsman may be performed by any other person authorised by the Ombudsman for that purpose if (a) that other person is suitably qualified to do so, and (b) there are special circumstances which make it proper to do so".

interest of having an open and fair adjudication process. The Commissioner may at her discretion review and revise the adjudication procedure in any particular case.

11. Where the Deputy Commissioner has, in the public interest, produced an interim report under section 58 of the Act, that interim report shall be referred to the Commissioner.
12. Where the Deputy Commissioner has referred an interim report to the Commissioner, the Commissioner may convene an interim Adjudication Hearing before coming to a decision on whether or not it is in the public interest to suspend or partially suspend a person under section 60(1) of the 2014 Act.
13. The Commissioner will appoint a legal practitioner, to act as Legal Assessor, and to provide legal advice and assistance prior to, during and following an Adjudication Hearing. The Legal Assessor will have no role in the Commissioner's decision-making. Administrative support to the Commissioner in relation to adjudications will be provided by members of the Ombudsman's staff not involved in the investigation of complaints under the Code.

#### **Receipt of a referral from the Deputy Commissioner**

14. A referral to the Commissioner by the Deputy Commissioner will be made in writing by sending to the Commissioner the report produced in accordance with section 57 (2) of the Act. The report will include the Deputy Commissioner's finding of the facts giving rise to the referral and the Deputy Commissioner's reasoning as to why these facts might be regarded as a failure to comply with the Code together with relevant supporting evidence.
15. The referral will include:
  - a. identifying details (reference number, name and address of the Respondent, name of the relevant council, name of the investigating officer and name and address of the original complainant (if applicable));
  - b. details of:
    - i. when the Respondent was elected
    - ii. a copy of the Respondent's undertaking to abide by the Code
    - iii. the Respondent's committee memberships or Council executive responsibilities, if relevant, and
    - iv. a note of any appointments to other bodies on behalf of the Council, if relevant.

16. A Register of all cases referred to the Commissioner for adjudication will be maintained and will be open to public inspection on the Commissioner's website. The Register will record all referrals received and any action taken by the Commissioner in relation to the referral.
17. Upon receipt of a report on an investigation in which the finding was that the Commissioner should make an adjudication, the Commissioner will give the Respondent notice of the intention to hold an Adjudication Hearing. The Commissioner will aim to provide the notification within 10 working days of receiving the investigation report. The notification will advise the Respondent to seek advice and will provide:
- a. a copy of the report<sup>5</sup> and any other such information relevant to the case;
  - b. any information guides/leaflets detailing the Respondent's rights and responsibilities in relation to the Adjudication Hearing;
  - c. a copy of a pro forma written response<sup>6</sup> for completion by the Respondent;
  - d. details of the sanctions, set out at section 59(3) of the 2014 Act, which may be imposed in the event of a finding that a Councillor has breached the Code;
  - e. the name of the adjudicator authorised by the Commissioner to perform that function if the Commissioner is not herself conducting the adjudication<sup>7</sup>;
  - f. details of the provisional date(s) on which it is intended that the Adjudication Hearing, if any, will take place. The Commissioner will aim to hold the Adjudication Hearing no later than 12 weeks from the date of the notification;
  - g. notice that the investigation report will be presented by the Deputy Commissioner, or by counsel, a solicitor or any other person appointed to assist the Deputy Commissioner to present the complaint before the Adjudication Hearing, and who may produce and make available documents for the Adjudication Hearing; and
  - h. Witnesses proposed to be called by the Deputy Commissioner in the event that the matter proceeds to an Adjudication Hearing.

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<sup>5</sup> In accordance with section 57 (2) (c) of the 2014 Act, under delegated authority, the Deputy Commissioner will separately send a copy of the investigation report to the Respondent.

<sup>6</sup> This will ask the Respondent to record any disagreement with the findings of fact made by the Deputy Commissioner and to provide reasons for disputing these facts. It will also ask the Respondent to provide copies of any documentation which he or she wishes the Commissioner to consider (or to indicate where these may be obtained)

<sup>7</sup> The Commissioner or an adjudicator appointed by the Commissioner will be required to sign a conflict of interest declaration prior to a case being heard

## **Consolidation of Proceedings**

18. Where two or more complaints have been made in respect of the same facts or related facts, the Commissioner may, of his own motion or on an application by one or more of the Respondents, order that the complaints be considered at the same Adjudication Hearing.
19. Before consolidating proceedings, the Respondents and the Deputy Commissioner will be notified of this decision. The Commissioner will aim to issue notice of this decision together with the notification of the intention to hold an Adjudication Hearing (as at paragraph 11), or as soon as practical thereafter and not less than 15 working days before the date of the Adjudication Hearing (as determined by the Commissioner in accordance with paragraph 33 below). Respondents should make representations as to the Commissioner's decision to consolidate proceedings within 10 working days of the decision being notified to them.

## **Delivery of Documents**

20. Any document required or authorised by the Commissioner to be sent or delivered to, or served on, any person shall be deemed to be duly sent or delivered to or served on that person if:
  - a. It is sent to him or her at the contact address provided by his Council by "signed for" delivery
  - b. It is sent to him or her at that address by electronic or other similar means, which will produce a document containing a text of the communication; in which case, the document will be regarded as sent when it is received in a legible form, or
  - c. It is delivered to him or her at his or her address.

## **Action by a Respondent following receipt of notification**

21. The Respondent should provide a written response, either by post/recorded delivery or by electronic or similar means within 15 working days of receiving a notification from the Commissioner. The 15 working days shall be deemed to start on the date on which the communication was provided to the Respondent by electronic or similar means, or the date on which the communication was delivered to the Respondent by "signed for" delivery or left at his or her address.
22. The Respondent written response should state:
  - a. Whether or not he or she intends to attend or be represented at the Adjudication Hearing. The Respondent is entitled not to attend and may instead rely on documents previously provided to the Deputy

Commissioner and/or a written statement of his or her case and/or other submissions. If the Respondent elects to attend, he or she is entitled to give evidence in person and/or may be represented by counsel, a solicitor or any other person on his or her behalf. The written response should include, if applicable, the name, address and profession of any person whom the Respondent wishes is to represent him or her and whether he or she wishes further communications to be sent directly to him or her or to his or her nominated representative;

- b. If the Respondent does not intend to attend or be represented, or he or she does not dispute the facts of the case, whether the Respondent wishes to make written representations to be taken into consideration by the Commissioner before she reaches a decision on the case;
- c. Whether or not he or she disputes the facts set out in the investigation report, and if so, on what grounds. The Respondent should provide a copy of any documentary evidence he or she wishes the Commissioner to consider;
- d. Whether or not he or she accepts there was a failure to comply with the Code and, if so, any circumstances in mitigation or otherwise, which the councillor wishes to bring to the attention of the Commissioner;
- e. Whether there are any other documents on which the Respondent intends to rely at the Adjudication Hearing. If so, these should be provided or the Respondent should indicate where these may be obtained;
- f. The details of the names and addresses of any witnesses which the Respondent would wish to give evidence at the Adjudication Hearing, and a summary of the evidence they would give;
- g. Any reason why the Adjudication Hearing should not be held on the provisional date indicated and offering alternative dates if that is the case.

23. The Respondent may request an extension of time to provide a response to the notification. The request should be made within 10 working days of receiving a notification from the Commissioner. The granting of a period of extension is at the discretion of the Commissioner.

24. Upon receipt of the information requested from the Respondent detailed at paragraphs 21 and 22 the Commissioner will consider any written representations and determine:

- a. What, if any, further evidence she wishes to obtain and in what form (i.e. written statements may be accepted by agreement of the parties and the Commissioner where, for example, the content of those statements are not disputed);
- b. Whether an Adjudication Hearing should be held; and

- c. When any Adjudication Hearing should be held, having considered any representations from the Respondent as to the date of the Adjudication Hearing.

### **Determination of Adjudication without an Adjudication Hearing**

25. The Commissioner has the discretion to adjudicate to determine whether there has been a breach without an Adjudication Hearing if she considers that she requires no further evidence *and* any one of the following circumstances apply:
  - a. If no reply is received in response to the notification provided to the Respondent within the specified time or any extension of time allowed by the Commissioner; or
  - b. If the Respondent states that he or she does not intend to attend or wish to be represented at the Adjudication Hearing; or
  - c. The Respondent does not dispute the contents of the investigation report.
26. If the Commissioner decides not to hold an Adjudication Hearing to determine whether there has been a breach she will send to the Respondent a list of the facts, together with any other supporting evidence, that she will take into account in reaching her decision. The Respondent will have 15 working days to submit any further written representations before the Commissioner makes her adjudication.
27. In circumstances where the Commissioner has made a determination as to breach without holding an Adjudication Hearing, she will, except in exceptional circumstances, hold an Adjudication Hearing to make a determination as to sanction. The procedures to be followed in regard to an Adjudication Hearing to determine sanction will, after the completion of any necessary preliminaries (such as an explanation of the order of proceedings and any opening remarks the Commissioner wishes to make) be those set out at paragraphs 67 to 68 below.

### **Actions prior to an Adjudication Hearing**

28. Following the Commissioner's decision to hold an Adjudication Hearing, she will inform the Deputy Commissioner of her decision and will
  - a. provide the Deputy Commissioner with copies of any documentation received by the Commissioner, subsequent to the Deputy Commissioner providing the investigation report, and which the Commissioner has taken into account.

- b. Ask the Deputy Commissioner to send to her, and to the Respondent, within 10 days, any additional documents to which reference will be made and the names of any witnesses whom the Deputy Commissioner proposes to call together with a summary of the evidence which it is proposed they will give.

### **Requirement for attendance of witnesses**

29. The Commissioner may require<sup>8</sup> any person to attend as a witness at the Adjudication Hearing and to answer any questions or produce any documents or other material in his custody or control which relate to any matter in question in the adjudication.
30. Unless a person accepts a lesser period, any person required to attend will be given at least 15 working days' notice of the Adjudication Hearing. The person will be required to complete a form indicating that they will attend or produce any documents or other material required by the Commissioner. If the person does not intend to attend or produce any documents or other material they will be asked to provide reasons. The Commissioner will then decide whether the attendance of the person or the production of documents or other material can be excused. If the person fails to attend or to provide the documents or other material required the Commissioner will consider whether the Adjudication Hearing should nonetheless proceed and may invite representations from the parties. Where the person fails to attend or provided the documents or other material required the Commissioner may certify the offence to the High Court in accordance with the Public Services Ombudsman Act (NI) 2016 (the 2016 Act) section 33(1).
31. The Commissioner may pay to the complainant and any other person who attends or provides information for the purposes of the adjudication:
  - a. a sum in respect of expenses properly incurred by them
  - b. an allowance to be determined by the Commissioner by way of compensation for their loss of time.

### **Attendance of the Deputy Commissioner**

32. The Deputy Commissioner is entitled to attend, or the Commissioner may request the Deputy Commissioner to attend, an Adjudication Hearing. A member or members of the Investigation Directorate may attend in place of the Deputy Commissioner if delegated to do so by the Commissioner in accordance

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<sup>8</sup> Schedule 7 of the 2016 Act extends the power contained in section 31(3) of the 2016 Act (to compel witnesses and require the production of documents) to Adjudication Hearings.



with Schedule 1, section 14(1) of the 2016 Act. The Deputy Commissioner may be represented at an Adjudication Hearing by counsel or a solicitor.

### **Role of the Deputy Commissioner at an Adjudication Hearing**

33. It is for the Commissioner to determine the role of the Deputy Commissioner, or other person acting on the Deputy Commissioner's behalf, at an Adjudication Hearing in light of all of the circumstances of the case. This may include the Deputy Commissioner or other person acting on behalf of the Deputy Commissioner:
- a. Making submissions and producing evidence in support of the findings in the report;
  - b. Responding to submissions or evidence produced by the Respondent or his/her representative in preparation for, or at, the Adjudication Hearing;
  - c. Questioning those appearing before the Commissioner at the Adjudication Hearing i.e. the Respondent or any witnesses; and
  - d. Where a breach of the Code is found, drawing to the Commissioner's attention any factors that she may wish to take into account in reaching a decision on sanction, such as previous breaches or other factors which may be relevant to the Commissioner's determination of the appropriate sanction.

### **Advisors**

34. Where the Commissioner considers that any question arises on which it would be desirable to have the assistance of an advisor, she may make arrangements for a suitably qualified person to enquire into and report in writing on the matter raised by the Commissioner and, if necessary, to attend an Adjudication Hearing and to give evidence.
35. A copy of the advisor's report will be supplied to the Respondent at least 10 working days before the Adjudication Hearing, any resumed Adjudication Hearing, or before the determination of adjudication where there has been no Adjudication Hearing.
36. The Respondent may question any advisor appointed by the Commissioner at the Adjudication Hearing and may request the Commissioner's permission to call their own advisor at their own expense.

## **Pre-Hearing Review and Directions for an Adjudication Hearing**

37. Where it appears to the Commissioner that an adjudication would be facilitated by the holding of a pre- Adjudication Hearing review to determine procedural matters, she may of her own motion or on the application of the Respondent, give directions for such a review to be held. The Commissioner will give the Respondent at least 10 working days' notice of the time and place of the review.
38. The review will be held in private, unless the Commissioner directs otherwise, and the Respondent may appear and may be represented by any other person including a solicitor or counsel. The Deputy Commissioner will also be invited to attend or be represented at the meeting. The review will be conducted by the Commissioner assisted by the Legal Assessor, and may be conducted by telephone or other suitable medium.
39. At a review the Commissioner may give all such directions as appear to be necessary or desirable to secure the fair and efficient conduct of the adjudication. The Commissioner may also give such directions at any time in the adjudication process. Any direction given by the Commissioner may be set aside or varied on her own motion or on the application of the Respondent or any party. The Commissioner shall notify the Respondent and any party affected by her decision to set aside or vary any direction of the decision to do so within 5 working days of the decision being taken.

## **Notice of Place and Time of an Adjudication Hearing**

40. The Commissioner will set the date, time and venue for the Adjudication Hearing and, not less than 15 working days before that date, will notify the Deputy Commissioner, the Respondent, and other witnesses requested to attend, of the Adjudication Hearing arrangements. The date of the Adjudication Hearing will be either the provisional date provided to the Respondent as part of the notice of the intention to hold an Adjudication Hearing, or another date determined by the Commissioner having considered any representations on the matter by the Respondent or any other party required to attend. Where practicable, the Commissioner will hold Adjudication Hearings in the council area in which the Respondent is a councillor. This is to facilitate the attendance of councillors, council officers, the public, and other interested parties who may wish to observe the proceedings, and to ensure the public interest of having an open and fair adjudication process.
41. Included with the notice of the Adjudication Hearing will be:
  - a. information and guidance as to attendance at the Adjudication Hearing of witnesses, the bringing of documents and the right of representation by another person;

- b. a requirement for the recipient of the notice to inform the Commissioner of any special needs which could impact on their participation in the Adjudication Hearing such as in relation to a disability or the need for an interpreter. This information is to be provided to the Commissioner within 10 working days of the date of the notice; and
  - c. a statement explaining to the Respondent the possible consequences of non-attendance and of the right of any Respondent who has delivered a reply but who does not attend and is not represented to make representations in writing.
42. The Commissioner may vary the date, or venue, of an Adjudication Hearing giving the Respondent not less than 10 working days' notice of the new date or venue.
43. The Commissioner may at any time, on her own accord or on application by the Respondent or the Deputy Commissioner or other party, adjourn an Adjudication Hearing. If the time and place of the reconvened Adjudication Hearing are announced before the adjournment takes place, no further notice shall be required.

### **Public Notice of Adjudications**

44. A list will be made available on the Commissioner's website giving details of all Adjudication Hearings to be held with the name of the Respondent, the part of the Code that has allegedly been breached, and the date, time and venue fixed for the Adjudication Hearing.

### **Adjudication Hearings to be Public**

45. All Adjudication Hearings will be held in public except where the Commissioner determines that this would not be in the public interest. The Commissioner considers that it would not be in the public interest to hold a public hearing where this would prejudice the interests of fairness or would threaten the personal safety/security of any parties involved in a case or where there are significant confidentiality concerns (where for example medical evidence was being considered). In relation to the issue of personal safety/security the Commissioner will normally require evidence of a risk of substantial harm to either the individuals involved in the Adjudication Hearing or to the public interest generally before holding an Adjudication Hearing or any part of an Adjudication Hearing in private.
46. The Commissioner will determine whether to permit any other person to attend a Hearing which is held in private.

47. In every case whether or not the hearing is in public the Commissioner can exclude from an Adjudication Hearing, or any part of it, any person whose conduct has disrupted or is likely, in her opinion, to disrupt the Adjudication Hearing. The Commissioner may also refuse to allow a particular person to assist or represent the Deputy Commissioner or the Respondent at the Adjudication Hearing, if she is satisfied that there are good and sufficient reasons so to do.

### **Failure of Parties to Attend an Adjudication Hearing**

48. If a Respondent, or any other person requested to be present (except the Deputy Commissioner or her representative) fails to attend or be represented at an Adjudication Hearing of which he/she has been notified, the Commissioner may:

- a. adjudicate in that person's absence; or
- b. adjourn the Adjudication Hearing to another date, in which case the Commissioner will advise the Respondent, or any other person required to be present, accordingly.

49. Before adjudicating in the absence of a Respondent, the Commissioner will consider any written representations submitted by or on behalf of that person in response to the notice of the Adjudication Hearing. For this purpose, any reply shall be treated as a representation in writing.

### **Procedure at the Adjudication Hearing**

50. At the beginning of the Adjudication Hearing the Commissioner will explain the order of proceedings that she proposes to adopt. The procedure to be followed is at the discretion of the Commissioner, with the aim of conducting the Adjudication Hearing in such manner most suitable to the clarification of the issues before her and generally to the fair and efficient handling of the adjudication. Appendix 1 sets out the manner in which the Commissioner will determine the relevancy of evidence. The Commissioner will, as far as possible, try to avoid formality in her proceedings. Adjudication Hearings will be electronically recorded and or will be recorded by a stenographer and copies of the transcript will be available on request by parties. The Commissioner may engage a transcribing company to provide a transcript of the Adjudication Hearing. If the transcript is provided by a transcribing company the parties to the matter should apply to the company to obtain a copy (paying any fee that may be charged by the company).

51. The Commissioner's opening remarks will include:
- a. An explanation of the purpose of the adjudication and the Adjudication Hearing;
  - b. An outline of the complaint that has been made;
  - c. An explanation that the allegation can only be upheld if the Deputy Commissioner establishes to the satisfaction of the Commissioner that, on the balance of probabilities there has been a failure to comply with the Code and
  - d. That the Commissioner will, if a breach of the Code is found by her, hear representations as to whether no action should be taken or whether sanctions should be imposed, on the same day if time allows or at a later hearing.
52. The Respondent will be entitled to state his or her case, provide skeleton legal arguments, and call witnesses and channel questions for witnesses through the Commissioner. The Respondent will also be entitled to address the Commissioner both on the evidence and generally on the subject matter of the adjudication.
53. The Commissioner may limit the number of witnesses called by the Deputy Commissioner or a Respondent where, in her opinion, this is conducive to the fair and efficient hearing of the case. The circumstances in which the Commissioner may impose such a limitation include, for example, where it appears to her that such witnesses will not be presenting significant new evidence or facts, or where an excessive number of witnesses are being called, for example by the Respondent to give character evidence or where the evidence is not relevant<sup>9</sup>.
54. Witnesses will not be allowed to sit in the public gallery prior to being called to give evidence by the Commissioner. A designated waiting area will be available for the Respondent and witnesses until they are called. Witnesses may attend the Adjudication Hearing after their evidence is concluded and they have been released by the Commissioner.
55. Evidence before the Commissioner may be given orally (under oath or affirmation) or, if the Commissioner directs it, by affidavit or suitably attested written statement. At any stage during the proceedings the Commissioner can request the attendance of any person making an affidavit or written statement. The Commissioner may accept signed but unsworn affidavits or signed but unattested witness statements as evidence but will consider the weight to be given to such evidence.

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<sup>9</sup> See Appendix 1 for more information on the relevancy of evidence.

56. The Commissioner can receive evidence of any fact that appears to her to be relevant even though such evidence would be inadmissible in proceedings before a court of law (see Appendix 1). The Commissioner shall not refuse to receive any evidence that is admissible at law and is relevant.

57. The usual running order at the Adjudication Hearing is set out in the following paragraphs, but the Commissioner is free to depart from that procedure where she considers it appropriate to do so.

### **Preliminary Issues**

58. After the Commissioner has provided an outline of the order of proceedings<sup>10</sup>, she will first seek to resolve any procedural issues or disputes that have arisen. This may include consideration of any application for the Adjudication Hearing to be held in private.

### **Stage 1 of the Adjudication Hearing – Findings of Fact**

59. The Commissioner will establish the agreed facts and to resolve any remaining disputes of fact that have been identified in the pre- Adjudication Hearing procedures.

60. The procedure will usually be for the Commissioner to invite the Deputy Commissioner or the representative of the Deputy Commissioner to make submissions in support of the investigation findings and to call witnesses.

61. The Order of Proceedings thereafter will be as follows:

- a. The Respondent or their representative will have the opportunity of asking questions of any witness called by the Deputy Commissioner or the representative of the Deputy Commissioner.
- b. The Deputy Commissioner or the representative of the Deputy Commissioner may ask further questions of any witness they have called.
- c. The Respondent or their representative will have the opportunity to make submissions, produce evidence in support of those submissions and to call witnesses.
- d. The Deputy Commissioner or the representative of the Deputy Commissioner will have the opportunity to ask questions of any witness called by the Respondent.
- e. The Respondent or their representative may ask further questions of any witness called by the Respondent.

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<sup>10</sup> Full details of the order of proceedings will accompany any Hearing Notice.

62. The Commissioner, at her discretion, may at any time during this stage of the Adjudication Hearing question any of the parties or witnesses or take advice from the legal assessor or to take expert advice.
63. The Commissioner may retire to deliberate in private on the submissions and evidence presented, after which the Commissioner will announce her findings of fact. The Legal Assessor may be present to provide advice during the Commissioner's deliberations, if required, but will have no role in the Commissioner's decision-making. Alternatively, the Commissioner may proceed directly to Stage 2 of the Adjudication Hearing without first retiring to deliberate on her findings of fact.

### **Stage 2 of the Adjudication Hearing - Determination**

64. At the end of Stage 2 of the Adjudication Hearing the Commissioner will decide whether or not the Respondent has failed to comply with the Code, if that has not been admitted by the Respondent.
65. The Deputy Commissioner or their representative will be invited to make submissions as to why on the facts found, the Commissioner should decide that the Respondent has failed to comply with the Code. The Respondent or their representative will be given the opportunity of responding to those submissions.
66. The Commissioner will retire to deliberate in private as to whether there has been a failure to comply with the Code after which she may announce her findings as to whether or not there has been a failure or she may determine to provide her findings at a reconvened Adjudication Hearing . If findings of fact have not been determined at Stage 1 of the Hearing, the Commissioner will first determine findings of fact before consideration of whether there has been a failure to comply with the Code. The Legal Assessor may be present to provide advice during the Commissioner's deliberations, if required, but will have no role in the Commissioner's decision-making. Where the Commissioner finds that there has been no failure a notice to that effect will be given to the Respondent and the Chief Executive of the Council concerned.

### **Stage 3 of the Adjudication Hearing – Action to be Taken**

67. Stage 3 of the Adjudication Hearing may take place immediately following Stages 1 and 2, or the Commissioner may determine that Stage 3 will take place at a reconvened Adjudication Hearing. However, where the Commissioner has made a determination there has been a breach without holding an Adjudication Hearing (in accordance with the procedures at paragraphs 25 to 27 above) Stage 3 will take place at an Adjudication Hearing held solely to

determine sanction. A reconvened Adjudication Hearing or an Adjudication Hearing held to determine sanction will be held, where possible, within two weeks of the date of the previous hearing or within two weeks of the decision that there has been a breach, whichever is applicable. If the Commissioner finds that a failure to comply with the Code has occurred, she will enquire of the Deputy Commissioner whether anything is known of previous breaches by the Respondent concerned. The Deputy Commissioner will also draw to the Commissioner's attention to any aggravating and/or mitigating factors that should be taken into account. Information on factors which will be taken into consideration by the Commissioner in determining the action to be taken and/or the level of sanction are set out in the Commissioner's Sanctions Guidance which is published separately on the Commissioner's website<sup>11</sup>. The Respondent (or his representative) will be invited to make submissions, with reference to any aggravating and or mitigating factors identified by the Deputy Commissioner or any other mitigating factors, on what action they consider the Commissioner should take. The Deputy Commissioner and/or the Respondent may, subject to the consent of the Commissioner, call witnesses when making representations as to action to be taken and/or sanction.

68. The Commissioner will then retire in private to consider whether a failure to comply with the Code warrants one of the actions set out at section 59(3) of the 2014 Act which are:
- a. That no action should be taken
  - b. That the Commissioner should:
    - i. censure the Respondent, which may involve the Commissioner issuing a warning as to the Respondent's future conduct
    - ii. suspend or partially suspend the Respondent for a period not exceeding one year or, if shorter, the remainder of the Respondent's term of office, or
    - iii. Disqualify the Respondent from being, or becoming (whether by election or otherwise), a Respondent of that or any other relevant council for a period not exceeding five years.

The Legal Assessor may be present to provide advice during the Commissioner's deliberations, if required, but will have no role in the Commissioner's decision-making.

## **Decision of the Commissioner**

69. The Commissioner's decision may be given at the conclusion of the Adjudication Hearing with a summary of the reasons or it may be provided at a later date by means of a written notification. A written notification of all

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<sup>11</sup> [www.nipso.org.uk/nilgcs](http://www.nipso.org.uk/nilgcs)



adjudication decisions will be prepared by the Commissioner, with the assistance of the Legal Assessor.

70. Where a sanction is imposed, the notification will:
- a. include a statement that the Respondent has failed to comply with the Code
  - b. specify the details of that failure
  - c. state the sanction imposed by the Commissioner, and
  - d. state the date at which the sanction will come into effect.
71. In accordance with section 59 (7) to 59 (12) of the 2014 Act the decision of the Commissioner will be notified to the Chief Executive of the council of which the Respondent is a councillor, the person who is the subject of the notice, and the person who made the original allegation (if known). The Deputy Commissioner will be provided with a copy of the notice. A copy of the notice will be published in one or more newspapers circulating in the area of the council concerned. A copy of the notice will also be published on the Commissioner's website. The notification will, wherever possible, be published within six weeks of the conclusion of the Adjudication Hearing.
72. Where a notification refers to evidence that has been heard in private, persons other than the Respondent and the Deputy Commissioner will be sent a copy of the notification, with such material redacted as the Commissioner may direct.
73. If the Respondent is no longer a councillor of that council, but is a councillor of another council, the decision will be notified to the Chief Executive of that other council.

## **Appeals**

74. Where the Commissioner decides that a Respondent has failed to comply with the Code and has, as a result, censured, suspended, partially suspended or disqualified the Respondent, that person may seek the permission of the High Court to appeal against the Commissioner's decision, in accordance with section 59(14) of the 2014 Act.

## **Interim Case Adjudications**

75. Where the Deputy Commissioner considers it necessary in the public interest, the Deputy Commissioner may produce an interim report before the completion of an investigation. An interim report containing such a recommendation must be referred to the Commissioner for adjudication.

76. The procedures for interim case adjudications are the same as those for adjudications, subject to the differences and to the truncated time periods noted at paragraphs 70 to 79 below.

### **Action Prior to the Interim Adjudication Hearing**

77. Where it appears to the Deputy Commissioner that the prima facie evidence is such that:

- a. the Respondent has failed to comply with the Code;
- b. that the nature of the failure is likely to lead to disqualification under section 59(3)(c) of the 2014 Act; and
- c. that it is in the public interest to suspend or partially suspend that person immediately,

the interim report may include a recommendation that the person should be suspended or partially suspended from being a councillor for a period not exceeding six months or (if shorter) the remainder of the person's term of office.

78. The following timescales will apply to procedures for interim adjudications:

- a) The Commissioner will provide notice of the intention to hold an Interim Adjudication Hearing and the associated documentation (as noted at paragraph 17 above) within five working days of receipt of the interim investigation report;
- b) The Commissioner will notify the Respondent of the provisional date(s) on which it is intended to hold the Interim Adjudication Hearing. The Commissioner will aim to hold the Interim Adjudication Hearing no later than 15 working days from the date of notification;
- c) The Respondent should provide a written response to the notice (as noted at paragraphs 21 and 22 above) [or a request for an extension of time (as noted at paragraph 23 above)] within five working days of the receipt of the notification;
- d) The Respondent, the Deputy Commissioner and any other person requested to attend will be given at least five working days notice of the date of the Interim Adjudication Hearing; and
- e) The written notification of the Commissioner's decision (as noted at paragraph 69) will, where possible, be provided within 10 working days of the conclusion of the Interim Adjudication Hearing.

### **Decisions of Interim Case Adjudication Hearings**

79. The Commissioner must decide whether the Respondent should or should not be suspended or partially suspended for a period not exceeding six months or (if shorter) the remainder of the person's term of office. The Commissioner will seek to establish at the Interim Adjudication Hearing when she is likely to be

able to convene a full Adjudication Hearing to determine the issues in question. The Commissioner will consider as part of her decision to suspend or partially suspend the Respondent whether or not to provide for a date, falling before the expiry of the temporary suspension period, on which she will review her interim decision.

80. The Commissioner will give notice of her decision to the person who is the subject of the report and to the Chief Executive of the council concerned. If the person is no longer a councillor of that council, but is a councillor of another council, the decision will be notified to the Chief Executive of that other council. The Commissioner will also take reasonable steps to inform the person who made the written allegation that the councillor (or former councillor) has failed, or may have failed, to comply with the Code.
81. If the Commissioner decides that a person should be suspended or partially suspended (for a period not exceeding six months) the notice must give details of the suspension or partial suspension and specify the date on which the interim suspension or partial suspension is to begin.
82. The Commissioner may decide in relation to an Interim Adjudication Hearing to shorten the usual timescales: both for representations to be made and for evidence to be provided. This will allow for the case to be dealt with quickly and takes account of the fact that the full investigation will not have been concluded and there may be limited evidence available for consideration. In exercising her discretion to shorten the timescales for an Interim Adjudication Hearing the Commissioner will bear in mind her duty to act fairly and lawfully.
83. Interim Adjudication Hearings will not be held in private unless one or more of the usual conditions for holding a full Hearing in private (set out in paragraph 45) is met.
84. The interim suspension of any Respondent must not extend beyond the day on which the final adjudication decision notification in respect of the Respondent is given to the Chief Executive of the council concerned.
85. The decision by the Commissioner to impose an interim suspension does not prevent the Deputy Commissioner continuing with the investigation as the Deputy Commissioner sees fit. If the investigation is concluded and an investigation report is available, the full Adjudication Hearing will be convened in line with the usual timescales and should not be delayed until the expiry of the interim suspension period.

86. A person who is suspended or partially suspended under this section may seek the permission of the High Court to appeal<sup>12</sup> against:
- a. the suspension or partial suspension, or
  - b. the length of the suspension or partial suspension.

### **Recommendations and Reports**

87. The Commissioner, having made her adjudication, may make recommendations to a Council on any matter relating to the exercise of the Council's functions or the failure to observe the Code of Conduct. The Commissioner will send a copy of her recommendations to the Department of the Environment (the Department), and may provide copies to other public bodies. The Commissioner will specify a date by which the Council should prepare a report to the Department giving details of what action it has taken or proposes to take as a result of the recommendations.
88. The Commissioner may also lay an annual general report (or other such reports she thinks fit) before the Northern Ireland Assembly on the performance of his functions under the 2014 Act. The annual general report may include case summaries of adjudications decisions and details of recommendations made.

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<sup>12</sup> An appeal may be made on one or more of the grounds set out at section 59(14) of the 2014 Act

## Relevancy of Evidence

### 1. THE ADJUDICATION HEARING

1.1 Whilst the Parties to an Adjudication Hearing are entitled to be heard and to call witnesses, the procedure at the Adjudication Hearing will be determined by the Commissioner<sup>13</sup> at her discretion with the aim of ensuring that any issues before the Adjudication Hearing are determined in a fair and efficient manner. This means that the Commissioner will not wish to hear irrelevant or unnecessarily repetitious evidence. For these reasons the Commission recommends that the Respondent and the Deputy Commissioner try to agree a Joint Statement of Fact or, where appropriate, discuss contentious evidence or procedural matters at a Pre-Hearing Review if one is convened by the Commissioner.

1.2 Whilst the parties are entitled to call witnesses to give evidence, the Commissioner may decline to hear evidence which is not relevant to the question of whether there has been a breach of the Code.

1.3 Therefore, the issue of relevancy is a matter for the Commissioner's discretion and it is up to the Commissioner to determine what evidence, if any, must properly be excluded as irrelevant with the aim of allowing the issues before her to be clarified in a fair and efficient manner.

### 2. RELEVANCY

2.1 The concept of relevance is fundamental to the law of evidence. Facts which a party wish to present as evidence must have a close and logical link with the issues to be determined in the case at hand. The ultimate test of relevance is whether the material presented has a reasonably direct bearing on the subject or which makes the matter which requires proof, more or less probable.

2.2 The role of the Commissioner is to determine whether, on the balance of probabilities, a breach of the Code has or has not occurred. If the Commissioner finds the Respondent has not contravened the Code the case will be dismissed and the Adjudication Hearing concluded.

2.3 If the Commissioner finds that the Respondent has breached the Code, it will proceed to hear any representations in respect of mitigation from the Respondent.

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<sup>13</sup> In special circumstances, for example where there is a potential conflict of interest, the Commissioner may appoint a suitable person to adjudicate on her behalf in accordance with Schedule 1, article 14(2) of the Public Services Ombudsman Act (Northern Ireland) 2016

2.4 This means that in order to be relevant to the question of whether or not there has been a breach of the Code, any evidence presented by the parties and witnesses must have a close and logical link to the provision(s) of the Code under consideration.

2.5 If the Commissioner determines there has been a breach of the Code, any evidence presented by the parties and witnesses may be taken into account in the imposition of an appropriate sanction if it has a close and logical link to the question of whether there are any mitigating factors.

2.6 Questions of relevance will depend on the individual facts of each case. It is for the Commissioner to determine whether disputed facts have a bearing on the issue to be determined. That is a question of degree, and will involve considering matters of fairness and efficiency.

2.7 If any lines of questioning, or evidence sought to be presented, by the parties are plainly irrelevant and have no bearing on whether there has been a breach of the Code, the Commissioner may exercise her discretion and prevent such evidence being presented on the grounds of relevancy.

2.8 If either party consider any lines of questioning or evidence sought to be presented by the other party is irrelevant, they can make submissions to the Commissioner as to the relevancy of such evidence to the allegation. The Commissioner will then decide whether or not to permit such evidence to be introduced.

2.9 In determining the degree of latitude permitted, the Commissioner will take into consideration evidence presented by the Respondent. For example, in order to refute the allegation(s) made, the Respondent may adopt a position that it is necessary for them to lead their own witnesses in response to evidence led by the Deputy Commissioner. Similarly the Deputy Commissioner may adopt a position that it is necessary for him to lead witnesses in response to evidence led by the Respondent.

2.10 Examples of evidence that may be excluded as irrelevant are:

1. Evidence relating to the complainant's motives;
2. Evidence relating to the Respondent's conduct which does not form part of the alleged contravention of the Code of Conduct being considered.

### **3. UNREPRESENTED PARTIES**

3.1 It is often the case that a Respondent without representation will be afforded some latitude in the manner in which their case is presented. However, the extent of the latitude afforded should not be to the detriment of the proceedings as a whole

and the Commissioner will ensure that a case is dealt with in a fair and efficient manner.

3.2 The role of the Commissioner when hearing evidence is not generally a proactive one. It is not the Commissioner's function to give advice to a party as to how that party should present their case. The main role of a Commissioner in determining whether or not there has been a breach of the Code during the course of an Adjudication Hearing is to listen to and assess the evidence of the witnesses and the parties and to deal with any procedural matters which may arise in a fair and efficient manner.