



Protocol for Managing an Alleged/Suspected Breach of Code of Conduct

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Summary of Changes

Section	Change
All	



Protocol for Managing an Alleged/Suspected Breach of Code of Conduct

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1.0 Introduction

This Protocol will be used by Ark to deal with any alleged breaches of our Code of Conduct for Governing Body Members. It is based on the Model Protocol provided by SFHA.

2.0 Who is Responsible?

The Chair has delegated authority to deal with all potential breaches of the Code, unless the allegation relates to him/her. In that event, the Vice Chair should take on the responsibilities that the Protocol allocates to the Chair. It may be necessary to ask other members of the Board to take on responsibilities should the allegation relate to both the Chair and Vice Chair.

The Chair should consult with other office-bearers (or members of the Board) to instruct, progress and conclude internal and external investigations carried out in accordance with this Protocol. A flowchart summarising the Protocol process can be found in Appendix 1 and additional guidance about implementing the protocol can be found in Appendix 2.

The Scheme of Delegation identifies who has primary responsibility for overseeing the management of alleged breaches of the Code of Conduct.

Delegated Authority to Oversee Potential Breaches	Any two from the following (must include at least one Board member)
Board	Chair, Vice-Chair, other office bearers
Senior Staff	CEO, ET members

No one who is directly involved in a matter that gives rise to a concern that there may have been a breach of the Code of Conduct should be involved in reviewing or managing/conducting an investigation of the matter. Consequently, it may be necessary to ask other members of the Board to take on the responsibilities that the Protocol allocates to the Chair and other office bearers.

The Chair or Senior Staff may seek advice from our solicitors in exercising all of the responsibilities associated with this Protocol.

3.0 What Constitutes a Breach?

A breach of the Code of Conduct is a serious matter. This Protocol is a process that will apply to managing and/or responding to alleged breaches of the Code of Conduct. Breaches can include:

- Conduct by a Board member during a meeting (which might involve a member being obstructive, offensive or disregarding the authority of the Chair or failing to observe Standing Orders);
- Complaints that the conduct of a Board Member has failed to meet the requirements of the Code of Conduct; is contrary to Ark's Values, Rules or policies; threatens the reputation of Ark; risks bringing the organisation into disrepute or undermines Ark and/or its people;
- Inappropriate behaviour towards colleagues, staff, customers or partners.

Some complaints and/or concerns may relate to relatively minor matters, whilst other may involve more significant issues. Consequently, different approaches are likely to be appropriate, depending on the details of individual circumstances, recognising that it may not always be appropriate to undertake a formal investigation in response to an isolated and/or relatively minor issue.

4.0 Initial Review to Determine if Further Investigation Required

When a complaint is received or a concern is raised, consideration should be given as to which is the most appropriate course of action. This may (but may not) require some initial review of the complaint or allegations before concluding on a specific approach. The review should be carried out by those members of the Board appointed in accordance with 2 of this Protocol, with support from the CEO if required.

It may be that such a review concludes that there is no substance to the concern or allegation. Depending on the circumstances, it may be appropriate to report the outcome of such a review to the Board. This might be the case, for example, if an anonymous complaint is received which cannot be investigated because of a lack of information.

Anonymous complaints or allegations can be difficult to resolve but, in the event that anonymous information is received or made known, an initial review should be undertaken to establish whether there is the potential for any substance to the concern. If so, an investigation should be undertaken, although it is recognised that it may not be possible to conclude any such investigation satisfactorily.

Minor issues, actions or conduct at an internal meeting or event are unlikely to constitute a breach of the Code of Conduct that warrant investigation. The Chair (and other office bearers) should exercise their judgement in determining which of the courses of action set out in this Protocol is more appropriate.

Two routes are described in this Protocol: Route A and Route B.

The SHR requires that alleged breaches of the Code which are to be investigated under either Route A or Route B must be regarded as Notifiable Events, in accordance with the terms of the SHR's Statutory Guidance. The Chair is responsible for ensuring that the necessary notifications are made to the Scottish Housing Regulator, and that the SHR's requirements (as set out in the relevant guidance) in terms of reporting the outcome of the investigation are met.¹

4.1 Route A

Route A is an internal and informal process to address potential minor breaches. This is intended to be a relatively informal process, used to address e.g. one-off discourtesy at an internal meeting, isolated or uncharacteristic failure to follow policy.

Alleged breaches that occur during the course of a meeting or other internal event (and which have not happened before) will, unless the Chair believes it to be serious, be dealt with by the Chair of the meeting, either during the meeting/event and/or within 24 hours of the meeting. In these circumstances, the Chair may ask the member to leave the meeting or a vote may be taken to exclude the member from the rest of the meeting.

After the meeting, the Chair or sub-committee Convenor will discuss such behaviour with the member and may require the member to apologise or take such other action as may be appropriate (Route A). Where the Chair regards such behaviour as being serious, it should be investigated in accordance with Route B as will repeated incidents of a similar nature.

It may be appropriate for the Chair to record the terms of the discussion in a letter to the Board member e.g. to confirm the provision of training or support or to record a commitment to uphold a specific policy or to record an apology.

It is possible that a concern that it is initially agreed can be addressed via route A ends up being the subject of a formal investigation, if more significant issues emerge, or actions are repeated.

¹ Scottish Housing Regulator (2019) Notifiable Events guidance

4.2 Route B

Route B will involve formal investigation of repeated breaches or an alleged significant/major breach. Investigations may be conducted internally or independently, according to the circumstances and people involved.

An investigation under Route B will usually be overseen by the Chair and another office-bearer or Board member.

The Chair or office-bearer, in consultation with the other office-bearers, will decide whether to instruct an independent investigation or carry out an internal investigation.

In the event that the Chair or other office-bearer is the subject of a complaint, an independent investigation should be conducted, overseen by the Vice-Chair and another Board member.

If the Chair is likely to be involved in an investigation (e.g. as a witness), it will be necessary for the office bearers to consider who should be involved in overseeing the investigation.

The CEO can support the implementation of the Protocol (unless involved in the issue, in which case the role should be assigned to the Director of People and Organisational Development).

Our scheme of delegation identifies who has primary responsibility for overseeing the management of alleged breaches of the Code of Conduct (see section 2)

Allegations of a potential breach should normally be made to the Chair or, where the complaint relates to the Chair, to another office-bearer. Where a complaint is made to the CEO, the matter should immediately be notified to the Chair.

Alleged breaches may be the subject of written complaints or allegations; they may also be witnessed by someone. However the alleged breach is identified, the Chair and CEO should ensure that there is always a written statement of the complaint or allegation that is used as the basis for the investigation. If no written complaint is made, the statement of the matter should be prepared by someone unconnected to the event/situation (e.g. a verbal complaint made by a Board member should be recorded by someone who was not present when the issue arose – this could be a member of staff).

The Board member who is the subject of the complaint/allegation that is to be investigated will be notified in writing of the alleged breach within seven working days, either of occurring or of receipt of the complaint. A Board member who is subject to an investigation should take

leave of absence until the matter is resolved. Rule 37.8 of the 2020 Model Rules contain the provisions to secure this. The letter will inform the Board member of the nature of the potential breach, the arrangements for the investigation and will advise that leave of absence will be in place for the duration of the investigation. Board members are expected to co-operate with such investigations.²

An alleged breach of the Code of Conduct which is being dealt with via Route B will be notified to the Board, normally by the Chair or Secretary, within seven working days, either of occurring or of receipt of the complaint. The notice (which should be confidential) will not describe the detail of the complaint and will set out the proposed arrangements for investigation, including who will conduct the investigation and which members of the Board are responsible for its oversight.

The appointment of an external Investigator (when it is decided to be the appropriate response) should be approved by the Board members responsible for overseeing the investigation.

An internal investigation (when it is decided to be the appropriate response) will be carried out by at least two and not more than three Members of the Board, who are not responsible for overseeing the investigation. In selecting the Board members, we will seek to ensure that the investigators represent the profile of the Board.

5.0 Investigation Under Route B

The conduct of an investigation should remain confidential, as far as possible, in order to protect those involved (witnesses, complainant(s)) and the Board member(s) who are the subject of the complaint.

All investigations will be objective and impartial. Investigations will normally be investigated by an independent person, unless it is decided that an internal investigation is appropriate.

Investigations should not usually take more than six weeks to conclude.

The investigator(s) will be supported by the CEO (or other senior member of staff if the CEO is involved in the complaint). The Chair and other office-bearer, with any support they feel necessary, will brief the agreed advisor/investigator and then consider their recommendations at the end of the investigation, before reporting to the Governing Body.

² Code of Conduct F7

All investigations will be the subject of a written Brief (see Appendix 4) which sets out the Board's requirements and which includes the statement of the alleged breach (scope, timescale, reporting requirements, access to information etc.). The Brief may refer to any action previously taken that is relevant.

All investigations will include at least one interview with the Board member who is the subject of the allegation, who will be invited to provide any relevant information. The interview(s) may be conducted face to face or remotely (by telephone or video call). Board members may be accompanied during an interview by a friend (at their request), as a companion to provide support and not to represent. It is not appropriate for another Board member to fulfil this role nor is it appropriate for the RSL to meet any costs (other than reasonable expenses as provided for in the relevant policy) in respect of a companion's attendance.

5.1 Considering the Outcome of the Investigation

The investigator will normally present their report to the Board. Before doing so, the report will be reviewed by those overseeing the investigation to ensure that the Brief has been met and that the report is adequate to support the Board's consideration and decision making.

The Board member whose conduct is being investigated will not be party to any of the discussions relating to the investigation.

The report will be considered at a meeting of the Board, which may be called specifically for this purpose. It is the responsibility of the Board to collectively consider the report and findings from the investigation and to determine:

- Whether there has been a breach;
- How serious a breach is;
- What action should be taken?

The Board will report the findings of the investigation and the proposed action to the member concerned within seven days of the meeting at which the report of the investigation was considered.

5.2 Action to Deal with a Breach

If, following investigation, a breach of the Code is confirmed, action will be taken in response. This action will reflect the seriousness of the circumstances. It may take the form of some or all of the following:

- A discussion with the member concerned (which may be confirmed in a subsequent letter);
- Advice and assistance on how their conduct can be improved;
- The offer of training or other form of support;
- A formal censure (e.g. in the form of a letter setting out the conclusions, expressing concern and specifying that there must be improvement / no repetition etc.);
- A vote to remove the Member from the Board.

Where, it is concluded that a serious breach has occurred, the Board may require the member to stand down from their position in accordance with the Rules.

If the Board proposes to remove a member, following investigation, the member will have the right to address the full Board before their decision is taken at a special meeting called for that purpose. Any such decision must be approved by a majority of the remaining members of the Board, in accordance with Rule (44.5).³

A record of the outcome of an investigation will be retained in the Board member's file for a period of 12 months.

The outcome of any investigation will be notified to the Scottish Housing Regulator, in accordance with the requirements of the Notifiable Events Statutory Guidance.

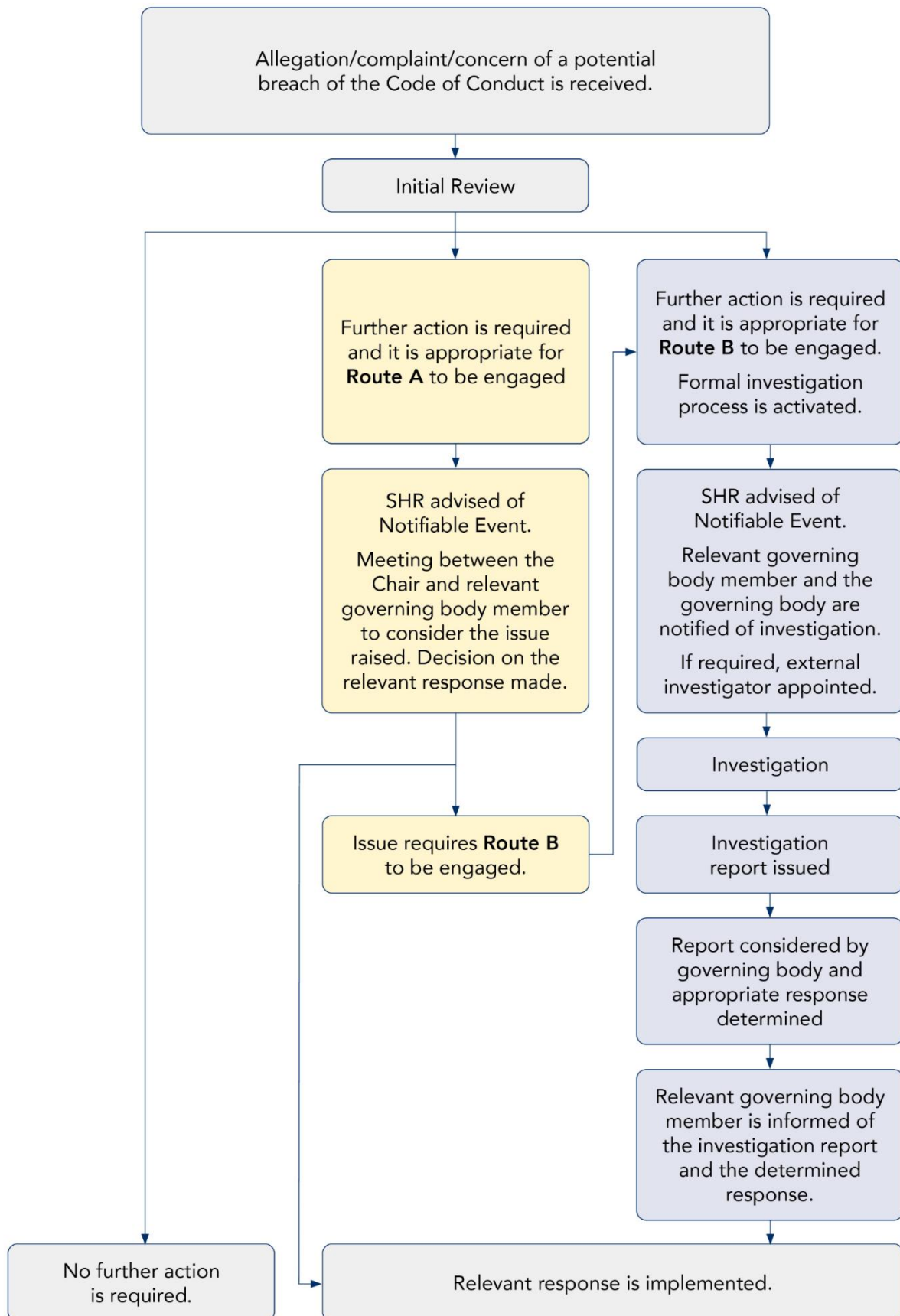
5.3 Definitions

Ark will regard the following actions as a "serious breach" of the Code of Conduct (this list is not exhaustive):

- Failure to act in our best interests and/or acting in a way that undermines or conflicts with the purposes for which we operate;
- Support for, or participation in, any initiative, activity or campaign which directly or indirectly undermines or prejudices our interests or those of our service users, or our contractual obligations;
- Accepting a bribe or inducement from a third party designed to influence the decisions we make;
- Consistent or serious failure to observe the terms of the Code of Conduct;
- Serious inappropriate behaviour towards a colleague, member of staff, tenant, customer, partner or stakeholder.

³ SFHA Model Rules (2020)

Appendix 1 – Flowchart summarising Protocol process



Appendix 2 - Guidance on Implementing Model Protocol

Who Implements the Protocol? (Section 2 of the Protocol)

Concerns about a governing body member's conduct should be communicated to the Chair who is then responsible for deciding how to proceed and leading the agreed process. On becoming aware of a concern, the Chair should, in consultation with other office bearers decide on the appropriate way forward.

If the Chair is the subject of the complaint or allegation, the Vice-Chair should lead the process, unless they are also involved. In that event, the other office bearers should take the lead; and if that isn't possible, two other members of the governing body should do so (e.g. members of the Audit Committee). This guidance refers to the Chair throughout but, when implementing the Model Protocol, should be understood to refer to the governing body member who is leading the process.

No one who is directly involved in a matter that gives rise to a concern that there may have been a breach of the Code of Conduct should be involved in reviewing or managing/conducting an investigation of the matter. Consequently, it may be necessary to ask other members of the governing body to take on the responsibilities that the Protocol allocates to the Chair and other office bearers. Delegated authorities should be sufficiently flexible/comprehensive to support this.

The senior officer will normally provide support to the Chair in implementing the protocol, although this role may be undertaken by another senior member of staff or by an officer with specific governance responsibility.

The Scheme of Delegation should make provision for the implementation of the Protocol so that there is an agreed list of authorised people to implement the process.

Describing or Defining the Complaint (section 3 of Protocol)

It is important that there is clarity about what the concern is or the nature of the complaint. Although the complaint or concern may not, initially, be in writing, the issue should always be recorded to ensure there is clarity and agreement about the issue. This may be achieved e.g. by the Chair producing a note of what has been reported to them or by the senior officer preparing the note.

Some examples might be:

- During a conversation, a concern is raised with the Chair by a governing body member about the conduct of another governing body member at an external event. The Chair subsequently produces a short note describing the conversation/concern which forms the basis of discussion with the office bearers about how to proceed;

- The CEO has concerns about the conduct of a governing body member towards staff which they communicate to the Chair in an e-mail; this becomes the basis for discussion between the Chair and the office-bearers about how to proceed;
- A written complaint is received about the conduct of a governing body member

When to Use the Protocol (section 4 of the Protocol)

If a concern is raised, the first step is to establish whether there is sufficient information to proceed and, if there is, to determine which route is most appropriate. The Model Protocol provides for an initial review (see Section 4) and it is important to stress that this is not a 'mini-investigation'. This should simply be a swift overview of the concern/complaint to establish which is the most appropriate course of action. This could be undertaken by the officer supporting the Chair and is likely to be especially relevant in the event that an anonymous complaint or allegation is made. The purpose of such a review is to

(a) clarify the complaint/concern/allegation;

(b) determine whether there is sufficient information to take the matter forward;

(c) if there is, agree which of the two 'routes' described in the Protocol is the most appropriate. This element of the review should always involve the Chair.

If this review concludes that there is nothing to support the matter being pursued (e.g. because the concerns are vague and/or because the anonymity of the allegation(s) make further investigation impossible or because the complaint is obviously malicious), no further action should be taken.

If there is agreement that sufficient information is (or is likely to be) available, a decision should be taken by the Chair as to the appropriate process to respond to the concern.

Routes of Investigation

It is the responsibility of the Chair to determine the most appropriate course of action. The Model Protocol is clear that not every concern justifies formal action. It describes two 'routes' – A and B.

Route A is essentially an informal response to a relatively minor issue e.g. minor discourtesy; inadvertent omission which does not have serious implications; lack of awareness of the impact of a comment; insensitivity towards another person; lack of knowledge in a significant area of the governing body's business. Such matters can appropriately be addressed in a conversation between the Chair and the governing body member concerned and may result in an apology being made and/or training provided. This is described at Section 4.1 of the Protocol.

For all other concerns, a more formal approach should be adopted as described in Route B of the Model Protocol and an investigation carried out. This is described at Section 4.2 of the Protocol.

Appendix 1 provides a flow chart summarising the process under Route A and Route B.

Who Should Be Informed that the Protocol is Being Implemented?

If either Route A or Route B of the Protocol is implemented, the governing body member whose conduct is being questioned should be informed about the nature of the concern/allegation and the process by which it is to be dealt with. The governing body member should be informed if leave of absence is to be taken and of the likely timescale for the conduct of the process. If there is any change to this timescale, they should be informed. A template letter for this purpose is included at Appendix 3.

The person making the complaint should be informed that the matter is being investigated and should also be informed of the outcome.

If Route B of the Protocol is being implemented, the governing body member should be informed that a complaint has been received, that the Protocol is being implemented and that the governing body member involved should take a leave of absence. Rule 37.8 of the SFHA Model Rules 2020 provides that the governing body can require a governing body member who is the subject of an investigation to take leave of absence until the investigation is complete and the matter has been concluded. If the Chair believes that this is NOT necessary, the governing body should be advised of the reason(s).

A Notifiable Event (NE) should be submitted to the SHR providing details of the allegation/complaint and the process by which it is to be investigated.

Investigation Under Route B (section 5 of Protocol)

Under Route B, the investigation may be either internal or independent, but complaints involving the Chair or any other office-bearer should always be investigated independently.

For either, a brief should be prepared, and a template for this purpose is included at Appendix 4.

- Internal Investigation

Internal investigations will only be appropriate in very limited circumstances. Exceptionally, if an RSL is considering carrying out an internal investigation, it must satisfy itself that all of the following apply:

- The investigation cannot give rise to any conflict of interest (present or future) given the working relationship that exists between governing body members;
- There is no potential for future working relationships to be compromised by an internal investigation being undertaken;

- The concern or complaint relates to a straightforward matter;
- The investigation is unlikely to be extensive;
- All of the required specialist skills are available in-house.

If undertaking an internal investigation, an investigating officer(s) should be appointed. This must be someone who has no knowledge of the matter to be investigated and who does not normally work closely with the governing body member(s) concerned. Please note that the investigating officer should not be a staff member because they would in effect be investigating their employer, which would represent a conflict of interests. For these reasons, in most cases an independent investigation is more appropriate under Route B.

- **Independent Investigation**

An independent investigator should be appointed. The brief should be issued and responses invited. Your solicitors, internal auditors, other external advisers and other RSLs may be able to suggest suitable people to approach.

An alternative might be to consider whether it would be appropriate to ask someone from another RSL to undertake the investigation. The same considerations listed above in respect of an internal investigation would, of course, apply. There are likely to be additional considerations around reputational impact when considering this possibility.

The Brief should be issued to those selected as being suitable and responses invited. It is not always necessary to seek proposals from more than one source. Often, it will be appropriate to check availability with potential investigators and to issue the brief to those who have indicated their ability to respond within the proposed timescale.

Keeping Everyone Informed

It is important to remember that the conduct of an investigation is likely to be unsettling and potentially stressful for those involved. Care should be taken to ensure that those who are the subject of an investigation are kept informed about its progress. Responsibility for doing this should be identified at the outset of the process. Any delay or change to the process should be communicated swiftly to everyone affected.

Considering the Investigation Report (section 5.1 of Protocol)

The draft report should be considered by the governing body members responsible for overseeing the investigation. Once they are satisfied that the report meets the terms of the

Brief and contains all of the information necessary for the issue to be considered, a governing body meeting should be called. Care should be taken to identify and manage any potential conflicts of interest on the part of other members of the governing body.

The Chair should decide whether or not the report should be issued in advance to the governing body and whether the governing body member concerned should be given access to the report. Individual circumstances will determine the most appropriate approach.

The Investigator will normally be invited to present the report at the meeting and to answer questions but should then leave to enable the governing body to consider the findings, their decision and the proposed response.

Determining Appropriate Response (section 5.2 of the Protocol)

Although the investigation is intended to establish whether there is sufficient evidence to conclude whether or not a breach of the Code of Conduct has occurred, it is the governing body's responsibility to determine if a breach has actually been committed. It is also the governing body's responsibility to determine how serious a confirmed breach is and what is an appropriate response.

In reaching a decision about the seriousness of a breach, the governing body should take account of its consequences (actual and potential; internal and external). The governing body must exercise good governance and must act in the best interests of the organisation. The response must always be proportionate: not unduly severe but, equally, not capable of being interpreted as overlooking or brushing aside unacceptable conduct. Whilst it is right that mitigating factors should be considered, care should be taken to ensure that decision-making is not unduly influenced by loyalty.

The response will depend on the specifics of the issue but the options can include:

- Request to make an apology: in this case, the governing body should be provided with confirmation that an apology, in appropriate terms, has been given / made
- Requirement to undertake training: the governing body should be informed of the completion of the required training
- Formal censure: the letter stating the outcome of the investigation should include the censure (e.g. "The board is very disappointed that XXX and expects you to ensure that this does not occur again. In the event of any further breaches occurring during the remainder of your term on the board/committee, we may ask you to resign")
- Request to resign from an office-bearing or representative role
- Request to resign from the governing body
- Removal from the governing body

The decision of the governing body should be communicated to the governing body member as soon after the meeting as possible. It may be appropriate for the Chair to contact the

governing body member to provide an initial indication before the formal written decision is issued.

It is possible for an interim meeting to be held, which the governing body member who has breached the Code is invited to attend to respond to the conclusion, before the governing body determines its final response.

If the governing body intends to seek to remove one of its members because of a breach of the Code of Conduct, a special meeting must be called for that specific and sole purpose (Rule 44.5). The process for calling a special meeting is set out at Rule 55.

Appendix 3 - Template Letter to Inform Governing Body Member of an Investigation

This template should be customised to reflect the particular circumstances. Ideally, the governing body member should first be made aware of the issue by the Chair (e.g. by telephone) and the letter is to confirm and formalise the process. It would be appropriate to make reference to the terms of any such phone call e.g. be referring to agreement to take leave of absence and not to discuss the matter.

Dear

Allegation of a Breach of the Code of Conduct

I write to inform you of the Board's intention to commission an independent investigation into an alleged breach of the Code of Conduct.

The Board has been made aware that it has been alleged that you [*insert details*].

This allegation must be independently investigated. The Board is aiming to conclude the matter by [*insert target completion date*]. Until the outcome of the investigation is confirmed, it is expected that you will take leave of absence from the Board and you should not discuss the matter with anyone other than the Investigator.

Your e-mail address [or other contact details] will be provided to the Investigator so that they can contact you. I will confirm the appointment of the Investigator as soon as possible. I know that you will co-operate fully with the investigation.

The Board is being informed today of the allegation and your leave of absence, as is the SHR.

Yours sincerely

Chair

Appendix 4 - Brief for the Conduct of an [Independent] Investigation

Background: [insert details of the concern / allegation or complaint – the written description referred to in the MP]

The Board member has been informed of the allegation and has taken leave of absence. The SHR has been notified.

Purpose and Scope of the Investigation: To investigate an allegation that [*specific allegation e.g. breach of confidentiality; unacceptable behaviour*] and to report to the Board on the findings and conclusions. The investigation should establish the facts of the allegation, determine whether or not the allegation is substantiated and determine whether or not a breach of the Code of Conduct may have occurred. The investigation should report on whatever facts and circumstances are relevant to the allegation and should identify the conclusions reached.

Conduct of the Investigation: The investigation should be conducted by means of [*e.g. a desk-top review of relevant documents and interviews with relevant people (who should be defined)*]. All interviews will be conducted by [*e.g. in-person meetings, phone or video-conferencing*] and the report will be presented to the Board of Management [*e.g., date of the meeting or virtually*]. Liaison with Ark and its representatives will be via [*insert details e.g., telephone, other virtual means, and meetings*].

Two members of Ark's Board (including the Chair) will oversee the conduct of the Investigation; they will be supported by [insert relevant Officer], who will be the primary point of contact for the Investigator.

The Investigator will have full access to all relevant documents and Ark will assist with administrative arrangements relating to the conduct of the investigation.

Timescale: [Specify, including dates by which any drafts are required and taking account of Model Protocol's 'normal' expectation that investigations should be concluded within six weeks]

For Independent Investigations Only

A suitably experienced person is required to undertake an investigation in accordance with this Brief. Proposals should be submitted which outline your experience of similar assignments, your availability and capacity to meet the required timescale and your anticipated fee. Details of potential referees should also be provided (Ark will inform you before approaching any referee)

Please submit your proposal to [insert details] by [specify]