



COMPLAINTS PROTOCOL AND BIAS GUIDELINES FOR TRAFFIC COMMISSIONERS

Foreword by the Senior Traffic Commissioner

All traffic commissioners seek to maintain the highest standards of personal and professional conduct. Any complaint that a traffic commissioner has in some way fallen short of these standards is taken seriously.

The protocol described below is designed to ensure that the complaints process is readily understood. It also indicates how everything will be done to ensure that any complaint is dealt with fairly and as quickly as possible.

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1 Introduction

- 1.1 This document sets out the procedures for dealing with complaints¹ about the personal conduct of traffic commissioners and deputy traffic commissioners [hereafter referred to as commissioners] in relation to their judicial² and their administrative functions. Complaints to the senior traffic commissioner will normally be submitted for investigation in the first place by the commissioner in the relevant office. The Senior Traffic Commissioner (STC) may vary this either where the complainant has failed to get a satisfactory response from a commissioner or where both the complainant and the STC considers it justifies immediate escalation to the STC. For avoidance of doubt this document refers to all complaints including those where the commissioner has already sought to address the complaint directly or via support staff. This protocol also includes processes for internal complaints, for example from a civil servant about a commissioner.
- 1.2 This document also sets out the scope of the protocol, the principles which govern its operation and the roles and responsibilities of those involved in handling complaints.
- 1.3 The procedures follow the principles laid down in:
 - i) the Lord Chancellor's publication Judicial Complaints Protocol – Procedures for dealing with complaints about Judges in England and Wales (July 2003) and the Judicial Complaints (Tribunals) Rules 2006. It is subject to amendment shortly to reflect the Judicial Complaints (Tribunals) (No. 2) Rules 2008.
 - ii) the DfT complaints procedure

2. Key features

- 2.1 The procedure exists to address complaints that arise when, it is considered that commissioners may have behaved inappropriately or may have failed in their responsibility to avoid bias or prejudice. The guidance that commissioners are to refer to in relation to questions of bias is attached at Annex A.
- 2.2 The protocol recognises the judicial independence of the commissioners. Complaints relating to judicial decisions made by commissioners or to the reasoning processes underlying a decision or the case management prior to such a decision, including the decision to call to Public Inquiry³ may form grounds of appeal to the Upper Tribunal Administrative Appeals Chamber or exceptionally the Administrative Court of the High Court.⁴ Complainants should consider in the first instance whether a complaint about a commissioner's judicial decision should be submitted to the appropriate appeals body.
- 2.3 These procedures apply to complaints received directly by the commissioners, or by the staff provided to support them and includes those sent to the Secretary of State

¹ See Annex B para 1 for definition.

² For general background on the duties and responsibilities of a Tribunal Chair see http://www.judiciary.gov.uk/about_judiciary/roles_types_jurisdiction/tribunals/index.htm.

³ See paragraph 101 of *Al-Le Logistics ad Ors v The Traffic commissioner for the South Eastern and Metropolitan Traffic Area* 2010] EWHC 134 (Admin) for confirmation that pre Inquiry determinations are judicial not administrative.

⁴ See paragraph 107 of *Al-Le Logistics ad Ors v The Traffic commissioner for the South Eastern and Metropolitan Traffic Area* 2010] EWHC 134 (Admin).

and/or the Department for Transport and/or Departmental agencies, their civil servants and other staff. All such complaints shall in the first instance be brought to the attention of the Senior Traffic Commissioner, immediately upon receipt, for logging, delegation or investigation, and tracking.

Requirements for a valid complaint

- 3.1 **The complaint must be made in writing.** If the complaint is made orally, the complainant will be told that the complaint can only be investigated if it is put in writing. However, this must not preclude complaints from persons unable to read, write, or speak English. The Senior Traffic Commissioner can arrange for translation of complaints received in languages other than English and other arrangements can be made for a complaint to be transcribed.
- 3.2 **Complaints must provide as much detail as is possible about the complaint.** General complaints will not be investigated. An example might be a complaint that all commissioners are not impartial.
- 3.3 **Complaints about commissioner decisions or procedures must relate to the personal conduct of a commissioner.** Complaints referring to the way in which judicial functions have been exercised or whether the proper steps were taken in the reasoning process underlying the commissioner's decision are not intended to be addressed in this protocol. Common complaints are that a commissioner made the wrong decision, refused to admit evidence or said that a witness's evidence was unreliable. Persons who are dissatisfied with a commissioner's decision or any related procedures should take legal advice and may appeal to a higher court if so advised. Complaints will not be addressed under this protocol whilst the matter remains subject to decision in a higher court (see 3.6)

It is difficult to describe every ground which might lead a person to lodge a complaint about a commissioner's personal conduct. Most complaints will concern personal behaviour at a Public Inquiry and examples of personal conduct complaints include;

- Allegations of inappropriate remarks made during the course of the hearing;
- Allegations of rude or offensive conduct towards an attendee; and
- Unacceptable delay in giving judgment or written reasons.

- 3.4 **Complaints must be lodged as soon as possible.** It becomes more difficult to investigate a complaint after a long passage of time and the Senior Traffic Commissioner has an absolute discretion to reject any complaint which is, in his opinion, so out of time as to prevent an effective investigation. It is unreasonable to expect a commissioner to recall events after a long passage of time⁵, particularly where a transcript of a hearing or paper file may no longer be available.
- 3.5 All complaints will be acknowledged within 14 days of receipt and once the full investigation is complete the complainant will be notified of the decision within 14 days.

⁵ See Annex B paragraphs 2, 3 and 6 for more detailed information on time limits.

- 3.5 **Frivolous or Vexatious complaints.** The Senior Traffic Commissioner may reject a complaint on the grounds that it is vexatious, malicious and/or that it is frivolous⁶.

Other considerations

- 3.6 **Complaints where proceedings are pending.** Some complaints, concerning personal conduct, may give rise to possible grounds of appeal to a higher court. Others are made while a case is continuing. In light of the overriding principle of fairness referred to above it may not be appropriate to intervene. The Senior Traffic Commissioner wishes to discourage what might be seen as 'tactical' complaints which might undermine that principle. Accordingly, this type of complaint will not normally be considered during the course of proceedings and the complainant will be asked to contact the Senior Traffic Commissioner once the case has been concluded.
- 3.7 **Complainants are required to give their consent to the complaint being forwarded to the commissioner complained of and/or any other parties where appropriate.** When a complainant states that the subject matter is confidential the initial response will explain that the complaint can only be taken forward if it is disclosed to the person who is the subject of the complaint. If the complainant does not reply within 28 days then the complaint will be treated as withdrawn.
- 3.8 **Special circumstances** may apply where the complaint raises serious concerns about a commissioner's conduct but a complainant is unwilling to be named or does not respond within 28 days as it may be contrary to the public interest to ignore any serious cause for concern. An investigation may be carried out on the basis of any other available information, even if the complaint has been withdrawn, subject to the requirements of natural justice.
- 3.9 **Withdrawal of a Complaint**⁷. Where a complaint is withdrawn the commissioner who is the subject of the complaint shall be notified in writing within 3 working days of the withdrawal.

4. Role and responsibilities of the Senior Traffic Commissioner.

- 4.1 The Senior Traffic Commissioner has the overall responsibility, subject to 4.3 below, for the investigation and adjudication of complaints concerning commissioners, including the unlikely event of complaints by one commissioner against another. The STC is under a statutory duty at all times to take into account the health, safety and welfare of the relevant commissioner(s).
- 4.2 Upon receipt of a complaint, the Senior Traffic Commissioner will decide whether the complaint should be referred to the Senior President of Tribunals ("the Senior President")⁸ and/or the Secretary of State for Transport having regard to the seriousness of the complaint.
- 4.3 The Senior Traffic Commissioner must, within 14 days of receipt of the complaint,

⁶ A frivolous complainant is a person who has complained "habitually and persistently and without any reasonable ground". The Senior Traffic commissioner is generally reluctant to find a complainant to be frivolous, based on a desire not to discourage people from using the protocol to resolve legitimate concerns.

⁷ See Annex B Para 4 for more detail of the process.

⁸ The Administrative Justice & Tribunals Council has statutory oversight for Traffic commissioners – Schedule 7 of the Tribunals, Courts and Enforcement Act 2007 and the Administrative Justice and Tribunals Council (Listed Tribunals) Order 2007 (S.I. 2007/2951).

refer to the appropriate higher authority the following complaints: -

- An allegation of racial, sexual or homophobic discrimination;
- Where there is a history of similar or related complaints; and
- Any other significant complaint for example allegations of fraud, misfeasance in public office or other criminal offences; and
- Complaints about the Senior Traffic Commissioner whilst fulfilling her commissioner role (see paragraph 5 below).

4.4 The investigating person, whether it is the Senior Traffic Commissioner, a commissioner, or the Department for Transport (on behalf of the Secretary of State) shall investigate and record complaints in accordance with these procedures. Where an allegation of fraud, misfeasance in public office or other criminal office is made the Department for Transport (on behalf of the Secretary of State) will notify the investigating person within 28 days of any proposed action.

5. Complaints about the Senior Traffic Commissioner

- 5.1 Complaints received about the Senior Traffic Commissioner acting in her role as a traffic commissioner shall be addressed to the Department for Transport who may appoint such persons as they see fit including another traffic commissioner currently in post to investigate and record such complaints in accordance with these procedures.
- 5.2 Complaints received about the Senior Traffic Commissioner in that function shall be referred by the Senior Traffic Commissioner to the Department for Transport who shall nominate an appropriate person to investigate and record such complaints in accordance with these procedures.

6. Making a complaint

- 6.1 All complaints arising in England, Wales and Scotland should be addressed to the Senior Traffic Commissioner at the Office of the Senior Traffic Commissioner, Suite 6, Stonecross Place, Stonecross Lane North, Golborne, Warrington, WA3 2SH. The email address to which complaints should be sent is sstc@otc.gsi.gov.uk

7. Investigating a complaint

- 7.1 The principles of fairness, transparency and consistency require a clear process for investigating complaints. The process to be followed will not be materially amended save in exceptional circumstances.⁹

8. Review of a complaint

- 8.1 The complainant and the commissioner may request a review of the Report by the investigating person.¹⁰

⁹ The investigation process is set out in Annex B paras 6 to 8 inclusive.

¹⁰ The review process is set out in Annex B paras 9 and 10.

9. Role of the Senior Traffic Commissioner

9. 9. The Senior Traffic Commissioner shall make such arrangements as are necessary to ensure that complaints can be dealt with in the absence of the Senior Traffic Commissioner; including the appointment of another commissioner to act on behalf of the Senior Traffic Commissioner in this regard where appropriate. A traffic commissioner who is the subject of a complaint clearly cannot deputise for the Senior Traffic Commissioner in that respect.
10. Annex B shall apply to this protocol. Annex B is derived from the Rules referred to at paragraph 1.3 i) and ii) above.

ANNEX A - BIAS

Principles:

1. Everyone is entitled to a fair hearing by an impartial tribunal. This right, guaranteed by the ECHR, is fundamental. All commissioners are bound to apply the law as they understand it to the facts of individual cases as they find them. They must do so without fear or favour, affection or ill will, that is, without partiality or prejudice.
2. Any commissioner who allows any decision to be influenced, wittingly or unwittingly, by partiality or prejudice deprives the party of the important right referred to above and violates one of the most fundamental principles underlying the administration of justice.
3. Any direct pecuniary or proprietary interest in the subject matter of a proceeding, however small, operates as an automatic disqualification.
4. This also extends to a limited class of non-financial interests. If the matter in issue raises the promotion of a cause then the rationale disqualifying a commissioner applies just as much as if the commissioner's decision will lead to the promotion of a cause in which the commissioner is involved with one of the parties.
5. In cases other than automatic disqualification, the law is settled by the decision of the House of Lords in *Lawal v. Northern Spirit* [2004] 1 All E.R. 187. The test is:

Would a fair minded and informed observer, who is neither complacent nor unduly sensitive, conclude that there was a real possibility that the tribunal was biased when it made the decision under challenge?

This is the overriding question and must be the question to be answered by any commissioner concerned about bias. [commissioners are assisted by recent appellate court decisions in this regard].

6. It is impossible, as stated, to attempt to list or define the factors which may, or may not, give rise to a real possibility of bias¹¹. Everything will depend on the facts and issues in each case. The religion, ethnic or national origin, gender, age, class, means or sexual orientation of a commissioner should not form the basis of a sound objection. Nor, at any rate ordinarily, should an objection based on matters of social or educational or service or employment background or history, or that of the commissioner's family; or previous political associations; or membership of social or sporting or charitable bodies; or Masonic associations; or previous decisions; or extra-curricular utterances; or membership of the same professional body, circuit, local law society or chambers. That a commissioner has previously adjudicated in a case involving a person does not give rise to charge of automatic bias. In a regulatory jurisdiction such as this it is quite likely that a commissioner will have to deal with an operator or applicant on more than one occasion. In giving his or her decision the commissioner will be bound to give reasons on all occasions.

¹¹ See paras 94, 103 and 104 of *Al-Le Logistics ad Ors v The Traffic commissioner for the South Eastern and Metropolitan Traffic Area* 2010] EWHC 134 (Admin) for helpful guidance in relation to Traffic commissioners.

7. By contrast, a real danger of bias might be thought to arise from personal friendship or animosity between the commissioner and any other person involved in the case; or if the commissioner were closely acquainted with such person if the credibility of that person could be significant in the decision; or when, in similar circumstances, the commissioner has in a previous case rejected the evidence of that person in such outspoken terms as to throw doubt on his ability to approach such evidence with an open mind on a later occasion; or if on any question at issue the commissioner had expressed views in such extreme and unbalanced terms as to throw doubt on his ability to try the issue with an objective mind; or if, for any reason, there were real grounds for doubting the ability of the commissioner to ignore extraneous considerations, prejudices and predilections and bring an objective judgment to bear on the issues.

8. If there is any real ground for doubt, it is incumbent upon a commissioner to recuse him or herself.

9. Considerations of waiver should not be considered a problem when a party is represented if appropriate disclosure has been made and the party makes no objection to the commissioner hearing or continuing to hear a case. If a party is unrepresented, then waiver would only be considered in exceptional circumstances.

Practical considerations:

1. Upon appointment, a new commissioner will be asked to identify any areas of a possible conflict of interests in his/her work which may give rise to a real possibility of bias when sitting as a commissioner.
2. Any commissioner who is concerned, at any time, about a real possibility of bias arising from his/her work shall notify the Senior Traffic Commissioner as soon as is possible.
3. Any commissioner who upon receipt of papers for a case identifies a possibility of bias can decide to recuse him/herself but if in doubt should raise the matter with the Senior Traffic Commissioner as soon as is possible. The final decision on whether to continue with the case shall remain at all times with the commissioner.

ANNEX B: DEFINITIONS and RULES OF PROCESS

1. **Definitions:** "complaint" means a complaint containing an allegation of misconduct by a judicial office holder;

2. Time limits within which a complaint must be made

- (1) A complaint must be made within twelve months of the event or matter complained of.
- (2) But a complaint relating to a continuing state of affairs may be made at any time while that state of affairs continues or within twelve months from when it ends.
- (3) Subject to rule 5, the Senior Traffic Commissioner or Senior President of Tribunals must dismiss a complaint without further investigation if the complaint is made outside the time limits set out at paragraphs (1) and (2).

3. Failure to comply with time limits

- (1) This rule applies where any person who has been invited to make representations to a person exercising functions under these rules has not complied with the relevant time limit for doing so.
- (2) The person exercising the functions may—
 - (a) continue to deal with the case,
 - (b) treat representations made outside the relevant time limit as if they had not been made,
 - (c) complete any report,
 - (d) recommend the dismissal of the complaint or the ending of an investigation or a review, or

4. Withdrawal of complaint

- (1) The complainant may withdraw a complaint at any time.
- (2) A complaint must be treated as withdrawn if the complainant indicates that he does not want the complaint or any further information which he has provided to be disclosed to the subject of the investigation.
- (3) If a complaint is withdrawn or treated as withdrawn at any time, but the Senior Traffic Commissioner or Senior President of Tribunals considers that the matters which it raised are sufficiently serious for further consideration to be necessary, he may direct that the complaint shall be considered further under these rules.

5. Functions of investigating person

The investigating person must advise the Senior Traffic Commissioner or Senior President of Tribunals

- (a) as to the facts of a complaint;
- (b) whether the complaint is substantiated or not;
- (c) whether disciplinary action should be taken; and if so what disciplinary action should be taken; and
- (d) as to any other matters in his terms of reference.

6. Procedure of investigation by investigating person.

- (1) The investigating person may decide how to conduct the investigation, but must—
 - (a) notify the subject of the investigation and any complainant of the proposals for the conduct of the investigation. The investigating person will be reluctant to take oral evidence, save in the more complex complaints;
 - (b) invite the subject of the investigation and any complainant to make representations on the proposals; and
 - (c) record any representations on the proposals which those persons may make.
- (2) Representations must be provided to the investigating person within ten business days of the invitation under paragraph (1)(b).

7. Evidence and representations

- (1) The investigating person must invite the subject of the investigation to give evidence and make representations about the case.
- (2) The investigating person may invite the complainant or any person who he considers can assist the investigation to give evidence about the case.
- (3) Evidence and representations must be provided to the investigating person within ten business days of the invitation under paragraphs (1) and (2).
- (4) The investigating person may take oral evidence if he/she considers it necessary to do so.
- (5) The investigating person must arrange for any evidence given orally to be recorded in a transcript or a tape recording.
- (6) The investigating person must disclose any evidence obtained under paragraph (2) to the subject of the investigation and must invite him/her to make representations on the evidence.
- (7) The subject of the investigation must make any representations under paragraph (6) within ten business days of the invitation under paragraph (6).
- (8) Where the investigating person considers that it is necessary to disclose evidence obtained during the course of an investigation to any person other than the subject of the investigation, he/she must first invite—
 - (a) the person who provided the evidence, and
 - (b) the subject of the investigation to make representations about the proposed disclosure.
- (9) The person who provided the evidence and the subject of the investigation must make representations under paragraph (8) within ten business days of the invitation.

8. Report of investigating person

- (1) Subject to the terms of reference, the investigating person may decide the form and content of his/her report.
- (2) The investigating person must disclose a draft of his/her report to the subject of the investigation and invite him/her to make representations about it.
- (3) The investigating person must disclose a draft of his/her report to any complainant and invite him/her to make representations about it.
- (4) The investigating person may show a draft of his/her report to any other person, and invite him/her to make representations about it.
- (5) Disclosure of the draft report under paragraphs (3) or (4)—
 - (a) may be of the whole or part,
 - (b) may be in the form of a summary, and
 - (c) must omit any information the disclosure of which is prohibited by any relevant legislation.

- (6) Representations must be provided to the investigating person within ten business days of disclosure of the draft report under paragraphs (3) or (4).
- (7) After considering any representations made in accordance with paragraphs (2) to (4) and (6) the investigating person must—
- (a) send a copy of the report to the subject of the investigation; and
 - (b) send a copy of the report or the relevant part of the report to any other person who has been invited to make representations about the draft report, but omitting any material the disclosure of which is prohibited under relevant legislation.

9. Composition of a review body

- (1) A review body must consist of—
- (a) a judicial office holder of a higher judicial rank than the subject of the investigation;
 - (b) a judicial office holder of the same judicial rank as the subject of the investigation; and
 - (c) two other members, neither of whom has been—
 - (i) a judicial office holder, or
 - (ii) a practising lawyer; or
 - (iii) A civil servant with the Department for Transport or any of the Department's executive agencies.
- (2) A judicial office holder for the purposes of paragraph (1)(a) or (b) may be a former judicial office holder and reference to his judicial rank means the rank he held immediately before he ceased to hold judicial office.
- (3) A person is ineligible for membership of the review body if he has had any previous involvement with the case concerned, other than as a member of a review body.
- (4) The judicial office holder nominated under paragraph (1)(a) shall chair the review body and shall have a casting vote if necessary.

10. Functions of a review body

- (1) A review body may review—
- (a) any finding of fact;
 - (b) any decision or recommendation as to the conduct of a commissioner;
 - (c) any action which has been proposed or taken; and
 - (d) the procedures which have been used to deal with the case, but only so far as necessary to enable the review body to deal with the matters in sub-paragraphs (a) to (c) above.