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What follows Standards?

It's a Post-Code Lottery

Bob Neill MP, Communities Minister, has confirmed that the Decentralisation and Localism Bill will provide for the abolition of not just Standards for England, but of the Code of Conduct for Members and of Standards Committees (in England, but not in Wales where this is a devolved responsibility of the Welsh Assembly). Instead, he says, barring unlawful expenditure or criminality, it will be left to the electorate to remove errant Councillors.

The opportunity to remove Councillors would normally occur only once every 4 years at ordinary elections, and in 4 years an errant Councillor can do a lot of damage not just to his/her own Council, but to the reputation of local government in general. In recognition of this, the Government intends to introduce Electoral Recall as a mechanism to enable an errant Councillor to be removed mid-term. For Members of Parliament, a petition of 10% of electors will require a by-election, and it is intended that this principle should equally be applied to Councillors.

This proposal is heavily qualified by the Government's assertion that recall will only be available on evidence of serious misconduct. In the absence of a standards regime, that would mean a criminal conviction or a High Court finding of personal liability on audit challenge. By way of illustration, under these rules no MP would yet have been subject to recall over expenses claims because, some 15 months after the publication of MPs' expenses, no MP has yet been found guilty in a criminal court. For Councillors, electoral recall would be of little concern to the 50% of Parish Councillors who are not elected but appointed in the absence of sufficient candidates. As elections will continue to be contested primarily on party lines, electoral recall will be of little concern to the 75% of elected Councillors who face no effective opposition in their wards, provided only that they retain the endorsement of their political party. We await a definition of what might amount to "serious misconduct" but, since a custodial sentence of 3 months or more, even if suspended, already results in an automatic disqualification from public office for 5 years, it is hard to see what additional redress electoral recall would provide.

The evidence is that some Councillors have seriously misbehaved, and the probability is that some will continue to misbehave. Recent Adjudication Panel and First Tier Tribunal decisions detail Councillors who have been disqualified as a result of assaults on fellow Councillors, adult and child pornography on Council laptops, serial bullying of officers and fellow Councillors, deliberate breach of personal confidentiality, racial abuse, deliberate breach of Council procurement rules and deliberate misuse of position to vote on matters for personal advantage or out of malice. An individual Councillor's misconduct can bring a local authority to a halt, but it can do far more damage to the reputation of local government as a whole. So, what means will be available to Councils to cope with the serial offender?

For bullying of officers, the Court of Appeal in *R v Broadland District Council ex p Lashley (2000)* confirmed the right of an authority to take administrative measures to ensure that it could continue to discharge its functions effectively, in that case by the Chief Executive barring a Councillor from the offices and from direct contact with individual officers. It is not a power to punish, and cannot be exercised in a manner which prevents a Councillor acting as a Councillor.

Simply turning back the clock to before the Local Government Act 2000 would mean a return to the 1975 National Code of Conduct, breach of which could amount to maladministration. It would mean

a return to pecuniary and non-pecuniary interests, with a criminal offence of failure to declare and withdraw for a pecuniary interest. The 2000 Code of Conduct was, of course, intended to overcome the difficulties of interpreting what amounted to a pecuniary or non-pecuniary interest. It should also mean a return of surcharge, of personal liability for members and officers for losses caused to their authority by wilful misconduct, as surcharge was only repealed once the Code of Conduct was in place. There appears to be no intention on the part of Government to reinstate this previous regime, so what is proposed is not a return to before 2000, but rather a return to before 1834, when surcharge first appeared on the statute book.

In the absence of personal and prejudicial interests under the Code of Conduct, where a Councillor takes part in a decision despite actual or apparent bias, because of their outside connections, that decision may still be challenged on judicial review, but that leads to sanctions against the authority rather than the individual Councillor.

Councillors are also required to take reasoned and reasonable decisions based on the facts. So, where they take a decision on an issue before they have all the relevant facts, their decisions may be challenged for predetermination. The Courts have recently issued judgments which make it clear that predetermination requires more than merely an indication of broad support or opposition to a proposal, requiring a clear indication that the Councillor has closed his/her mind and is no longer open to have his/her opinion changed by the evidence [*R (Island Farm Development Ltd) v Bridgend CBC (2006)]*. However, despite this reasonable approach, the Government now proposes to amend the law of predetermination. The purpose is to enable a Councillor to implement election manifesto commitments without falling foul of predetermination. We await the specific wording of such an amendment, but it would be remarkable if a Councillor who had been elected on a "No Incinerator" manifesto could then ignore technical information available to him as the new Cabinet Member for the Environment and Waste, which information evidenced that an energy-from-waste incinerator was not only safe, but by far the most economic solution for the Council, and base his/her decision on ignorant prejudice.

So what personal liability will a Councillor have for his/her actions? Normally, a Councillor takes a decision not as a private individual but as a Councillor on behalf of the Council. Accordingly, it is the Council rather than the individual Councillor who incurs the liability resulting from what is in law a decision of the Council to enter a contract, buy land or grant planning permission. But the statutory immunity from personal liability, which the Councillor enjoys under Section 265 of the Public Health Act 1875, does not apply where the Councillor goes outside his/her powers as a Councillor (so acting as a private individual) or acts in bad faith, for personal gain or out of malice. A Councillor is treated as a trustee of Council assets, with a fiduciary duty to apply those assets in the public interest. Where a Councillor abuses that trust, for example by disposing of those assets for personal gain, as was the case when Dame Shirley Porter as Leader of Westminster City Council sold Council Houses at a discount to encourage Conservative voters to move into marginal wards, he/she can be held personally liable for the resulting loss – in that case amounting to £37million.

But the lesson of that episode is that it took 10 years to hold Dame Shirley Porter to account. It was a full 10 years after the Council Houses had been sold, only after the District Auditor had incurred huge costs in investigation and after very prolonged litigation reaching to the House of Lords, and after two 4-yearly Council elections, that Shirley Porter's personal liability was established. So, had electoral recall been available at the time, it would only have been 10 years after the misconduct that electoral recall would have been available. For all the faults of the Standards Board regime, at least it did not require a 10-year wait and massive legal costs to deal with the serious offenders who damaged their authorities and discredited local government.

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