

ORDERS AND REGULATIONS RELATING TO THE CONDUCT OF LOCAL AUTHORITY MEMBERS IN ENGLAND – CONSULTATION

1 SUMMARY

- 1.1 This report advises Members of a consultation by the Department for Communities and Local Government (CLG) on the detailed arrangements for putting into effect the orders and regulations to provide a revised ethical regime for the conduct of local councillors in England.

2 INTRODUCTION

- 2.1 Elsewhere on this agenda Members have been advised of the implications for standards committees arising out of the Local Government and Public Involvement in Health Act 2007 (the 2007 Act). On 3 January 2007 CLG published a consultation paper on their website seeking views on how the detailed rules for these arrangements should work in practice.
- 2.2 A copy of the consultation paper has been provided to all members of this Committee under separate cover. A copy has also been placed in the Members' library for wider consideration or can be accessed directly from CLG website (www.communities.gov.uk).
- 2.3 As is usual, the consultation consists of a series of questions. These are reproduced in this report together with a suggested response for Members' consideration.

3 CONSULTATION

Questions and Draft Response

- Q1. **Does our proposal to prohibit a member who has been involved in a decision on the assessment of an allegation from reviewing any subsequent request to review that decision to take no action (but for such a member not to be prohibited necessarily from taking part in any subsequent determination hearing), provide an appropriate balance between the need to avoid conflicts of interest and ensure a proportionate approach? Would a requirement to perform the functions of initial assessment, review of a decision to take no action, and subsequent hearing, by sub-committees be workable?**
- A1. The 2007 Act requires different members to undertake the initial assessment and the review functions but not the actual hearing. However, a person complained against is likely to feel unfairly prejudiced if the same members conduct a hearing having previously considered the allegation, with no counter-evidence, and taken a decision that it appeared to show a breach of the Code of Conduct meriting investigation. It would therefore be preferable if

no member is involved in more than one stage of the process, whether the initial assessment, the review or the hearing.

A sub-committee, each with different membership, should undertake each separate stage. Unfortunately, this is likely to require an increase in the number of independent co-opted members of standards committees and has resource implications for local authorities.

Q2. Where an allegation is made to more than one standards committee, is it appropriate for decisions on which standards committee should deal with it to be a matter for agreement between standards committees? Do you agree that it is neither necessary nor desirable to provide for any adjudication role for the Standards Board?

A2. Given that the authorities concerned may have different Codes of Conduct or the circumstances may be more serious for one authority than another, it must be for individual authorities to decide whether the matter would be appropriate for joint treatment or not. If authorities cannot reach agreement, it would be best if the issues were considered separately rather than on adjudication through the Standards Board.

Q3. Are you content with our proposal that the timescale for making initial decisions should be a matter for guidance by the Standards Board, rather than for the imposition of a statutory time limit?

A3. It would be inappropriate to impose a statutory time limit for the initial assessment process and this is better dealt with by guidance. 20 working days seems an appropriate guideline time for this process although there may be exceptions and provision should be made for this.

Q4. Do you agree that the sort of circumstances we have identified would justify a standards committee being relieved of the obligation to provide a summary of the allegation at the time the initial assessment is made? Are there any other circumstances that you think would also justify the withholding of information? Do you agree that in a case where the summary has been withheld the obligation to provide it should arise at the point where the monitoring officer or ethical standards officer is of the view that a sufficient investigation has been undertaken?

A4. Arguably, the 2007 Act requires amendment since, on strict interpretation, the responsibility to provide prior notification to a member falls on the committee with no provision for delegation to an officer. For practical reasons this responsibility is likely to fall to the Monitoring Officer, otherwise decisions on notification would probably be resolved at the same meeting as the initial assessment. Therefore, if standards committees are to decide on issues of prior notification, it must be on the basis of very clear guidance from the Standards Board, which should also include guidance on the information to be contained in the summary of the allegation.

There may, in very rare cases, be instances where there is a risk of intimidation, or attempted intimidation, of witnesses. For this reason, in exceptional cases, notification might be deferred, though it would be hard to justify such deferral once those witnesses had been interviewed and had made written witness statements.

To ensure a fair hearing, the person complained of must have previously been supplied with a copy of the investigating officer's report, and it is standard practice for the member to have been asked to comment on a draft investigating officer's report. Indeed, it is hard to see how a comprehensive investigation can be undertaken without making enquiry of the member, which will reveal the fact of the allegation. Accordingly, there is no case for deferring such notification beyond, at the latest, the completion of any investigation.

Q5. Do you agree that circumstances should be prescribed, as we have proposed, in which the monitoring officer will refer a case back to the standards committee?

A5. A standards committee should have the ability to refer an allegation to the Monitoring Officer for action short of a formal investigation, for example to arrange training or mediation.

The 2007 Act makes no express provision for local resolution of allegations, and the Standards Board for England should issue guidance on how this may be achieved in appropriate cases. Not all cases are susceptible to local resolution, but given the cost of formal investigations and hearings, it clearly makes sense to seek amicable local resolution where possible. For example, where conduct may not have been appropriate but is not serious and the complainant would be satisfied with an apology. Where that is the case, the Monitoring Officer might be able to report to the committee at initial assessment stage and advise that the Member has apologised and that the complainant no longer wishes to proceed, in which case the Committee may feel able to decide that the allegation no longer merits investigation. However, this is a pragmatic solution outside the 2007 Act and it would be useful for the Standards Board to endorse such a role for Monitoring Officers.

The Monitoring Officer should be able to refer a matter back to the Standards Committee where circumstances have significantly altered since the decision to investigate was taken. However, this does not include the discovery of further potential misconduct which appears to require a further written complaint.

Q6. Are you in favour of an increase in the maximum sanction the standards committee can impose? If so, are you content that the maximum sanction should increase from three months to six months suspension or partial suspension from office?

A6. An increase in the maximum local sanction is required if more cases are to be handled locally. The proposal for a maximum 6 months' suspension at local

level is a modest increase and should be further increased to a maximum of 12 months' suspension.

Q7. Do you have any views on the practicability of requiring that the chairs of all sub-committees discharging the assessment, review and hearing functions should be independent, which is likely to mean that there would need to be at least three independent chairs for each standards committee? Would it be consistent with robust decision-making if one or more of the sub-committee chairs were not independent?

A7. The chairmen of all sub-committees involved in the determination process should be Independent Co-opted members. There is a much stronger argument for the independence of chairmen of sub-committees handling individual cases, than there is for the main Standards Committee, which has more responsibility for policy, resource and training issues.

Q8. Do you agree with our proposal that the initial assessment of misconduct allegations and any review of a standards committee's decision to take no action should be exempt from the rules on access to information?

A8. The initial assessment and review functions should be conducted without press and public access. The requirement to publish an agenda and report 5 clear days in advance of the meeting gives rise to prejudicial publicity on allegations that may have no substance and the process should be exempted from all access to information rules. The meeting to hear the case should still be publicised in the normal way together with an agenda that does not disclose the name of either complainant or Member.

In addition with regard to initial assessment, there is evidence that an authority may receive a number of allegations against a particular Member, each of which may not merit investigation, but which together indicate a serious course of conduct. For example, APE Decision No. 322 is an example of a number of minor events that, grouped together, were found to amount to serious bullying. The Regulations and Guidance should enable the Standards Committee to instruct that allegations are taken together and subject to a single investigation and if appropriate a single hearing.

Ethical Standards Officers' reports are confidential but there is no statutory confidentiality for Monitoring Officer reports. The opportunity should be taken to remedy this omission and bring local investigation reports into line with national reports.

Q9. Have we identified appropriate criteria for the Standards Board to consider when making decisions to suspend a standards committee's powers to make initial assessments? Are there any other relevant criteria that the Board ought to take into account?

A9. Yes, although it would be helpful if it were made clear that intervention might be only in respect of parts of the process, such as failure to undertake prompt initial assessments, rather than in respect of the whole functions.

Q10. **Would the imposition of a charging regime, to allow the Standards Board and local authorities to recover the costs incurred by them, be effective in principle in supporting the operation of the new locally-based ethical regime? If so, should the level of fees be left for the Board or authorities to set; or should it be prescribed by the Secretary of State or set at a level that does no more than recover costs?**

A10. The Department indicates that it does not intend to introduce a charging regime but it should note that the costs of investigations are reported to vary from £5,000 to £50,000.

Paragraphs 39-42 refer to recovering costs where an authority takes over the responsibilities of another authority because its functions have been suspended. It would be appropriate to charge the failing authority the actual cost of this work in such circumstances.

Q11. **Would you be interested in pursuing joint arrangements with other authorities? Do you have experience of joint working with other authorities and suggestions as to how it can be made to work effectively in practice? Do you think there is a need to limit the geographical area to be covered by a particular joint agreement and, if so, how should such a limitation be expressed? Do you agree that if a matter relating to a parish council is discussed by a joint committee, the requirement for a parish representative to be present should be satisfied if a representative from any parish in the joint committee's area attends?**

A11. Joint arrangements can be effective and the option to operate such arrangements is welcome. However, the initial impact on resources will arise from undertaking investigations and preparation of reports. Working to a joint committee could add to the administrative burden, at least while the new regime is bedded in.

There is a suggestion that it is much more likely that authorities will agree joint arrangements for initial assessments and reviews, but less likely for actual hearings. If this were so, it would seem to weaken the case for joint committees.

If joint committees develop so as to operate on behalf of a large number of authorities or a wide geographic area then arguably they may as well be based on counties and entirely independent of local authorities.

Under current arrangements there appears to be a need to include a parish member for the areas of each of the participating principal authorities in joint arrangements. This will result in joint sub-committees dominated by parish councillors.

Q12. Are you content that the range of sanctions available to case tribunals of the Adjudication Panel should be expanded, so the sanctions they can impose reflect those already available to standards committees?

A12. It is sensible that case tribunals should have the full range of sanctions available to standards committees. The same should apply to appeals tribunals.

It should be made clear that an appeals tribunal should not re-conduct a hearing and substitute its discretion for that of the standards committee, but should only overturn a decision or part of a decision of a standards committee where it is of the opinion that the decision was either outside the powers of the standards committee or was unreasonable and not because the appeals tribunal comes to a different value judgement.

Q13. Do you agree with our proposals for an ethical standards officer to be able to withdraw references to the Adjudication Panel in the circumstances described? Are there any other situations in which it might be appropriate for an ethical standards officer to withdraw a reference or an interim reference?

A13. The proposal to enable an Ethical Standards Officer to withdraw a case from the Adjudication Panel where there has been a material change in circumstance is reasonable.

Q14. Have you made decisions under the existing dispensation regulations, or have you felt inhibited from doing so? Do the concerns we have indicated on the current effect of these rules adequately reflect your views, or are there any further concerns you have on the way they operate? Are you content with our proposals to provide that dispensations may be granted in respect of a committee or the full council if the effect otherwise would be that a political party either lost a majority which it had previously held, or gained a majority it did not previously hold?

A14. This committee has granted a dispensation on only one occasion but has not felt inhibited by existing regulations although it may be that they have deterred potential applicants for dispensation.

Clarification of the rules is always helpful. However, there is a difficulty in that an individual member must make a request for a dispensation, but in that application, the member must evidence that more than half of the decision-making body are precluded from participating on the particular item.

Consideration needs to be given as to whether the dispensation must be limited to that number of members of the majority party necessary to re-establish a bare majority for the majority party, or should apply to all members of the majority party. A relaxation which enables only members of the majority party to vote where they have clear prejudicial interests is likely to give rise to considerable resentment among members of minority parties subject to similar

or lesser prejudicial interests, and accordingly, in such circumstances, all members with prejudicial interest should be given a dispensation irrespective of party.

However, it is likely that in many cases the particular members' participation in the decision may give rise to allegations of bias and/or predetermination. As the participation of these members is intended to alter the outcome of the committee's decision, the members with prejudicial interests are likely to be precluded from participating because their participation is likely to vitiate the decision of the Committee.

It should be noted that where authorities operate systems of "substitute members" on committees and sub-committees, a party group may withdraw a member with a prejudicial interest and substitute another member who is not subject to such a restriction, without recourse to dispensations.

Q15. Do you think it is necessary for the Secretary of State to make regulations under the Local Government and Housing Act 1989 to provide for authorities not required to have standards committees to establish committees to undertake functions with regard to the exemption of certain posts from political restrictions, or will the affected authorities make arrangements under section 101 of the Local Government Act 1972 instead? Are you aware of any authorities other than waste authorities which are not required to establish a standards committee under section 53(1) of the 2000 Act, but which are subject to the political restrictions provisions?

A15. S101 of the 1972 Act is unlikely to be available to Waste Authorities since the 2007 Act confers the power specifically on the standards committee of each authority. It would be more cost effective to provide a new Section 3A to apply to authorities without standards committees so as to confer the function on the authority rather than on such a standards committee?

Q16. Do you agree with our proposal to implement the reformed conduct regime on 1 April 2008 at the earliest?

A16. The proposed implementation date of 1 April 2008 leaves only one week for any issues raised in response to this consultation to be taken into account in the drafting of the statutory instruments, let alone consultation on the draft regulations and draft guidance. Further, as the proposed changes may require the recruitment of additional independent co-opted members, which many authorities undertake through a public advertisement and appointment procedure, authorities will not be in a position to undertake these new functions from 1 April. The earliest date for adoption should be after the local elections in May 2008.

The current consultation allows only 6 weeks for response, whereas the Code of Conduct on Consultations which has been adopted by the Government prescribes that consultation shall allow a minimum of 12 weeks for written

consultation at least once during the development of the policy. That commitment has clearly not been met by the Government in this case.

There is also a need to review the Code of Conduct itself, for example to deal with provisions in the 2007 Act that allow Ward Councillor decision-making and to give effect to the re-application of the Code to private life.

There is also a need for some tidying up of the Code, for example the mismatch between the Code, which applies to conduct that has resulted in a conviction and the Act, which refers to conduct that "would constitute a criminal offence" - leaving open the issues of the circumstances in which it would constitute a criminal offence and what burden of proof is to be applied.

Problems also arise from the limitation of "meetings" to formal meetings and uncertainty, for example, with the status of site visits.

No proposals for such changes have yet emerged for consultation. It would seem sensible to introduce changes to the Code at the same time as changes to the system for enforcing the Code. Accordingly, the proposed implementation date of 1 April 2008 now appears completely unrealistic.

4 RISK IMPLICATIONS

- 4.1 The Council needs to be aware of the requirements and timeframe for the Act to ensure its timely and appropriate implementation. There are reputational risks associated with this as well as resource risks.

5 RESOURCE IMPLICATIONS

- 5.1 Officer and committee time in considering and preparing a response to the consultation documents.

6 LEGAL IMPLICATIONS

- 6.1 The Council has a statutory duty to comply with the Act.

7 PARISH IMPLICATIONS

- 7.1 Members of Parish and Town Councils are also subject to the National Code of Conduct and proposed regulations.

8 RECOMMENDATION

It is proposed that the Committee **RESOLVES** to respond to the consultation as outlined in the report subject to member comment and amendment.

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Background Papers:-

None

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