

Protocol for the Assessment and Determination of Allegations of Breaches of the Members Code of Conduct

1. Introduction and role of Independent Persons

- 1.1 Torbay Council and Brixham Town Council are required to have a Code of Conduct which deals with the conduct expected of their elected and co-opted members when they are acting in their official capacity. The Code of Conduct is also required to include appropriate provisions relating to the registration and disclosure of pecuniary and other interests.
- 1.2 The obligations in the Code of Conduct only apply when a Member is acting, holding themselves out as acting or giving the impression that they are acting in their official capacity.
- 1.3 Torbay Council is responsible for administering its own Code of Conduct and the Code for Brixham Town Council. Torbay Council is therefore required to have in place arrangements under which allegations against members can be investigated and decisions on allegations can be made.
- 1.4 Torbay Council is required to appoint at least one Independent Person whose views may be sought by the Council, usually through the Monitoring Officer, or by subject members whether they are members of Torbay or Brixham Councils. The Council must seek the views of an Independent Person before making a decision on an allegation that has been referred for investigation. There is no right for the complainant to seek the views of the Independent Person and no such contact will be permitted.
- 1.5 The Independent Persons do not represent and nor are they advisors to the subject member or the Council. They must remain completely impartial and objective. Their only role is to assess complaints and form a view on them.
- 1.6 This protocol sets out the procedure for submitting a complaint alleging that a member has breached the Code of Conduct and the procedures that will be followed in dealing with such complaints. It also sets out the criteria for assessing a complaint.
- 1.7 All allegations will be dealt with objectively, fairly and consistently. Regard will be had to the public interest and the Council's fiduciary duty to council tax payers.
- 1.8 Within this protocol references to the Monitoring Officer include the Monitoring Officer or his/her nominated representative(s).
- 1.9 In this protocol the term 'Code of Conduct' means the Code of Conduct applicable to the subject member.
- 1.10 In this protocol the term 'member' means any councillor or co-opted member.
- 1.11 In this protocol the term 'subject member' means the member against whom the allegation has been made.

2. Submitting a complaint

- 2.1 All complaints must be submitted in writing to the Monitoring Officer, but this includes fax and electronic submissions. We will assist complainants if they have a disability that prevents them from making or makes it difficult for them to submit their complaint in writing. We can also help if English is not the complainant's first language.
- 2.2 Complainants are encouraged to use our complaints form which we can send out as a hard copy or which is available in electronic format from our web site. Further information and the complaint form are available at:
<http://www.torbay.gov.uk/index/yourcouncil/councillorsdecisions/behaviourinterestsstandards.htm>
- 2.3 If a complainant makes a verbal complaint we will ask that the complaint is confirmed in writing unless the Monitoring Officer is satisfied that the circumstances justify a departure from the requirement that complaints are made in writing. If you make a verbal complaint and simply decline to confirm the complaint in writing for reasons which we do not consider to be justifiable we will take no further action on the complaint.
- 2.4 Anonymous complaints will be rejected. This does not include complaints where the complainant requests confidentiality (see section 7 below and on the complaint form).
- 2.5 Some complaints will fall outside of the scope of this protocol. If that happens the complaints will be forwarded to the relevant officers in the Council and where appropriate referred to the Council's corporate complaints, the complainant will be advised of this.
- 2.6 To submit complaints electronically complainants are requested to use the on-line form at the link in paragraph 2.2 above.

All complaints must be sent or delivered to:

The Monitoring Officer
% Governance Support
Torbay Council
Town Hall
Castle Circus
Torquay TQ1 3DR

3. Processing and determination of complaints**Initial Assessment – Stage 1**

- 3.1 When a complaint is received which is within the scope of this protocol we will aim to acknowledge receipt within 5 working days.
- 3.2 The Monitoring Officer will carry out an initial assessment of whether the alleged behaviour could amount to a breach of the Code of Conduct and therefore within this protocol. This will normally be done within 10 working days. If the allegation could not amount to a breach of the Code of Conduct or is considered to be within one or more of the criteria set out below the complaint will not be progressed beyond this

initial assessment stage:

- If the complaint is the same or substantially the same as a complaint previously dealt with within the subject member's term of office
- If the period since the alleged behaviour is so significant that it is considered to be inequitable, unreasonable or otherwise not in the public interest to pursue
- If the complaint is insubstantial
- If the complaint discloses a minor or technical breach of the Code that it would not be in the public interest to pursue
- If the complaint is or appears to be malicious, politically motivated, tit-for-tat or otherwise submitted with an improper motive
- If the complaint is not considered to disclose sufficiently serious potential breaches of the Code to merit further consideration
- If the complaint is covered by the Council's policy on persistent and vexatious complaints
- If the member against whom the allegation has been made has remedied or made reasonable endeavours to remedy the matter
- If the complaint is about a person who is no longer a member of a relevant council and there are no overriding public interest reasons to merit further consideration
- The complainant has suffered no significant injustice or emotional upset from the breach complained about

Provided always that if the complaint falls into one or more of the above categories, but is deemed sufficiently serious by the Monitoring Officer, then the complaint may be progressed at the Monitoring Officer's discretion.

- 3.3 At this stage, if the complaint is not to progress further the Monitoring Officer will notify the complainant in writing of that fact and with the reasons. The Monitoring Officer will also write to the subject member with details of the complaint, the decision made and the reasons for the decision. Where the subject member is a member of Brixham Town Council, the Monitoring Officer will also provide the same information to Brixham Town Council's Clerk. The name of the complainant will be disclosed to the subject member and, where appropriate, the Brixham Town Council's Clerk unless confidentiality has been requested and the Monitoring Officer considers the request to be justified.
- 3.4 Notwithstanding paragraph 3.2, the Monitoring Officer will in appropriate circumstances pass to the police or Director of Public Prosecutions any allegations it receives which disclose behaviour that may constitute a criminal offence, whether under the ethical standards provisions of the Localism Act or otherwise.

Assessment of Complaints – Stage 2

- 3.5 For those complaints which are to be taken beyond the process detailed in the preceding paragraphs, the following steps will be followed. The Monitoring Officer and the subject member may seek the views of the nominated Independent Person at any time during this process. If considered necessary by the Monitoring Officer he or she may convene a panel of members of the Standards Committee to assist him or her with the consideration and determination of the complaint including any preliminary hearing. The Monitoring Officer may do this at any time during the process. Where a complaint is in respect of a breach of Brixham Town Council's code of conduct the Monitoring Officer will ask the Clerk to Brixham Town Council to

nominate a member of Brixham Town Council to sit on any such panel.

Step	Action
1	The Monitoring Officer will write to the subject member with details of the complaint, including those of the complainant unless any confidentiality request has been agreed, and also the name and contact details of the Independent Person who has been nominated for the complaint and who the subject member may contact to seek their views. If the Monitoring Officer considers it appropriate the Clerk to Brixham Town Council will be notified of the complaint. At this stage the subject member will be given an opportunity to provide the Monitoring Officer with a written response to the complaint. Ordinarily we will ask the subject member to restrict their written comments to two sides of A4 but they will be permitted to provide copies of supporting documents.
2	The Monitoring Officer will consider the complaint again in the context of any written submissions and supporting documentation provided by the subject member.
3	The Monitoring Officer will determine the complaint in accordance with the Assessment Criteria set out in Annex A. The options the Monitoring Officer has are: (i) to make no finding as to whether there has been a breach of the Code and take no further action; (ii) to make no finding as to whether there has been a breach of the Code but determine that some action other than an investigation is appropriate; (iii) to find no breach of the Code; (iv) to find a breach of the Code without an investigation but impose no sanction; (v) to find a breach of the Code without an investigation; (vi) to require the complaint to be investigated to determine whether there has been a breach of the Code and the seriousness of the breach; (vii) No further action; (viii) Referral for other action; and (ix) to conclude that the circumstances of the complaint indicate that an offence under Chapter 7 of Part 1 of the Localism Act 2011 may have been committed and that the complaint ought to be investigated, by the police where appropriate, to determine whether a prosecution should be brought.
4	The outcome of the determination of the complaint will be notified in writing to the complainant, the subject member and, where appropriate, the Clerk to Brixham Town Council within 5 working days of the determination.

- 3.6 The above steps 1 to 4 will normally be conducted within 28 days of receipt of the complaint. If it is not possible to do this within this time the complainant, subject member and, where appropriate, the Clerk to Brixham Town Council will be contacted and advised of the delay and provided with an estimate of when the Steps will be completed.

4 What happens following assessment of complaints?

- 4.1 Any action or investigation will be implemented. If other action is determined as appropriate and either party declines to cooperate that will be reported to the Monitoring Officer who may decide to deal with the complaint under another option under step 3 in the table above. Where the subject member belongs to a political group any failure by that subject member to cooperate will be reported to their group leader by the Monitoring Officer.
- 4.2 If potential criminal offences are identified and the complaint referred for investigation with a view to prosecution the appropriate procedures of the police or the Council will be followed so as to protect the integrity of the investigation.
- 4.3 A report setting out all the complaints received and what action was taken regarding them will be forwarded to members of the Standards Committee on a quarterly basis.
- 4.4 Where an investigation is deemed appropriate investigations will be carried out in accordance with the guidance on 'How to Conduct an Investigation' produced by Standards for England that was applicable to the Code of Conduct for Members pursuant to the Local Government Act 2000. Prior to the final investigation report being issued the Independent Person shall be asked for any comments they may have in respect of the investigation report and the investigator must take into account these comments but is not obliged to follow them. Any comments of the investigator will be included as part of the final report.
- 4.5 Any hearings following investigation will be dealt with in accordance with Annex B to this protocol.

5 General rules concerning assessments – public access to meetings and information

- 5.1 Should the Monitoring Officer decide to convene a panel of the Standards Committee to assist him or her in the consideration or determination of a complaint such meetings shall be deliberative only and shall not be open to the public. The decision as to how the matter should be progressed shall remain the decision of the Monitoring Officer. The press, members, officers (except the Monitoring Officer and Governance Support Officer), members of the public, the subject member and the complainant will not be permitted to attend the meetings.
- 5.2 Data protection requirements will be complied with and may prevent the public disclosure of information relating to complaints.
- 5.3 On completion of the assessment a written summary will be published in the form of a decision notice. Once this has been sent to the subject member and the complainant a copy will be placed on the Council's web site.

6 Withdrawal of complaints by Complainants

- 6.1 Request to withdraw complaints will normally be granted but in considering such a request from the complainant the Monitoring Officer will consider the following factors:
 - (i) Whether the public interest in taking action on the complaint outweighs the

- complainant's desire to withdraw it;
- (ii) Whether the complaint is such that action can or should be taken on it without the complainant's participation; and
- (iii) Whether there appears to be an identifiable underlying reason for the request to withdraw the complaint such as whether there is information to suggest that the complainant may have been pressurised into withdrawing the complaint.

7 Complainant confidentiality

- 7.1 The subject member will, in normal circumstances, be told from the outset who has complained about them. If a complainant asks for their identity to be withheld their request will be considered by the Monitoring Officer prior to the member being notified that a complaint has been made.
- 7.2 Each request for confidentiality will be considered on its merits and in determining such a request the following will be considered:
- (i) Whether the complainant reasonably believes that they, or those connected to them, will be at risk of harm if their identity is disclosed;
 - (ii) That the complainant is reasonably concerned about the consequences to their employment, or those connected to them, if their identity is disclosed;
 - (iii) That the complainant, or somebody closely connected to them, suffers from a medical condition and there is evidence of medical risks associated with their identity being disclosed or confirmation from an appropriate medical professional that that is the case; and
 - (iv) Whether the public interest in proceeding with the complaint outweighs the complainant's wish to have their identity withheld.
- 7.3 If it is not considered appropriate to grant a request for confidentiality the complainant will be offered the opportunity to withdraw the complaint rather than proceed with it.

Annex A - Complaint Assessment and Determination Procedure**Assessment Criteria****1. Introduction**

- 1.1 All complaints and reviews will be considered on their merits and according to the facts.
- 1.2 The Monitoring Officer will determine when it is appropriate to seek the views of the Independent Person.
- 1.3 These assessment criteria, will be used as guidance in the consideration and determination of complaints. However, due to the wide variety of complaints received by the Council, avoiding the perception of inconsistency, even in assessing complaints, is no easy task. For example two complaints may be about the same aspect of the Code but differ considerably in terms of the facts, how serious they are and there may be huge differences in the relevance and amount of detail regarding the complaint. For these reasons the assessment criteria can only be a guide.

2. The Assessment CriteriaOverriding criteria

These three tests will be applied during the initial assessment of a complaint:

- Is the complaint about one or more named members of a relevant authority?
- Was the subject member in office at the time of the alleged conduct?
- If proven, would the complaint disclose a breach of the Code of Conduct?

No finding of whether there is a breach of the Code

If, based on the facts, it is not possible to determine whether there has been or may have been a breach of the Code and the alleged conduct does not merit an investigation, having regard to the public interest, this is the appropriate finding to make.

No finding of whether there is a breach of the Code but action other than investigation is appropriate

Where, based on the facts, it is not possible to determine whether there has been or may have been a breach of the Code and having regard to the public interest, the alleged conduct does not merit an investigation. If the allegation and any response from the subject member disclose an underlying issue that action such as mediation or training on the Code or council procedures might assist with, this is the appropriate finding to make.

Finding of no breach of the Code

If the facts available demonstrate on the balance of probabilities that there has been no breach of the Code, this is the appropriate finding to make. If there is no breach of the Code a sanction cannot be imposed but other action such as mediation or training might still be considered.

Finding of a breach of the Code without an investigation

A finding that the Code of Conduct has been breached without the need for an investigation

will usually be appropriate in the following circumstances:

- It can clearly be shown that from the information that has been provided by the subject member and the complainant that a breach of the Code has occurred without the need for an investigation;
- The subject member has admitted to the breach of the Code, whether or not they have offered to remedy the breach;
- It can be shown that an investigation is unlikely to be able to establish any further independent relevant evidence regarding the complaint or that the cost of obtaining any further evidence would not be justified having regard to the public interest and that on the evidence supplied a breach of the Code can be shown.

A breach of the Code without investigation can only be found if the complaint satisfies the first three initial tests and that it can be clearly shown, on the balance of probabilities, that a breach of the Code of Conduct has occurred.

No Further Action

If a breach of the Code is found but it is trivial, a technical breach or otherwise of limited effect it may be appropriate to take no further action.

Referral for other action

A complaint may be referred for other action in the circumstances listed below. Other action may be appropriate whether a breach is found or not. However, in general, other action may be used where the complaint discloses a widespread problem rather than a specific one concerning the members conduct.

The following should be considered in determining whether it is appropriate to refer a complaint for other action:

- Does taking further action provide an opportunity to resolve the issue and to prevent any similar issues arising in the future and promote good governance?
- Does the complaint present a potentially less serious breach of the Code than would require the matter to be referred for investigation and is any benefit to be gained from referring the matter for investigation?
- Is the council of which the subject member is a member suffering from a widespread breakdown in internal relationships and trust where a course of action other than an investigation of a complaint may be more appropriate and beneficial to that council?

Referral for Investigation

A complaint should usually be referred for investigation in the following circumstances:

- The complaint has passed all three of the initial tests
- The subject member has denied the allegations but the information presented indicates that there may be a breach of the Code
- On the information provided the potential breach of the Code of Conduct is sufficiently serious that an investigation should be undertaken to either discount or substantiate the complaint and to determine what sanction, if any, is appropriate

Potential offences under the Localism Act 2011

If it is considered that the allegation concerned may disclose an offence under the Localism Act it should be referred to the police or other appropriate person(s) for further consideration as to whether there should be an investigation with a view to prosecution. No prosecution can be brought without the consent of the Director of Public Prosecutions.

If it transpires that no offence was committed, whether following trial or otherwise, the complaint ought to be reintroduced to this procedure for determination of any breach of the code and appropriate sanction, if any.

Annex B – Actions Following Completion of Investigation Report**1. Processing the Investigator's Report**

- 1.1 As soon as possible following receipt of the Investigator's report the Governance Support Team will write to the complainant and the subject member enclosing a copy of the report.
- 1.2 Where the investigation report makes a finding of no breach, the Monitoring Officer, in consultation with the Chair of the Standards Committee, will consider the most appropriate course of action.
- 1.3 Where the investigation report does find there to be a breach of the Code of Conduct the Governance Support Team will arrange for three members of the Standards Committee (plus one member of Brixham Town Council where the complaint is in respect of a breach of Brixham Town Council's Code of Conduct) to make up the Hearing Sub Committee and set a date a Hearing is to take place. The complainant and subject member will be contacted with details of when the Hearing is to take place and given a deadline by which to submit the following:-
 - Whether they will be attending the hearing and if they will be represented
 - The names of any witnesses they will be bringing to the hearing
 - What findings of fact (if any) they dispute in the investigator's report
 - Any other matters that they would like to be taken into consideration
- 1.4 Prior to the Hearing taking place and after the deadline for responses to the above paragraph from the complainant and the subject member the nominated members of the Hearing Sub Committee will meet with the Monitoring Officer in private to discuss:
 - (a) The findings of fact in the Investigator's report that are agreed.
 - (b) The findings of fact in the Investigator's report that are not agreed.
 - (c) Whether or not the complainant, the subject member and/or the Investigator will attend or be represented or should be asked to attend.
 - (d) The names of any witnesses who the complainant and/or subject member intend to invite
 - (e) The comments of the Independent Person in respect of the investigation report
 - (f) An outline of the proposed procedure for the hearing.
 - (g) Any other matters the Monitoring Officer considers appropriate.

Following this pre hearing discussion the complainant and the subject member will be informed in writing of persons who will be present at the Hearing and the agenda for the Hearing. At this stage the complaint and/or subject member may also be asked to attend the Hearing if they have not already indicated that they will be attending.

2. The Hearing

- 2.1 Unless otherwise specified following the pre hearing meeting referred to at paragraph 1.4 above, those required to attend the Hearing shall be the Hearing Sub Committee members, the investigator and a legal adviser (who shall not be the investigator) nominated by the Monitoring Officer. The subject member and complainant and any witnesses either may have nominated cannot be required to attend the meeting although will be expected to attend if requested following the pre hearing meeting.
- 2.2 The subject member or the complainant may be represented or accompanied during the meeting by a solicitor, counsel or, with the permission of the Hearing Sub Committee, another person. Where representation is required by either party subject to this clause the party should notify the Monitoring Officer as soon as possible and failure to notify in good time may mean that the request for representation is refused. **Note:** the member or complainant (as the case may be) must meet the cost of their representation.
- 2.3 The Hearing Sub Committee may take legal advice from its legal advisor at any time during the hearing or while they are considering the outcome. The Hearing Sub Committee may adjourn to hear legal advice but this advice will then be repeated by the legal advisor in the public forum.
- 2.4 At the Hearing Sub-Committee, it will not normally be permitted to raise new disagreements over findings of fact in the final report unless there are good reasons for doing so (for example, new evidence becoming available). It is therefore important that the subject member raises any issues of concern with the Monitoring Officer or the Head of Governance Support before the hearing.

3. Preliminary Procedural Issues

- 3.1 Before the Hearing Sub-Committee considers the Investigator's report it will consider any procedural issues, including requests for paperwork to be withheld from the public and/or for any part of the meeting to be held in private. The Hearing Sub-Committee will then resolve any other issues or disagreements about how the hearing should continue, which have not been resolved during the pre-hearing process.
- 3.2 The Hearing Sub-Committee may adjourn at any time to require further information or a further investigation to be carried out.

4. Making Findings of Fact (Stage 1)

- 4.1 After dealing with any preliminary issues, the Hearing Sub-Committee will then move to consider whether or not there are any significant disagreements about the facts contained in the investigator's report.
- 4.2 If there is no disagreement about the facts, the Hearing Sub-Committee will move on to the next stage of the hearing.
- 4.3 If there is a disagreement, the Investigator, will be invited to make any necessary representations to support the relevant findings of fact in the report. With the Hearing Sub-Committee's permission, the Investigator may call any necessary supporting witnesses to give evidence. The Hearing Sub-Committee may give the

subject member an opportunity to challenge any evidence put forward by any witness called by the Investigator.

- 4.4 The subject member will then have an opportunity to make representations to support his or her version of the facts and, with the Hearing Sub Committee's permission, call any necessary witnesses to give evidence.
- 4.5 At any time, the Hearing Sub-Committee may question any of the people involved or any of the witnesses and may allow the Investigator to challenge any evidence put forward by witnesses called by the member of the complainant.
- 4.6 If the subject member disagrees with any relevant fact in the Investigator's report, without having given prior notice of the disagreement during the pre-hearing process, he or she must give good reasons for not mentioning it before the hearing. After considering the member's explanation for not raising the issue at an earlier stage, the Hearing Sub Committee will then:
 - (a) continue with the hearing, relying on the information in the Investigator's report;
 - (b) allow the subject member to make representations about the issue, and invite the Investigator to respond and call any witnesses as necessary; or
 - (c) adjourn the hearing to arrange for appropriate witnesses to be present but only if they believe that those witnesses will attend any adjourned hearing.
- 4.7 The Hearing Sub Committee will normally move to another room to consider the representations and evidence in private unless there are no significant disagreements about the facts contained in the Investigator's report.
- 4.8 If the Hearing Sub Committee have withdrawn they will then return for the Chair to announce its findings of fact.
- 5. Did the Subject Member Fail to Follow the Code of Conduct for Members? (Stage 2)**
 - 5.1 The Hearing Sub Committee will then consider whether or not, based on the facts it has found, the subject member has failed to follow the Code of Conduct.
 - 5.2 The subject member will be invited to give relevant reasons why the Hearing Sub Committee should not decide that he or she has failed to follow the Code.
 - 5.3 The Hearing Sub Committee will then consider any verbal or written representations from the Investigator.
 - 5.4 The Hearing Sub Committee may, at any time, question anyone involved on any point they raise in their representations.
 - 5.5 The subject member will be invited to make any final relevant points.
 - 5.6 The Hearing Sub Committee will then move to another room to consider the representations.

- 5.7 If the Hearing Sub-Committee have withdrawn when they return the Chair will announce its decision as to whether or not the subject member has failed to follow the Code of Conduct.

6. If the Subject Member has not Failed to Follow the Code of Conduct for Members

- 6.1 If the Hearing Sub Committee decides that the member has not failed to follow the Code of Conduct, it will move on to consider whether it should make any recommendations to the authority.

7. If the Subject Member has Failed to Follow the Code of Conduct (Stage 3)

- 7.1 If the Hearing Sub Committee decides that the subject member has failed to follow the Code of Conduct, it will consider any verbal or written representations from the Investigator and the member (in that order) as to:

- (a) whether or not the Hearing Sub Committee should set a sanction; and
- (b) what form any sanction should take.

- 7.2 The Hearing Sub Committee will move to another room to consider whether or not to impose a sanction on the subject member and, if so, what that sanction should be. On their return, the Chair will then announce the Hearing Sub Committee's decision.

- 7.3 When deciding on a sanction, the Hearing Sub-Committee will make sure that it is reasonable and in proportion to the subject member's behaviour.

8. Recommendations to the Council

- 8.1 After considering any verbal or written representations from the Investigator, the Hearing Sub-Committee will consider whether or not it should make any recommendations to the Council, with a view to promoting high standards of conduct among members.

9. The Written Decision

- 9.1 The Hearing Sub Committee will announce its decision on the day and provide a short written decision on that day. A full written decision prepared by the Head of Governance Support (or his/her representative) and approved by the Monitoring Officer and Chair of the Hearings Sub-Committee will be published within ten working days.