

**SPORT ENGLAND**

**REVIEW OF THREE CASES OF COMPLAINTS RELATING TO**

**SWIM ENGLAND**

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**REVIEW, REPORT and RECOMMENDATIONS**

*March 2023*

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**THE INDEPENDENT EXPERTS**

## ***Introduction***

1. I was appointed under Terms of Reference agreed with Sport England dated November 2022 (**TOR**) to carry out a review of Swim England's (**SE**) actions in respect of complaints that were made to Sport England by those involved in three cases addressed by the SE's safeguarding and/or judicial procedures and to produce a report with any feedback I judged to be appropriate. Those TOR are at Appendix 1. In this report I refer to the three cases as Cases 1, 2 and 3 and collectively "the Cases".
2. My review has been a paper review with the exception that I have met by video conference the complainants, or representatives of them, in relation to the Cases. I have been provided with a very substantial body of papers and communications relating to the three cases by Sport England and the SE and also by a group of parents concerned with the events in relation to Case 1 (**C1 Parents**). Those papers came in electronic format, and they are listed in Appendix 2.
3. It follows from both the manner of my review and from the TOR that I am not asked and am not able to re-hear, or to review any of the disciplinary or other decisions that were made in the Cases and I do not.
4. Further, and for the same reasons, I make no personal criticism of any person in any way, I have not given anyone the opportunity to respond to this review or report and it would be grossly unfair to draw criticism of any individual who did not have such opportunity.
5. Specifically, I record and underline that the TOR did not extend to any exploration of any of the matters raised in the Cases with persons working within SE or for them, for example the ICPO or CEO, nor did it involve any review of other safeguarding cases or disciplinary cases brought before SE's judicial bodies. The purpose of reviewing the Cases is to draw from them not any different conclusion to that which was reached but to illustrate matters of concern in SE's existing safeguarding and/or judicial procedures.
6. Against that I provide therefore this Review to Sport England for Sport England's consideration.

7. I set out my report under these headings:
- a. Summary
  - b. Swim England, Swim England's Regulations and Procedures
  - c. The Cases
    - i. Case 1 Summary and Issues
    - ii. Case 2 Summary and Issues
    - iii. Case 3 Summary and Issues
  - d. Swim England Regulations and Procedures Discussion and Analysis
  - e. Recommendations and Implementation.

### ***Summary***

8. My review of the papers in the Cases that I have considered, my meetings with at least some of those involved in the Cases, and my consideration of the Regulations and Processes of Swim England has led me to conclude that the current state of the Regulations, Safeguarding Investigations and Disciplinary Processes and Procedures within Swim England are unsatisfactory and fail the sport.
9. I consider that they:
- a. Adopt a confusing and inconsistent approach to safeguarding and concerns of child abuse in sport.
  - b. Do not provide clarity of process for reporting of any concerns.
  - c. Do not allow for or require investigations of safeguarding concerns that provide for contested hearings.
  - d. Create unfairness and prevent proper challenge to decisions being made in relation to safeguarding investigations, their outcomes and the sanctions that are imposed because of them.
  - e. Grant extraordinary and unjustified powers to the CEO and to the ICPO which are not capable of challenge and/or review.
  - f. Are perceived to grant to Swim England a power to act without challenge or review.
  - g. Have allowed for unduly complicated disciplinary processes, that generate delay and create unfairness in their application against respondents.
  - h. Lead to determinations before tribunals that are not adequately legally resourced

creating a lack of independence from Swim England.

10. I consider that whatever the correct outcome in the Cases, the persons concerned with them who have complained to Sport England have raised justified and evidenced complaints about the processes Swim England has made them subject to.
11. I have made therefore nine broad Recommendations that I consider Swim England should follow to put in place to provide a fair, independent, and efficient Safeguarding and Disciplinary process, which on the evidence of the Cases that I have reviewed it does not provide at present.
12. I have also set out a means by which those Recommendations, if accepted, could sensibly be implemented by SE with the support of Sport England. It is plainly a useful process to provide timeframes and monitoring of changes to give efficacy to those Recommendations that are accepted to be followed.

## ***Swim England, Swim England's Regulations and Procedures***

14. SE is the National Governing Body for swimming in England.
15. In respect of this review the SE's safeguarding and complaints policies and procedures are set out in these documents:
  - a. *The Swim England Handbook* (the **Handbook**) which contains the regulations governing the sport including the regulations (**the Regulations**) which govern its disciplinary procedures and constitution of its various disciplinary bodies, the codes of conduct and ethics and procedures.
  - b. The *Child Welfare Management Concern Procedure* (the **CWMCP**) (Handbook [19]), which is expressed to '*provide an avenue for people to raise concerns they have about alleged incidents where the management of concerns in clubs or in their activities falls short of providing a safe environment for children and/or where child welfare is not being promoted or managed appropriately*' [ibid].
  - c. *Wavepower* which is the SE's Child Safeguarding Policies and Procedures, and which creates the post of the Independent Child Protection Officer (**ICPO**) who has ultimate responsibility for the CWMCP.
  - d. *Protocols for Child Safeguarding Investigations 2021* (**the Protocols**). That document sets out how such investigations are to be conducted. I do not know if the Protocols are publicly available.
16. SE attempts to separate its disciplinary and regulatory functions into two: safeguarding and non-safeguarding (for example code of ethics/conduct violations). I summarise those different schemes as follows.

### ***Safeguarding***

17. In respect of safeguarding SE adopts this process (as set out in the CWMCP and Wavepower):
  - a. All safeguarding concerns are to be reacted to by reference to the Wavepower guidance in the form of a toolbox set out in §2.1 of Wavepower. That section is the guidance for club and regional Welfare Officers to follow in respect of any report from

any person in relation to 'abuse' of children.

- b. 'Abuse' is defined in Wavepower, and thus by SE, as '*any action by another person that causes significant harm to a child*' or '*When someone fails to prevent harm to a child*' (Wavepower [29]).
- c. Under the Wavepower guidance on *Reacting, recording and reporting concerns* [21] the guidance under the scheme *React, Record, Report* has the guidance that:

*'If the child is not considered to be at immediate risk of harm contact should be made with the Welfare Officer or Swim England Child Safeguarding Team with full details of the concern as soon as possible e.g. the next working day'* [23].

- d. The CWMCP uses the language of '*Child welfare*' which '*includes concerns about abuse, maltreatment, risk of safety, and impairment of children's health or development*' (Handbook [19]).
- e. The CWMCP sets out the approach to '*the management of concerns in clubs*'. It has two contradictory positions.
  - i. First, it commends the position that such concerns are addressed without delay following the Procedure and that the Procedure should be a '*last resort and for matters which that have been incapable of resolution*' [20].
  - ii. Second, it then sets out a Procedure which it is '*recommended*' be followed [21].

Further, it is not clear and obvious where the line between a '*management concern*' and a '*child welfare concern*' is to be drawn. The Procedure notes that a '*child welfare concern... will be something very important to [someone under 18]*'.

- f. The Procedure under the CWMCP adopts a triage approach to reports (Handbook [21]):
  - i. Step One: If a management concern is reported, then, per the CWMCP, if the management concern is short of a potentially criminal conduct and '*relatively minor*' it should be dealt with by '*an adult member of Swim England*' (Step one [21]) but on a 'need to know basis' and suggests the Club Welfare officer '*may need to know*'.
  - ii. Step Two: If not so resolved, the Club Welfare Officer should resolve the issue by it being referred to that person, albeit then the Chairperson is required to

take decisions as to whether the Chairperson can address the issue through the club's internal dispute processes. An example given is of '*minor code of conduct issue[s]. poor practice and bullying*' following the Wavepower Guidance (Step two [21]).

- iii. Step Three: The ICPO whilst always having a right to be involved in any concern, is the third step in the CWMCP, with matters referred to the ICPO either from Steps 1 or 2 or directly. The ICPO then decides whether to refer to a statutory agency or to commence an investigation under the Protocols or make a recommendation.
- g. Where the ICPO gives guidance the CWMCP states that if the ICPO's guidance is not followed:

*the ICPO may complete a report to the Head of Safeguarding and may recommend that a Judicial Complaint is filed against the club under the Judicial Regulations. The basis of a Judicial Complaint will be that the club has failed to comply with the required level expected of Swim England clubs in complying with Child Safeguarding Procedures [22].*

- h. Then these statements [22] that:

*In the case of clubs with Swim Mark/Stronger affiliation accreditation (or some other such similar accreditation in place from time to time) the ICPO's Report may be submitted to the Swim England Clubs Team or an individual with responsibility for that accreditation in Swim England. The ICPO may recommend, including but not limited to, (i) ongoing monitoring of the club; (ii) highlight support needs for that club; or (iii) in certain cases recommend suspension / removal of that accreditation if it is believed the club has not met its accreditation requirements...*

**Note**

***The ICPO's report and any determination contained therein is final. There is no avenue of appeal available under this Procedure...***

- i. The Procedures highlight Regulation 241 may be used for non-compliance with the

Procedure.

18. Within the Regulations, it is Regulation 241 that addresses Child Safeguarding issues. Of importance in relation to that Regulation is that:

- a. It gives the Chief Executive Officer (**CEO**) of SE:
  - i. the power to issue interim suspensions when the CEO has information that an *individual* has been charged with specified offences or has been investigated for them (Regulation 241.3) or a determinate suspension when convicted or convicted of such offence (Regulation 241.6) or from the Local Authority Designated Officer's (**LADO**) statement of belief as to suitability (Regulation 241.7)
  - ii. the power to issue an interim or determinate suspension when the ICPO has made such a recommendation in respect of an *individual* (Regulation 241.4), there is a right of appeal against such decision under Regulation 108.8. The term of such a suspension is to be *decided upon by the [CEO]* (Regulation 241.4).
- b. Affiliated clubs are required to comply with the DBS and requests from SE and its procedures (Regulation 241.8)
- c. 'A club, body or organisation or individual suspended by the [CEO] under this Regulation 241' shall not be involved in regulated activities (Regulation 241.11).
- d. Regulation 241.16 applies the balance of Regulation 241 to Adults at Risk, and a definition to be found on the website.

19. The appeal against a decision by the CEO under Regulation 241.4 under Regulation 108.8 is for an *individual*.

20. The Protocols are directed to investigations of all child safeguarding concerns. They are written on the premise that the concern will be raised in respect of an individual and not an organisation or body referring to the '*subject of the complaint*'. The general process outlined is one of an inquisitorial process:

- a. The complainant/referrer is expected to meet the ICPO (or investigator) (¶1) and be updated as to progress (¶4).
- b. The *subject of the complaint* will be interviewed with disclosure, if possible, of the



nature of the complaint and given the opportunity to respond to it (¶2)

- c. Once the investigation is complete (the investigation itself is not detailed other than *'The highest possible standards of investigation will be used'* (¶5) *the subject of the complaint* is normally allowed an opportunity to *'comment on matters of factual accuracy'* (¶8).
- d. A report is then finalised with a view to one of at least 9 potential outcomes, of which a suspension under Regulation 241, guidance being given and/or *a complaint under Swim England's Judicial Regulations* are three.

21. The Protocols do not on their face:

- a. Allow for any opportunity for the *subject of the complaint* to deploy any witness evidence, or to have a right of challenge to any complainant, nor does it allow the complainant to respond to any points raised in writing by the *subject of the complaint* or in any interview.
- b. Do not empower the ICPO to or recommend that the ICPO should suggest periods of suspension, and
- c. Give any opportunity for the *subject of the complaint* or any other person affected by a suspension or outcome any input on that suspension or outcome.

22. Within Wavepower there are statements of roles and Codes and Policies:

- a. Wavepower thus identifies the requirements of the role of Club Welfare Officer and of County Welfare Officer and Regional Welfare Officer, and the minimum standard of training and to be a club Welfare Officer,
- b. It includes four Codes for different categories of persons involved in the Swimming,
- c. It includes the *SE Anti Bullying Policy*, using a definition of bullying as *'the repetitive, intentional hurting of one person or group by another person or group, where the relationship involves an imbalance of power. Bullying can be physical, verbal or psychological. It can happen face-to-face or through cyberspace'*. The Policy suggests resolution at club level.

*Code of Conduct and Code of Ethics Complaints*

23. The Code of Ethics is set out in the Handbook [18] and requires compliance with the Codes of Conduct in Wavepower.

24. Under the Regulations there are general Regulations that:

- a. Require any club affiliated to the SE to adopt Wavepower (Regulation 241.13),
- b. Require any club to affiliate to a Region (Regulation 6).

25. The SE has a system of complaint management the procedures are as follows:

- a. A '*complaint*' is defined as an expression of dissatisfaction with '*the actions or behaviour of any person, including an individual or club, or other body, or organisation or with alleged unfair practice within the sport*' (Regulation 102.1) with grounds including '*maladministration*' (Regulation 102.3.4).
- b. No complaint can be brought against '*an employee of Swim England relating to any action taken in the course of their employment*', that is a matter for the CEO (Regulation 102.3).
- c. A complainant must be a member or affiliated club (Regulation 102.5).

26. Any complaint must be referred to the 'Judicial Commissioner' who is a creature of Regulation 58.5, whose role is to decide whether the complaint falls into one of a number of categories set out in Regulation 160:

- a. Complaints that have no merit or insufficient gravity which can be stopped by non-acceptance,
- b. Complaints which should be dealt with under the Protocols (Regulation 169.1.6).
- c. Complaints which raise allegations of serious misconduct which are referred to the SE's Disciplinary Officer to pursue (Regulations 160.2 and 162 et seq.). The test is one of bringing the sport into disrepute.
- d. Complaints which are simple misconduct which can be dealt with by the Commissioner or referred to a Disciplinary Committee, but which are prosecuted by the complainant (Regulations 160.2.2 and 162 et seq.).
- e. Complaints that are less serious and fall to be determined in the arbitral and mediation processes (Regulations 160.2.3 and 167 et seq. and 174).

27. Under those Regulations disciplinary cases (i.e. those where there is a complaint to proceed) are dealt with by a Disciplinary Committee or a Mediator or an Arbitrator and documents for those persons are provided by the Judicial Administrator which standards as

its secretariat (Regulation 162.2). The constitution of which bodies is provided for under Regulations 73 and 74.

28. The Regulations do not appear to require any person involved in the disciplinary process to have any legal qualification or experience; membership of SE is a requirement; however, the Commissioner can appoint a lawyer to chair a disciplinary committee (Regulation 78).
29. Rights of appeal are described in Regulation 108 and such appeals are to an appeal body which has the same requirements of qualification (the Appeal can co-opt members with any skills required under Regulation 74.1.6).
30. Both the members of the Independent Disciplinary and Appeal Panels are elected by nomination from within the members of Swim England (Regulations 73 and 74).
31. Complainants generally are required to pay fees of £100 or £200 to bring complaints or appeals (Regulation 110).
32. Procedures both at disciplinary hearings (Regulation 163) and at appeals (Regulations 175 and 176) are generally flexible and permissive.
33. Under Regulation 261 each region has an obligation to provide '*Swim England Friends*' who are in place to assist with the judicial processes at the discretion of the Judicial Administrator.

### ***The Cases***

34. I set out in respect of each of the Cases a Summary of it and the Issues raised by it. In doing so I aim to reflect the complaints made to Sport England in relation to SE's processes.



## **Case 1 Summary and Issues**

35. In respect of Case 1 the background factual position is this.
- Case 1 concerns a club (**Club 1**).
  - Club 1 is an unincorporated association that was affiliated to SE at the relevant times.
  - Club 1 used the facilities of an independent school (**the School**).
  - A substantial proportion of the members of Club 1 were pupils at the School, and the coaches at Club 1, affiliated to SE, were also coaches/teachers at the School, further some officers and post holders of Club 1 were also teachers or held positions at the School. Plainly therefore the School and Club 1 were closely connected.
36. In 2020 safeguarding concerns were raised in relation to Club 1 and to some of its coaches and its officers. In response the ICPO began an investigation which led to reports being produced in relation to Club 1 and those officers and coaches. In preparing those reports the ICPO consulted widely with the LADO and interviews with the individuals, the subject of complaints and the product of the ICPO's investigation are set out in a lengthy report dated 24 June 2021 (**the First Report**).
37. The First Report made a series of recommendations as to sanction under Regulations 241.4, 241.10, 241.11 and 241.13.2.
38. In the First Report the ICPO drew support from the School's inspectorate's (the ISI) report of May/June 2021 that there were failings of the School in relation to safeguarding concerning swimmers at Club 1 including that *'The school fails to ensure that it provides a safe environment in which children can learn while they are taking part in the activities of the swimming club which the school permits to use its facilities and which it enables pupils to join'*
39. Following consideration of the First Report by the CEO, the recommended sanctions proposed by the ICPO were imposed under Regulation 241 by the CEO.
40. More specifically in respect of Club 1, the CEO by letter (which is undated, but which appears to have been dated 28 June 2021) wrote to Club 1 and imposed 12 conditions on

Club 1 with the expressed threat that if those conditions were not met or challenged there would be *'consideration of suspending [Club 1] for a specified term in accordance with [Regulation 241]'*.

41. There were then various appeals by individuals suspended by the CEO. The appeals were heard before an Independent Appeal Committees and were not successful.
42. In January 2022 the ICPO produced a second report into Club 1 (**the Second Report**).
43. The ICPO produced the Second Report following the ICPO's receipt of further information, in the form of an anonymous letter, that related to both the School and to some limited extent Club 1. The matters that the ICPO refers to in the Second Report are objectively very serious insofar as they relate to the School and led to the ICPO discussing the situation with the NSPCC's Child Protection in Sport Unit (**CPSU**) and the LADO.
44. I note that the most serious allegation in the Second Report arose from facts that occurred before the CEO imposed Conditions on Club 1, however the tenor of the Second Report is that there were still ongoing concerns. In the result, the ICPO reached the conclusion that there were still very substantial issues with the School, that conclusion was reached without contact with the School.
45. The Second Report then made a series of recommendations to the CEO. The recommendations [25] include:
  - a. *I would suggest that the sanction under which [Club 1] is currently operating... which involves Swim England ongoing assessment for approximately 2 years, continue, before any change of affiliation is considered, subject to 6.4 below [which related to a time condition on any application for affiliation by the School], and*
  - b. *Should the current [Club 1 Committee] not be willing, or able, to prevent [the School's] current attempts for intervention or be involved in the running of [Club 1], this heightens the risks as described, and serious considerations should be given by Swim England not to allow the continued affiliation of [Club 1].*
  - c. *The statement that Ultimately, it is for Swim England to consider, knowing the information above, whether they are satisfied children will be safe from harm, in effect, in allowing current affiliation of an organisation who have failed to protect*

*children, and are presently failing to act in the best interest of children, and failing in their management of safeguarding.*

46. After the conclusion of the Second Report:

- a. The Independent School's Inspectorate – the ISI – produced a report dated February 2022 where it was concluded that the School now met the standards following a further inspection.
- b. The LADO appears in an email of 4 February 2022 to the School's designated safeguarding lead to have confirmed that there was no new safeguarding issue being considered by the LADO.

47. I do not have the correspondence that ensued between the ICPO, the CEO and the Safeguarding Team at SE. However, it is clear from the summary of that correspondence that between receipt of the Second Report on 19 January 2022 and 24 January 2022 the decision was taken within SE that Club1 and the School should be at least separated.

48. In an undated document which was sent to Club 1 to notify it of a Zoom meeting to be held with SE and the Club 1 members/officers on 17 February 2022, the CEO set out the decision that:

- a. *After significant consideration, it has been determined that there must be ongoing and clear separation of any Swim England Swimming Club and [the School] – both now and in the foreseeable future...*
- b. *[Club1 governance must remain separate from [the School]].*
- c. *[Club 1] cannot be based or train at [the School] going forward.*

49. That communication led to a substantial body of complaints to SE from the C1 Parents and the involvement of the CEO and the Safeguarding Team at SE. Their interactions appear to be, at the least, to have generated significant disharmony within part of the safeguarding team in SE and concern that the CEO was not giving adequate support to the Safeguarding Team.

50. In the two months that followed I summarise briefly the position that:

- a. SE and its West Midlands Region moved to disaffiliate Club 1 from the Region and

thus from Swim England.

- b. Club 1 opposed this position seeking to offer different and varied structures and plans to avoid disaffiliation, and in particular highlighting to SE in correspondence that the closure of Club 1 would have a substantial impact on the members of Club 1 (not least it was contended, although this is disputed, that there is about a 4 hour round trip to the nearest affiliated club that met with the requirements of the C1 Parents) and the position of the LADO and the ISI.

51. West Midlands Region disaffiliated Club 1 on 18 March 2022, and on 23 March 2022 SE wrote to Club 1 repeating its position that SE could not allow a situation where Club 1 was associated or based within the School. It is plain from an email of 27 April 2022 from the CEO to Sport England that the decision of the Region was '*based on the advice of Swim England*'.

52. Following its disaffiliation Club 1 (by the C1 Parents):

- a. On 27 April 2022 made a complaint to SE's Office Of Judicial Administration against Swim England for its disaffiliation (**the First Complaint**).
- b. On 2 May 2022 made a complaint to SE's Office Of Judicial Administration against the chair of the Region for its disaffiliation (**the Second Complaint**).

53. In both cases the stated complaint was

- a. *Disaffiliation of [Club 1] by Swim England (SE) and preceding process.*
- b. *Unjustified decision to disaffiliate [Club 1] on grounds of procedural unfairness & irrationality. Evidence of misconduct, lack of governance, transparency, due diligence & accountability- breaching own policies. Misinformation, false allegations, implicit discrimination, withholding information, breaching confidentiality & failure to protect & respond to members.*

54. In respect of the First Complaint:

- a. It was rejected by the Judicial Commissioner by email of 28 April 2022 on the grounds that '*the OJA cannot deal with complaints made directly against Swim England and do not have jurisdiction regarding this and therefore [the complaint] cannot be*



*accepted and is rejected. The complaint fee should be refunded in this instance’.*

- b. The decision that OJA could not deal with complaints against SE was made by the Judicial Commissioner only after having consulted with the Director of Legal and Governance for British Swimming, the NGB for Swimming and upon who’s board sits the CEO of SE, that Director of Legal and Governance also held the roles of Swim England’s Head of Safeguarding and Swim England’s Judicial Administrator.

55. As a result of that rejection the Second Complaint was raised against the named chair. In respect of the Second Complaint:

- a. It was rejected by the Judicial Commissioner by email of 5 May 2022 which rejection was explained in a further email of 23 May 2022 on the grounds that:

*...the complaint essentially is against the Swim England process and the disaffiliation of [Club 1] where the fundamental review process undertook is challenged.*

*Additionally where an investigation concerned / related to child welfare concerns, the ICPO's report and any determination contained therein is final. There is no avenue of appeal under this procedure.*

*The Complaint also refers to specific Swim England employees where the Office of Judicial Complaint process does not have jurisdiction to deal with complaints directly against SE / its' employees in their employed roles. There is also no identifiable specific complainant as a generic email is given. The complaint is therefore rejected and the complaint fee refunded on this occasion.*

- b. That rejection followed discussion between the Judicial Commissioner and SE’s Director of Legal and the Director of Legal and Governance for British Swimming, who also held the roles of Swim England’s Head of Safeguarding and Swim England’s Judicial Administrator.

56. In respect of the issues of complaint raised, the Club 1 Parents in correspondence and in my meeting with them on 7 November 2022 identify these ‘heads of complaint’:

- a. That whilst they (or the members) were invited (and joined) Video Conference

Meetings with SE following the First or Second Report and prior to the imposition of the disaffiliation they do not feel those meetings were adequately resourced and all their points answered.

- b. That they (or the members) were not interviewed as part of the process that led to the ICPO preparing the First or Second Report.
- c. SE's communications were inconsistent with other agencies – there was said to be a current safeguarding risk by SE but neither the LADO, School nor the ISI were aware of it.
- d. The sanction was not justified
- e. They nor the members were entitled to challenge the sanction.
- f. The effects of the sanction at the club or school were not taken into account. Parents in particular have made schooling decisions off the back of the connection and the loss of the affiliation to the School meant some parents contend that they would be required to travel on 4 hour round trips for their children to continue with SE affiliated swimming that met their requirements.
- g. Club 1, the School, and the C1 Parents had not had a rationale or explanation for any Decision.
- h. The Club 1 Parents did not have any support from SE.
- i. Breaches of confidence occurred during the case, but SE made no investigation or sanction<sup>1</sup>.

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<sup>1</sup> I consider this specific issue to be outside my review and do not address it further.

## ***Case 2 Summary and Issues***

57. In respect of Case 2 the background factual position is this.

- a. In 2019 a Parent (**the C2 Parent**) made a complaint about his child's (**the C2 Swimmer**) treatment at Club 2 (**the Initial Complaint**).
- b. The Initial Complaint was made to Club 2 and related to the selection of the C2 Swimmer for a squad within Club 2. The Initial Complaint was not addressed to the satisfaction of the C2 Parent and in November 2019 the C2 Parent brought a complaint to SE (**the SE Complaint**). The SE Complaint was that Club 2 was not allowing the C2 Swimmer access to a squad and not explaining why and had not allowed a mediation.
- c. The SE Complaint was brought on the SE complaints form and the C2 Parent identified as the complainant, and the respondent to it as Club 2.
- d. SE determined that the Initial Complaint should be dealt with by mediation under the Regulations. Thereafter there was a very substantial delay until July 2021 when there was a mediation which was unsuccessful. The delay was caused by amongst other things, Club 2 not responding to correspondence, Club 2 not wishing to engage in the process, SE being slow to pursue Club 2 for responses, from March 2020, Covid, and SE's OJA's staffing being reduced and the office closed for a period. The C2 Parent was engaged in regular correspondence to progress matters.
- e. In the period after the mediation Club 2 disbanded and joined another club.
- f. During the period of delay in May 2021, the C2 Parent raised with SE further complaints about the conduct of Club 2. The complaints now raised were that the C2 Swimmer was being mocked, taunted and ignored when he was injured and that the issue having been raised with Club 2 had not been addressed. The C2 Parent expressly raised these issues with SE as safeguarding issues by writing to the CEO in an email of 2 July 2021 identifying that the complaints were in his view related to Wavepower codes on bullying and emotional abuse.
- g. The complaints raised in July 2021, were new in the sense that they had arisen after the Initial Complaint and after the SE Complaint, not least as they relate to coaching sessions by Zoom. Not only was that clear and obvious from the complaints but also the CEO made that point to the Safeguarding Team in an email of 5 July 2021.
- h. The CEO advised the C2 Parent to make contact with the SE Safeguarding Team.

That advice led to the C2 Parent making contact with the safeguarding team and producing a safeguarding complaint in July 2021 (**the Safeguarding Complaint**).

- i. The Safeguarding Complaint drew two reactions within the SE Safeguarding team:
  - i. First, the Safeguarding Team were not of the view that the Safeguarding Complaint was raising anything ‘new’ and so the position the Safeguarding Team took was to tell the C2 Parent that the Safeguarding Complaint was a code of conduct issue and not a Safeguarding issue (see for example the NSO’s email of 7 July 2021) following a review with the ICPO. When the C2 Parent challenged this suggesting that Wavepower include bullying, the NSO replied in an email of 7 July 2021 that *‘concerns you have raised are matters which fall under the remit of breaches of the SE Code of Ethics.... Rather than that of child safeguarding / child protection (which is defined under Sections 47 and 17 of the Children Act – ‘cases that may involve clear or potential significant harm/ criminal acts on children’)* and it is therefore appropriate for the matter to be dealt with under the OJA process. A view endorsed by the ICPO (see the ICPO email of 6 July 2021 at 0545)
  - ii. Second, the Safeguarding Team complained to British Swimming’s Director of Legal and Governance, who also was providing services to Swim England as its Head of Safeguarding and Judicial Administrator that the CEO was involving herself in safeguarding issues, in an email of 5 July 2021 it was stated:

*It is extremely frustrating that our CEO is undermining what we do and telling individuals that she thinks this is a safeguarding issue, even after we have advised them of the appropriate course of action!!!.*

- j. The C2 Parent then raised the matter with the CPSU who corresponded with SE and were told there were no safeguarding issues.
- k. Whilst that correspondence proceeded the SE Complaint was in the hands of the OJA. The Commissioner was concerned by the fact of Club 2 disbanding, and it was suggested that the C2 Parent uses named individuals rather than the name of Club 2 in the complaint. This was done and the C2 Parent put forward 6 names but that was met with a direction that was unmanageable from the Commissioner. In January

2022 an agreement was reached that the SE Complaint proceed against 1 named person.

- l. An arbitration hearing took place on 1 May 2022 (a Sunday, by Zoom) against the one named person leading to a written decision (**the Determination**). Only the C2 Parent and the C2 Swimmer attended, no one from Club 2 did. The Determination does not explain the allegations or set out the complaint, it does not analyse any evidence other than to say there was no diagnosis of C2 Swimmer's mental health and no '*corroborating information that the complaint was valid*' and no evidence was submitted by Club 2. The complaint was dismissed on the grounds that no action could be taken against a disbanded club or former officers of the club.
- m. The Determination was reviewed by the legal officers of SE before it was issued (see email chain of 10 May 2022). It is noted in an email of 10 May 2022, 11h56, that in the past, arbitration decisions had been reviewed by the legal officers (acting as Judicial Administrator), to correct and clarify references but also to make sure that advice was given and proportionality and the high test needed to suspend a member was met, and to record that safeguarding concerns had been investigated. Here the legal officer was asked to consider the change of respondents to one person. This led to a consideration of how the determination should be phrased and what the intent was behind it and the formulation of reasons for a decision. None of this advice was revealed in the determination or the C2 Parent.
- n. An appeal was then pursued which was heard on 30 May 2022 on paper (**the Appeal**). The Appeal decision lists a number of complaints made by the C2 Parent and includes the allegations that:
  - i. The Determination followed a hearing in which one tribunal member of the two who heard the complaint (the third having not attended) left part way through the hearing.
  - ii. The Determination had been reached by a tribunal which had been informed of the C2 Parent complaining to the CEO.
  - iii. The Appeal body did not have any record of the hearing below, but none the less the Appeal Chair states '*if the Chair curtailed a diatribe against someone who was not a respondent... that is not a failing*'.
- o. The document setting out the decision on the Appeal was again reviewed by the legal officers of SE, acting as Judicial Administrator, and tracked changes were made to

the draft. This was not revealed to the C2 Parent. I record that the changes made were not substantial numerically or in terms of outcome, however the changes are not limited to typographical or purely administrative matters.

58. In respect of the issues of the complaint raised the C2 Parent in correspondence, and in my meeting with him on 15 November 2022, identifies these 'heads of complaint':

- a. The very substantial delay in the process from November 2019 to May 2022. It is emphasised that the delay arose before COVID ie March 2020 and that the C2 Parent was required to chase SE for the complaint to move forward.
- b. The lack of any consistent messaging from SE as to the progress of the complaints being told to name persons as respondents then being told there were too many by way of example.
- c. The complexity of the process in identifying who should be responsible and the lack of support in it to the complainant.
- d. The conflict between different persons within SE as to what was and was not a safeguarding issue, and the confusion as to what Wavepower raised as a safeguarding issue.
- e. The lack of any investigation of any issue. No one from SE involved themselves in investigating any complaint with the C2 Swimmer or Club 2.
- f. The hearing leading to the Determination and the Determination and the Appeal were unfair, in that there was no opportunity to explain a case, the C2 Parent's concerns were not explored and there is no actual decision on the facts of the complaint.
- g. The disbanding of Club 2 has led to no responsibility, with the lack of cooperation of Club 2 in the process allowing it to avoid any sanction to it or its officers.

### ***Case 3 Summary and Issues***

59. In respect of Case 3 the background factual position is this.

- a. Case 3 concerns Club 3 and a series of complaints made by a former Coach or Members of Club 3 against some of the officers of Club 3, the parents of a swimmer and the resolution of complaints by SE in relation to the coaching methods and governance at Club 3.
- b. It is easier to summarise the two sides to the complaints separately.

60. In relation to the complaints by the former coach or members at Club 3 and swimmer the background is that:

- a. In late 2020 a swim event was held, and a dispute arose as to whether the meet met with regulations.
- b. The outcome of which was that disciplinary proceedings were taken within Club 3 against coaching staff and a swimmer's parent complained of losing out on an important award. The coaching staff and some members pursued complaints against the Club 3 and some named officers, as did the swimmer's parent.
- c. Some of those complaints were heard in 2022 (with some outstanding) and led to disciplinary sanction against the officers and club. Appeal processes have not altered those outcomes save as to duration of sanction at the rehearing of one allegation.
- d. As I understand it there have been a total of at least 5 complaints at least two of which have been determined, the outcome of the balance being delayed pending sequential determination and proceedings before an Employment Tribunal.
- e. In relation to the swimmer's parent's complaint the Appeals Panel considered an appeal on 25 June 2022, the decision makes clear that the Appeals Panel considered a re-hearing was appropriate (having regard to a series of complaints of procedural impropriety by the Arbitration Commission Chair, including that he knew a witness, introduced his own evidence and did not recuse himself), but in the result the case was determined on paper as a review without the participation at a hearing by the Appellant (the Club 3 Chair), after no convenient date for a rehearing could be agreed in the window available.

61. In relation to Club 3's complaints:



- a. Club 3 and its Chair made a complaint to SE in relation to the conduct of some of the coaching staff. The complaints related to, amongst other things, the weighing of swimmers and in subsequent disputes the coaches involving child swimmers in the signing of supportive statements.
- b. The position of Club 3 (by at least its Chair) was that the complaints as to weighing had been raised with SE in 2020, and SE had through its safeguarding officer considered that the issue of publicly weighing swimmers (ie before their peers and other coaches) was not a safeguarding issue but a code of conduct issue that should be resolved within the club. That attempt at resolution had at least partly led to the complaints from the coaches.
- c. As a result of the reports by Club 3 to SE, the ICPO carried out a 'Review' in relation to Club 3 in April 2021 leading to a Report dated 28 April 2021 (**the Club 3 Report**). The ICPO made clear it was a 'review' not an investigation. The ICPO's review did not therefore hear from any of the coaches against whom allegations were made.
- d. The Club 3 Report nonetheless:
  - i. Records that the Chair had made reports of bullying over a period of 6 months and of public weighing, as well as specific complaints related to a single coach.
  - ii. Records that a parent of a child had been upset by public weighing and '*how it made her not eat, and/or miss sessions if she knew weighing was going to happen*' and a parent had made the 'assumption' that the Coaches had sought to intimidate children.
  - iii. Expresses opinions that Club 3 had falsely contended that there was a welfare issue involved in the investigations as to the Coaches and that there was a poorly/falsey worded letter put out by Club 3 and a poorly worded letter from the Coaches that was published on the internet.
  - iv. Noted that the internal investigation of Club 3 had '*identified some less favourable Club points, including weighing swimmers without parental consent and knowledge, 'safeguarding' concerns, unfair treatment of swimmers, and not understanding needs*'. The internal report had noted some parents had suggested their children felt more body conscious and that they felt humiliated and would not eat after being weighed, and that whilst '*Weighing was not made a condition of being able to partake in a pool session, but encouraged. Having started, parents reported this became a subject of discussion between*

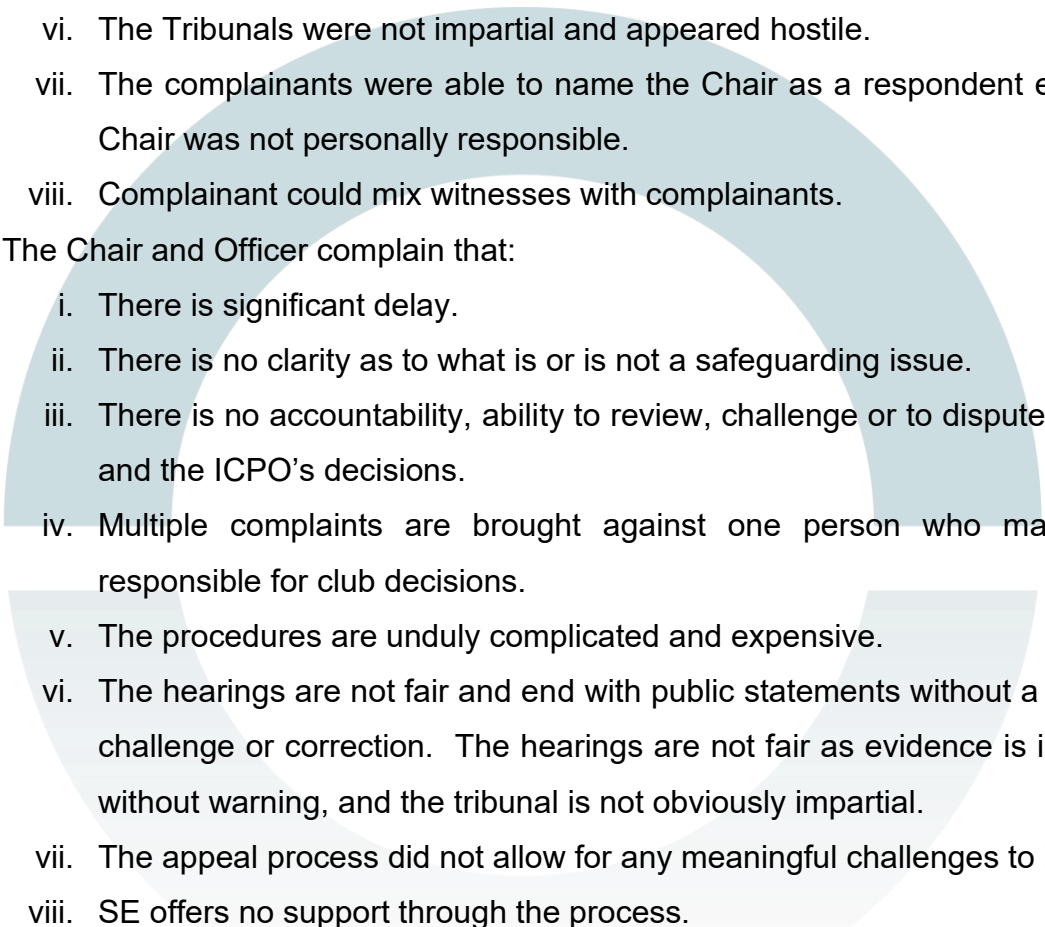


*girls about how 'fat and obese' they considered themselves'.*

- v. Contended SE had not been involved in the Club 3 internal investigation and had not had matters referred to it.
- vi. The ICPO considered Club 3 should have referred concerns to the SE Safeguarding Team.
- vii. Concluded that Club 3 had no ongoing safeguarding concerns that merited investigation and that *'There is no evidence, under Wavepower or Swim England guidance that any Coach represented a risk of harm to a child'.*
- viii. Include the position of the ICPO noting that the ICPO had received concerns following weighing, made recommendations that there should not be weighing of children and SE should produce a policy on this and there should be publication of statements of correction on false public statements.
- e. The Chair of Club 3 and other of its officers were not content with the Club 3 Report and asked the ICPO to make amends to it. The ICPO refused to do so and stuck firmly to the ICPO's analysis that there were no safeguarding issues. That dispute continued in many emails with the Chair complaining that there were factual inaccuracies in the Club 3 Report and there were welfare issues and issues with the Coaches (see emails of 17 May 2021 and 1 June 2021).
- f. The position of SE remained that weighing was not a safeguarding issue, and was so expressed in an email from SE's CEO to Sport England of 2 August 2021 in which it was said that there was *'no issues of .. ie fat shaming... no evidence that weighing in these circumstances, had a harmful effect on children or that children were at risk of harm, immediate or otherwise...'*
- g. The Chair of Club 3 took up the complaints with SE's CEO in August 2021 and a note in the Safeguarding documents records that the discussions were not shared with the Safeguarding team.
- h. On 30 November 2021 SE published a statement on weighing which recommended that the weighing of child swimmers should not take place unless they were on a national pathway.

62. The issues raised by Club 3 by its Chair and Officer are raised by solicitors acting on their behalf and by them as follows:

- a. The solicitors in a letter of 15 August 2022 complain that:

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- i. The Employment Tribunal should take precedence over regulatory/disciplinary disputes in chronology.
  - ii. Case management should place more serious cases first.
  - iii. There was significant delay.
  - iv. The processes offered by SE were unfair.
  - v. The complaints process allowed multiple complaints to be brought severally and sequentially against the Chair and Club 3.
  - vi. The Tribunals were not impartial and appeared hostile.
  - vii. The complainants were able to name the Chair as a respondent even if the Chair was not personally responsible.
  - viii. Complainant could mix witnesses with complainants.
- b. The Chair and Officer complain that:
- i. There is significant delay.
  - ii. There is no clarity as to what is or is not a safeguarding issue.
  - iii. There is no accountability, ability to review, challenge or to dispute the ICPO and the ICPO's decisions.
  - iv. Multiple complaints are brought against one person who may not be responsible for club decisions.
  - v. The procedures are unduly complicated and expensive.
  - vi. The hearings are not fair and end with public statements without a chance of challenge or correction. The hearings are not fair as evidence is introduced without warning, and the tribunal is not obviously impartial.
  - vii. The appeal process did not allow for any meaningful challenges to be made.
  - viii. SE offers no support through the process.

## ***Swim England Regulations and Procedures Discussion and Analysis***

63. Having summarised the facts and issues in the Cases, I discuss them and give feedback on SE's safeguarding and complaints policies and procedures, having first identified the structure that I will follow in discussing the Cases.
64. I take as uncontroversial that regulations and processes whether for safeguarding cases or for other disciplinary cases ought to meet these tests:
- a. First, regulations and processes should reflect current best practice. No sport operates in isolation and all sports should draw from each other and common experience to be up to date in terms of definitions, policies of conduct and of addressing complaints.
  - b. Second, they should be accessible to the users of that process. Accessibility requires that policies and regulations are clear and coherent and that a complaints process is capable of being used by those who require it or are subject to it, both in terms of complexity but also in terms of affordability.
  - c. Third, any investigations and disciplinary proceedings that arise from complaints should be fair. Investigations should be impartially conducted, and any disciplinary proceedings or complaint resolutions should accord with natural justice, that is, at the least, allowing a right to be heard before an independent, unbiased tribunal in respect of allegations made known to the person accused.
  - d. Fourth, sanctions imposed by a sport on its members should be justified, and proportionate take account at the least to the direct and indirect consequences of that sanction.
  - e. Fifth, no sport governing body or process should be above complaint and not accountable. Any significant decision of a sport in safeguarding or complaints should be explained, reasoned and open to challenge.
65. I doubt that SE's Regulations and Procedures meet those tests and I consider that each of the Cases demonstrates those failures. For that reason I do not distinctly in each case consider what could have happened under the current Regulations and Procedures, rather I address recommendations as to how the SE Regulations and Procedures ought in my view

to be amended.

66. In my discussion I follow the scheme of the tests I identify.

### *Best Practice*

67. I consider that SE does not adopt and does not follow best practice in relation to its policies or procedures in relation to safeguarding. I consider that the failings are best broken down into these parts:

- a. What is a safeguarding concern?
- b. How should a safeguarding concern be addressed and investigated?

68. SE has a confused and inconsistent approach to what it views as a safeguarding concern and does not follow the current best practice. I consider that because of that there has been a confused and inconsistent approach to what is a safeguarding issue and should amount to 'abuse' triggering a safeguarding response.

69. SE has these approaches:

- a. In Wavepower by using the definition of *abuse* as '*any action by another person that causes significant harm to a child*' or '*When someone fails to prevent harm to a child*', SE adopts:
  - i. A definition based on an outcome and not a potential outcome, the outcome of '*significant harm*',
  - ii. Has a contradictory definition of failing to '*prevent harm*'.
- b. In the CWMCP the concern is linked to criminal conduct (see its Step 1), and matters short of that can be addressed by any member.
- c. In Case 2 the use of criminal standards of conduct were referred to in the NSO's reply of 7 July 2021 (*supra*).

70. That variety of definition stands in contrast to the clarity of the CPSU's definition: *Child abuse is any form of physical, emotional or sexual mistreatment or lack of care that leads to injury or harm.*

71. That CPSU definition is consistent with its *Standards for Safeguarding and Protecting Children in Sport* which starts with the uncontroversial statements of principle that:

*Children and young people have a right to enjoy sport, free from all forms of abuse, exploitation and poor practice.*

*All children and young people have equal rights to protection from harm.*

*All children and young people should be encouraged to fulfil their potential, and inequalities should be challenged.*

*Everybody has a responsibility to support the care and protection of children.*

*Sporting organisations have a duty of care to children and young people who take part in sport.*

72. The importation of a qualifier by SE of 'significant' in Wavepower and of criminal in CWMCP and in practice, in outcome, is not an acceptable policy as it causes, obviously, a judgement to be made as to whether:

- a. the abuse has caused anything, and
- b. whether what it has caused is 'significant' and/or
- c. is criminal.

73. This is not an academic distinction but a practical one. A child that is bullied or shamed to their appearance may possibly not suffer in the eyes of some 'significant' harm. That does not mean that SE should stand by and allow that bullying or shaming to continue, until significant harm occurs.

74. Further, what is criminal or not requires a knowledge of criminal law and sets a standard that the state imposes on all its subjects, not the standard a participant in a sport might expect.

75. A consequence of this lack of definition is that whilst Wavepower has a whole series of policies and codes that arise from Anti-Bullying, these policies are linked to code of conduct issues and not to issues of safeguarding. That entails they are dealt with at club level (see Wavepower pages 70-74).

76. Bullying and emotional abuse, falling short of significant harm are not therefore regarded as safeguarding concerns. Even when those acts are said to have been carried out by coaches registered with SE. The confusion this causes is manifest in the Cases:

- a. In Case 2, the C2 Parent raised a concern as to the treatment of his child because it was breaching the policies of Wavepower in relation to bullying. The CEO of SE considered it at least capable of being a safeguarding issue; the ICPO and the safeguarding team did not.
- b. In Case 3, Club 3 and at least its Chair considered that the public weighing of children was capable of being a safeguarding issue. SE appears to have decided it did not, mostly, it seems, on the basis that there was no policy in respect of it.

77. By following the CPSU definition SE could use the further examples of what is abuse in the context of sport that the CPSU provide. For example, the CPSU provide definitions of '*Emotional Abuse*' which include a range of behaviours including '*excessive weighing*' and '*bullying*'<sup>2</sup>.

78. **I recommend** that SE re-assess its policies and regulations and adopt a current meaning of 'Child abuse' triggering a safeguarding concern and a response that follows the guidance of the CPSU which I take to be current best practice **[R1]**.

79. I do not consider that SE follows best practice in reacting to or investigating safeguarding concerns. I break down the issues I raise into three:

- a. First, I doubt the process for reporting concerns is clear.
- b. Second, I doubt the investigation process adopted by the ICPO is current best practice.
- c. Third, I doubt the structures of SE for addressing safeguarding concerns follow best practice.

I take those points in turn.

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<sup>2</sup><https://thecpsu.org.uk/help-advice/introduction-to-safeguarding/child-abuse-in-a-sports-setting#emotional-abuse>

80. I consider that there ought to be a single destination of reporting in respect of all safeguarding concerns. A single line should be capable of being drawn from the reporter of the concern to the NGB's Safeguarding Office from all reporting sources. The purpose of that single destination of reporting is that:
- a. All reports are centrally known and recorded.
  - b. All reports are given proper weight.
  - c. An 'intelligence picture' can be composed by the NGB which avoids siloes and patchy responses.
  - d. The sport can produce a consistent response to safeguarding concerns.
81. The SE position as it stands is to adopt what I see to be an unclear and inconsistent policy because the CWMCP adopts a different pathway to Wavepower. Under the CWMCP a child who considers that they are a victim of abuse, may express that concern as a concern about process. The concern would then be reported to any member of SE who is enjoined to solve it themselves if not criminal. Similarly at Step 2 matters can be addressed locally.
82. In my view a single line reporting structure should be the requirement and the report should be made to Club Welfare Officer then to Regional Welfare Officer then to National Safeguarding Officer or any point in between (i.e. direct to National Safeguarding Officer), as well as confidential line which should feed to the National Safeguarding Officer.
83. Once a report of a safeguarding concern is received the process SE follow appears, at least, to depend on the investigation of the ICPO. I doubt this is good practice and I doubt it is best current practice (which might be regarded as that set out by the NSP<sup>3</sup>).
84. The ICPO currently appears to adopt a process of investigation which is described in the Protocols, but which itself is not described. The process as illustrated in the Cases is to:
- a. Triage a complaint and to decide whether it amounts to a safeguarding concern. That triage process does not always involve any discussion with the alleged victim (see

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<sup>3</sup>[https://www.sportresolutions.com/assets/documents/2021\\_-\\_NSP\\_Investigation\\_Guide\\_-\\_FINAL\\_%2822\\_July\\_2021%29.pdf](https://www.sportresolutions.com/assets/documents/2021_-_NSP_Investigation_Guide_-_FINAL_%2822_July_2021%29.pdf)

Case 2 where the C2 Swimmer was not spoken to by the ICPO or the Safeguarding Team at all).

- b. If a concern is found the ICPO then takes upon the ICPO the investigation and the judgement in the case. The process adopted is unlikely to follow any best practice, because:
  - i. It does not allow any review by any person other than the ICPO.
  - ii. It does not allow any challenge by the subject of the investigation to the ICPO's findings of fact.
  - iii. It does not allow the complainants any opportunity to respond to the answers given by a subject in interview.
  - iv. The scope, structure and form of the investigation is all in the judgment of the ICPO.
  - v. The 'evidence' that the ICPO bases the ICPO report upon is not actually revealed to anyone.
- c. The problems that causes are manifest in the Cases by way of example:
  - i. In Case 1 the Club 1 Parents contend and feel that no adequate attempt was made to visit Club 1, and to speak to any of the Club 1 Parents (this is disputed by SE) prior to the preparation of the Reports.
  - ii. In Case 2 the C2 Swimmer was not spoken to.
  - iii. In Case 3 no attempt was made to speak to any swimmer or any coach as far as I can see in relation to the weighing complaints.
  - iv. In each of the Cases the participants do not feel they have had a fair investigation.
- d. I discuss below the ICPO procedure in terms of challenge.

85. Following the investigation, the ICPO report is passed to the CEO of SE to decide outcomes.

This process does not allow for:

- a. Any independent judgement of the CEO on the facts,
- b. Any representations to the CEO by concerned parties,
- c. Any involvement of any person independent of SE in the decision on sanction,
- d. Any justification for sanction or representations on it.

86. That process is outdated and unfair. I consider that whilst something like Regulation 241



may be justified for the imposition of emergency sanctions it is inappropriate for the imposition of interim sanctions and permanent sanctions which have:

- a. Very substantial reputational risk and harm,
- b. Very substantial effects on participants.

87. In my view any sanctioning of a participant or club should only occur after there has been an opportunity for a contested hearing before an impartial tribunal. Any interim sanctions should be imposed by such a tribunal or chair of such tribunal with a review period and a right of challenge.

88. Once more, the problems the process causes are manifest in the Cases. In Cases 1, 2 and 3, the CEO was drawn into the process by complaints from members and became involved in the decisions to initiate or act on complaints. The CEO was thus put in a position of involvement in a process that the CEO theoretically would be involved in sanctioning.

89. **I recommend** that SE introduce a new reporting process, a clear investigation process and remove the powers of sanction from the CEO under Regulation 241 **[R2a, b and c]**.

90. Allied to this concern is the dependence within SE on volunteers for its safeguarding and disciplinary roles (at least to regional level) some of whom are not expected to have any training at all.

91. Under Wavepower the points of contact for safeguarding concerns are the club and regional welfare officers. Those officers are expected to undergo basic training and to operate as volunteers. Under the structure of the CWMCP, where the Procedure is followed, the first step places the responsibility of addressing immediate reports of management of a child welfare concern on any adult member of Swim England, who is additionally given the guidance that that person should keep the information as restricted as possible and record it. Such persons are not expected to have any training.

92. The *Whyte Review*<sup>4</sup> has highlighted in another sport that placing too much responsibility on the work of volunteers with limited training is an unacceptable risk (see its

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<sup>4</sup> <https://www.sportengland.org/guidance-and-support/safeguarding/whyte-review>

Recommendations 1 and 2). I gratefully adopt the analysis in that review.

93. **I recommend** that the SE review and clarify both its reporting mechanisms and guidance and adopt the recommendations of the *Whyte Review* in relation to the training use of volunteers [R3].

94. In cases which are not determined under Regulation 241 but come before the judicial bodies of SE, I consider again that current best practice is not followed.

95. What is best practice is capable of being discerned from the processes adopted in the courts and in other sports. In short form (for both Code of Conduct and Safeguarding cases):

- a. The tribunals are independent and impartial, either they are composed of at least one experienced qualified lawyer or can draw on legal advice to the tribunal (not to SE).
- b. Once a complaint is made, the tribunals provide a timetable for consideration of the complaint or determine it as being frivolous or vexatious. The timetable requires fair exchange of disclosure and evidence, followed by a hearing before which parties supply summaries of their cases. Failing to follow the process is subject to sanction.
- c. Hearings are conducted in a structured manner determined by the tribunal.
- d. The tribunal should disclose in advance any conflicts of interest.
- e. At the conclusion of the hearing a decision is reached *by the Tribunal* and a decision is provided which sets out the complaint, the decision, why the decision has been reached and why any sanction has been imposed.

96. I do not see in the Cases that this practice is followed by SE in all cases:

- a. In Case 1 there was no hearing because the Complaints were rejected without a hearing, but with the involvement of the SE law officers, acting as Judicial Administrator, in a case where the SE's decision making was under challenge.  
In Case 2, the Initial Complaint and the SE Complaint was allowed to drift without decision for nearly 2 years. I do not, on reading the Determination or the appeal, understand how any decision has been reached. I do not see where the involvement of SE's legal officers, acting as Judicial Administrator, allows for a fair hearing.

97. **I recommend** that SE reconsider the form and constitution of its tribunals and require standard directions for hearings, and whether volunteers without legal support should sit on

those tribunals [R4].

### *Accessibility*

98. I do not consider that the SE complaints procedures or safeguarding procedures are accessible, coherent or clear nor are they obviously affordable.

99. I do not repeat the issues I have raised above in relation to the definitions of safeguarding concerns.

100. Here instead I focus upon the structures and costs of bringing cases of complaints.

101. My view is that the Regulations and procedures set out are complicated and confused and I doubt that they are in those circumstances accessible to the users of them.

102. It is, as the persons involved in Cases 1, 2 and 3 have all raised, a daunting process for any complainant to navigate the Judicial Procedures and to identify why a complaint amounts to a safeguarding or a code of conduct issue.

103. If such hurdles are crossed, the complainant is then faced with the position of preparing for either a disciplinary hearing, a mediation, or an arbitration without, as far as I am aware, any narrative explanation of how those procedures operate, their differences and their potential outcomes.

104. SE's website <https://www.swimming.org/members/how-to-resolve-issues-with-your-club/> makes some attempt at summarising the various procedures and processes in a flowchart which I append as Appendix 3, but in doing so highlights the multitude of potential avenues of dispute resolution that the SE is seeking to operate.

105. I have particular concern that in cases of any complexity a lay person does not obviously have the ability or skills to obtain evidence, present evidence and pursue a complaint and most importantly to formulate complaints against the Regulations, and the costs of doing so in time and pure financial costs are high. This could easily act as a deterrent, and as the Cases indicate has led to non-participation in the process.

106. Plainly there is a balance to be struck between cases that are pursued by the NGB and cases which do not merit or justify the costs of the NGB prosecuting them. I consider however that SE should provide a scheme of dispute resolution which is:
- a. Streamlined between cases that require a disciplinary hearing and those that do not i.e. could be resolved by ADR.
  - b. Where cases do justify a disciplinary hearing a clear, concise set of rules can be provided and the complainant can call on the assistance of SE's disciplinary office to focus complainants and explain evidence.
  - c. SE should provide access to pro bono resources and, trained, volunteers, within the sport, who can assist the complainant and the subject of complaints.
  - d. Only charges nominal fees.
107. **I recommend that** the judicial processes are reviewed and simplified [R5].
108. Simplification is but a part of the issue. I doubt that the Regulations as drafted are coherent. That is exemplified by Case 1.
109. An essential issue in Case 1 is that the C1 Parents wished to challenge the disaffiliation of Club 1 under the Regulations but were told that they could not. I do not express a view on the issue save that it appears to me at the least to be arguable that:
- a. The Regulations allow a Complaint to be made in relation to '*the behaviour of any person.. [a] body or an organisation*' (Regulation 102.1), including on the grounds of '*maladministration*' (Regulation 102.3.4).
  - b. Swim England is an organisation or a body or a person, its legal identity being a company – The Amateur Swimming Association (Swim England) Limited. Similarly, the region in which Club 1 was situated is likely to be a body or organisation.
  - c. Whilst Regulation 102.3 prevents complaint against '*employees*' of SE, it does not prohibit complaints against SE, the entity, nor would it on its face bar a complaint about a Regional Chair or the ICPO (assuming the ICPO or the Regional Chair is not an employee).
  - d. Further, whilst Regulation 102.5 requires a complainant to be a member or affiliated club, a suspended or disaffiliated club is not obviously to be disbarred from bringing complaints. Such would be an unusual construction.

110. A second issue in Case 1 is the decision to disaffiliate Club 1. Again, it is not obvious to me and at the least arguable that the process followed to do so was not the one set out in the Regulations or CWMCP. In this way:
- a. The CWMCP provides a route for the ICPO to refer a club for disaffiliation. However, the Second Report does not, on its face follow that route. The recommendation was not the ICPO's to disaffiliate, the ICPO presented choices.
  - b. Regulation 241 is the route for suspension. However, Regulation 241 does not set out any express basis for suspension of a Club, suspension powers are directed to '*individuals*'. Where a Club has an obligation under Regulation 231.8 no sanction is identified, and whilst 241.11 states a Club may be suspended it does not explain why or on what basis. In any event the '*suspension*' of a Club does not equate to disaffiliation; they appear to be different things.
  - c. I am also concerned as to the basis that the ICPO makes recommendations to the CEO as to sanction. Whilst the CWMCP allows for such recommendations to be made, Regulation 241 does not.
  - d. I am further concerned that in any event the recommendation in the Second Report was not for disaffiliation. It is not obvious how the CEO concluded that that outcome should be followed under Regulation 241.
111. In my view the Regulations or their interpretation of them by SE are not clear or coherent and it is unsurprising that the C1 Parents and the participants in Cases 2 and 3 are troubled by their lack of ability to challenge the acts of SE.
112. I doubt that the process by which the complaints were dismissed (which depended on the legal advice from Swim England in relation to complaints about Swim England) could be considered fair by any standard.
113. **I recommend that** the drafting of the Regulations and powers entrusted to officers or agents of SE under them are clarified and more clearly set out [R6].

#### *Fairness and independence*

114. In each of the Cases it is apparent that the complainants do not consider that they have

received any fair hearing from SE.

115. There is in my view very substantial grounds for the complainants to so react because the process and decisions made in each of the Cases do not appear to have obviously followed any fair process, whether in the investigation or the disciplinary action that followed.
116. In respect of the ICPO investigations, whether the reports prepared in Case 1, the review in Case 3 or the decision not to act in Case 2, there is a clear risk that a single person being both investigator and decision maker and also sanction recommender does not provide any or any plausibly fair process.
117. The core reason for that is that the process of carrying out a review/investigation is not an open process in which the persons to be affected by it are given any opportunity of challenge to the case against them or say on the outcomes imposed upon them.
118. That core reason is compounded by the fact that the CWMCP contends that the decision of the ICPO should be unchallengeable, and Regulation 241 insofar as it permits suspensions to be imposed on Clubs does not permit the Club to appeal.
119. Whichever route SE choose to follow it denies the subjects of the ICPO's investigation input and challenge, a right to be heard, a right to know the case against them and then a right of appeal. It is not however only the subjects the unfairness is in both directions.
120. A complainant does not apparently under the CWMCP or the Regulations have any right of answer to the any material put forward in response to the complaint.
121. For example, in Case 3 the ICPO review did find evidence of children not eating as a result of the weighing process, and did find evidence of children being more aware of their weight and that being a subject of discussion about how 'fat and obese' they considered themselves to be. Yet, the CEO wrote to Sport England that there was no evidence of fat shaming or of any risk of harm to children. It is not obvious that such a conclusion follows from the 'review' nor that any investigation of the children's attitudes had in fact been pursued once the ICPO concluded this was not a safeguarding issue.

122. **I recommend that** the Regulations and policies of SE that allow safeguarding cases to be investigated, reported upon and determined as to recommendations by one person end and be replaced with a process of investigation that ends with disclosure and a contested hearing in an open forum [within **R2**].
123. The disciplinary processes that follow on from complaints are also open to criticism as not being fair or independent. For the following reasons, exemplified in the cases.
124. The process does not appear independent or impartial
- a. In Case 1, the decision to refuse Club 1, the C1 Parents a right of challenge against the disaffiliation was denied by the Commissioner on advice from SE's lawyers where SE was the subject of the complaint.
  - b. In Case 2, the disciplinary decisions were reviewed by the SE lawyers who had input into them, without having been present at the hearings.
125. An absence of suitably qualified lawyers on the disciplinary tribunals does cause a need for legal advice, but if such legal advice is needed it should be provided openly and, in a forum, where the parties to the dispute are both aware of it and have the opportunity to comment upon it.
126. In Case 3, there are separate considerations of fairness. In short, they are that:
- a. The procedure of allowing complaints to be pursued by complainants and not by SE leads to the possibility of a multiple series of complaints being presented sequentially. That is at least capable of creating a heavy burden on a respondent.
  - b. The complainants do not have any obvious disclosure obligations. That is at least capable of creating unfairness in the evidence used in the hearings.
  - c. The complainants are able to name one but not all of the committee which reached the decisions complained of. The burden of defence falls on an individual not a body that individual represents.
  - d. The fact of a re-hearing taking place in the absence of a party appears an unusual procedure and one that is not obviously justified on the face of the decision.
127. These are significant criticisms of the SE judicial processes. A sport which does not



provide a fair and independent disciplinary process is failing its members.

128. I also consider that arising from the Cases is the concern voiced in the emails between the SE Safeguarding Team and in the views of the participants in the Cases that the CEO and the SE Safeguarding Team did not always adopt either the same approach or same view of cases. Two issues arise.
- a. First, I doubt that the CEO should become involved in any decisions as to prosecutorial decisions in relation to safeguarding or disciplinary matters. The decisions within SE as to whether or not a case ought to be prosecuted are not 'management' issues, and the CEO has, in the Regulations as they are currently drafted, a quasi-judicial function under Regulation 241.
  - b. Second, as the Cases illustrate, a divergence of opinion causes not only confusion to the participants but uncertainty as to the policies and aims of SE.
129. **I recommend that** the SE judicial processes are reviewed and re-written so as to create [within **R4**]:
- a. An independent disciplinary panel and appeal panel,
  - b. A legal support for that disciplinary panel and appeal panel which is independent of SE either by being embedded in the panel/appeal panel (for example broadly the position of the BHA) or being a distinct and separate legal office (for example broadly the position of the English FA).
130. **I further recommend that** SE give urgent consideration to the creation of a new disciplinary process wherein [**R7**]:
- a. SE provide the prosecutorial resources for bringing disciplinary and safeguarding cases which involve either allegations of safeguarding or breaches of the Regulations capable of leading to a suspension or complex factual or legal dispute.
  - b. SE appoint an independent disciplinary officer to oversee the decision to prosecute cases and to have the power to consolidate or limit sequential complaints.
  - c. SE remove any involvement of the CEO or other management from the prosecutorial decisions of the disciplinary and/or safeguarding teams.
  - d. Any complaints (as opposed to challenges on outcomes) as to the disciplinary process should be referred to a board member or independent person who should



react to them, reporting to the board, and should not be resolved as a management issue by the CEO.

e. Complaints against SE are resolved independently of SE.

### *Justified and Proportionate Sanctions*

131. I take this section shortly. The purpose of disciplinary sanction is to protect the participants and those involved in the sport, preserve the reputation of the sport, its integrity and its good governance as well as providing, if necessary, some element of deterrence. Balancing those factors in any particular case is a matter of judgement to be reached on evidence.
132. Sanction should be imposed in cases where there has been a failure to comply with the Regulations and Codes of Conduct.
133. Against that background I turn to the cases.
134. In Case 1 the sanction was determined by the CEO. It is not clear how the sanction was reached, when the Second Report did not recommend it. It is not clear what basis the decision to impose a disaffiliation was reached or what evidence was considered in reaching that view.
135. I do not address the question as to whether the correct sanction was imposed, that is not part of my review. However, it is clear and obvious that the C1 Parents and the members of Club 1 had no formal or structured opportunity at all to address the decision, and there is no basis for concluding on what materials I have seen that the CEO was imposing a sanction that took any or any proper account of the effects of disaffiliation on Club 1 that the C1 Parents contend for.
136. It would be a relevant consideration to judge whether:
- a. The effects on the members of Club 1 were considered. If the position is, for example, that some were required to travel round trips of many hours to continue swimming that would be an important factor.
  - b. The ability of the C1 Parents to form a new committee and to abide by terms of SE

as to its management, as in general was the recommendation of the Second Report would be an important factor.

- c. The practical outcomes of disaffiliation whereby it would seem the same staff at the School would still be teaching the children to swim, and would do so without LADO or ISI complaint would be relevant.

- 137. The members of Club 1 and the C1 Parents were not given any opportunity to raise such matters in any formal forum and are left in doubt as to whether they were considered.
- 138. In Case 2 the unacceptable delay and complexity of the disciplinary process ended with no sanction. It is not obvious from the decision as to whether that arose from the failure of any case to be made out or simply because the persons whose conduct was under complaint had left the sport/the club or a combination of both. There is no obvious reason why a sanction cannot be imposed on an individual who is no longer a member. Resignation ought not to be a bar to sanction.
- 139. In Case 3, the sanction fell on the Chair of Club 3. It is not obvious again from the decision why the individual ought to be the subject of the financial sanction and that where the individual is representative of the club the individual rather than the club should be subject to a financial sanction.
- 140. In all cases it would be a sensible course for SE to provide a guide to the likely penalties and sanctions that will arise from disciplinary breaches so as to provide a yardstick for different panels and set out the principles on which the sport considers sanctions should be reached.
- 141. **I recommend that** in any case where sanctions are imposed that they are only reached after contested hearings in which the basis of sanctions are explained and justified against relevant criteria [R8].

### *Accountability and Challenge*

- 142. Once more emphasising that it is not my role to re-hear the cases, what comes out of

the Cases is that SE is not, and does not perceive it, or judge itself to be accountable under any disciplinary or judicial process and that its ICPO's decisions are immune from challenge. By way of example

- a. In Case 1 SE prevented any challenge to its decision that Club 1 should be disaffiliated. There was no ability to challenge the ICPO report, the CEO decision under Regulation 241 or to complain of the maladministration of the sport by SE.
- b. In Case 3 the ICPO decision that there was no safeguarding issue, was reached without investigation and was not open to challenge. The ICPO's report was expressed to be final and conclusive.
- c. Regulation 241 puts decisions of the CEO, and the CWMCP puts decisions of the ICPO out of any challenge.

143. I cannot see that such a position is tenable or maintainable.

144. In my view a significant decision as to safeguarding or a decision as to sanction or a decision as to affiliation should be open to challenge at the least by review.

145. A part of the explanation of why SE does not allow challenge may lie in the fact that its judicial processes are not themselves independent of SE. I have addressed that position above.

146. **I recommend that** the Regulations of SE are reviewed and reframed so that [R9]:

- a. Any sanction imposed by SE ought to be subject to review by an independent person or tribunal under the judicial processes whether or not the body appealing has been disaffiliated or not.
- b. SE and its administrative decisions are capable of challenge if they do not comply with the SE Regulations and/or Procedures.
- c. Decisions not to pursue a safeguarding investigation and/or inquiry are capable of being challenged by review by either an independent disciplinary officer or SE's prosecutorial team.

## ***Recommendations and Implementation***

### *Recommendations*

#### **Recommendation 1**

147. Swim England should re-assess its policies and regulations and adopt a current meaning of 'Child abuse' triggering a safeguarding concern and a response that follows the guidance of the CPSU.

#### **Recommendation 2**

148. Swim England should
- a. Introduce a new reporting process which makes clear and states plainly that all safeguarding complaint reports should be made to the Welfare Officer at Club, Regional or National Level and passed to the National Safeguarding Officer.
  - b. Introduce a new investigation process which follows the preparation of evidence for a contested hearing before a disciplinary panel and not a single person's determination. I suggest adoption of the National Safeguarding Panel's guidance and that investigations are carried out with the review of the Safeguarding Team.
  - c. Remove from the CEO any powers of disciplinary sanction for safeguarding, such powers should be passed to a disciplinary panel or its Chair, with provision for emergency interim sanctions and appeals therefrom.

#### **Recommendation 3**

149. Where responsibility in safeguarding or other disciplinary functions falls on volunteers those volunteers should be trained and have access to sufficient training and expertise to fulfil those roles with sufficient professional support (see the Recommendations of the *Whyte Review*).

#### **Recommendations 4**

150. Swim England should consider the form and constitution of its disciplinary tribunals and provide either qualified lawyers to sit upon them and/or independent legal support. The aim of such consideration should be to create an independent disciplinary structure that is capable of resolving disputes independently of SE's law officers.

### **Recommendation 5**

151. Swim England should seek to streamline and simplify its disciplinary processes and with simplified rules and procedures and standard directions, and signpost access to legal resources (pro bono where possible) to participants in the process.

### **Recommendation 6**

152. Swim England should redraft and reconsider the structure of Regulation 241 and the powers entrusted under Regulation 241 to the CEO, and the structure of the CWMCP and the powers entrusted to the ICPO. Swim England should also redraft its Regulations to make plain what challenges are and are not permitted against the decisions of Swim England.

### **Recommendation 7**

153. Swim England give urgent consideration to the creation of new disciplinary process wherein:
- a. SE provide the prosecutorial resources for bringing disciplinary and safeguarding cases which involve either allegations of safeguarding or breaches of the Regulations capable of leading to a suspension or complex factual or legal dispute.
  - b. SE appoint an independent disciplinary officer to oversee the decision to prosecute cases and to have the power to consolidate or limit sequential complaints.
  - c. SE remove any involvement of the CEO or other management from the prosecutorial decisions of the disciplinary and/or safeguarding teams.
  - d. Any complaints (as opposed to challenges on outcomes) as to the disciplinary process should be referred to a board member or independent person who should react to them, reporting to the board, and should not be resolved as a management issue by the CEO.
  - e. Complaints against SE are resolved independently of SE.

### **Recommendation 8**

154. Swim England revisit its disciplinary and safeguarding processes so that any case in which sanctions are imposed are only reached after contested hearings in which the basis of sanctions are explained and justified against relevant criteria.

## Recommendation 9

155. Swim England review and reframe its regulations so that:
- a. Any sanction imposed by SE ought to be subject to review by an independent person or tribunal under the judicial processes whether or not the body appealing has been disaffiliated or not.
  - b. SE and its administrative decisions are capable of challenge if they do not comply with the SE Regulations and/or Procedures.
  - c. Decisions not to pursue a safeguarding investigation and/or inquiry are capable of being challenged by review by either an independent disciplinary officer or SE's prosecutorial team.

### *Implementation*

156. My view is that the implementation of the Recommendations is urgent, and it may require that temporary measures for the provision of safeguarding support and safeguarding disputes can be implemented using external bodies.
157. In the longer term I recognised that under the TOR this Review is prepared for Sport England, but makes Recommendations in relation to the Regulations, Procedures and Policies of Swim England.
158. The acceptance of any Recommendations and their Implementation will therefore depend on a cooperative approach by Swim England and Sport England and plainly must take account of the resources of time and finance available to Swim England, matters which are not for my consideration.
159. To assist in that process, and to give proper purpose to the review, **I recommend that** a plan of implementation should be agreed between Sport England and Swim England.
160. I propose this scheme stand as its framework:
- a. Swim England should be given time to consider the Recommendations and to identify those it accepts and those that it does not, explaining why. I would expect that to be achievable by 20 January 2023.

- b. Any Recommendations not agreed should be discussed, and a resolution of any dispute reached by 17 February 2023.
- c. A plan for Implementation of the agreed Recommendations should be put in place under the direction of an identified person at board level within SE. I would expect that:
  - i. Proposed amendments to Regulations could be prepared by 16 June 2023,
  - ii. Recruitment of and appointment of post holders completed by 15 September 2023.
- d. Monthly reviews of progress of implantation would assist the monitoring of implementation and could sensibly commence in March 2023, from Swim England to Sport England.

**Outer Temple Chambers**

**Louis Weston**

**17 March 2023**

**SPORT ENGLAND**

**REVIEW OF THREE CASES OF COMPLAINTS RELATING TO**

**SWIM ENGLAND**

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**REVIEW, REPORT and RECOMMENDATIONS**

***March 2023***

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