

## SOUTH CAMBRIDGESHIRE DISTRICT COUNCIL

---

**REPORT TO:** Standards Committee

14 December 2011

**AUTHOR/S:** Monitoring Officer /Legal & Democratic Services Manager

---

### UPDATE ON LOCALISM ACT 2011

#### Purpose

1. To update the Committee on changes made to the ethical standards sections of the Localism Bill in the House of Lords before it received Royal Assent on 15 November 2011 and became the Localism Act 2011.
2. To outline potential changes for the Code of Conduct, the complaints handling framework and the Standards Committee itself.

#### Recommendations

3. It is **recommended** that this report be **NOTED**.
4. An extraordinary meeting of the Standards Committee is likely to be needed to enable the Committee to make recommendations to the meeting of Full Council on 23 February 2012, so that the new arrangements can be in force on 1 April 2012. If the Government's current timetable for implementation should change to allow for greater time for the new arrangements to be adopted then this meeting date can be vacated, allowing the business to be transacted at the next ordinary meeting of the Committee on 14 March 2012. Recommendations can then be made to the meeting of Full Council on 26 April 2012.
5. It is **recommended** that the Committee agree to **hold an extraordinary meeting of the Committee on Monday 6 February 2012 at 10am**.

#### Background

6. As members are aware, the Localism Act proposes to abolish Standards for England and replace the current standards regime with one which should result in shorter, cheaper and more proportionate investigations and less formal and time consuming hearings and procedures which are more proportionate to need.
7. The new provisions apply to all "relevant authorities" in England, including district, county, town and parish councils, as well as a number of other public bodies, e.g., fire and police authorities.
8. The Government, under pressure from a group of cross-party peers, brought forward extensive amendments very late in the day in the House of Lords and some amendments have therefore been drafted very quickly, which may lead to problems of interpretation and implementation.
9. The standards provisions which were in the Local Government Act 2000 will be repealed and replaced by sections 26 - 37 of and Schedule 4 to the Localism Act.

## Considerations

10. In summary, the Act proposes that:
- All authorities must promote and maintain high standards of conduct;
  - All authorities will be required to adopt a code of conduct;
  - The code must be consistent with the Nolan Principles of selflessness, integrity, objectivity, accountability, openness, honesty and leadership;
  - The code must include a requirement for members to register and disclose pecuniary and interests other than pecuniary interests;
  - The adoption, revision or replacement of the code must be publicised to bring it to the attention of persons living in the area;
  - Parish councils must have a code, but may adopt the district council's code as their own code;
  - Principal councils are to deal with allegations of breach in relation to parish councillors;
  - Local authorities will have to put in place a system to investigate allegations that members have breached the code (both district and parish members);
  - The current requirement to have standards committees is replaced by a requirement to have "arrangements" to deal with allegations;
  - Those arrangements must include provision for the appointment of at least one independent person whose views are to be sought and taken into account before making a decision about an allegation it had decided to investigate;
  - A person against whom a complaint is made may also seek the views of the independent person;
  - An independent member cannot be appointed unless the vacancy has been advertised, an application has been submitted and the appointment approved by the Council;
  - The Monitoring Officer must continue to maintain a Register of Interests for both district and parish councillors and it is for the Council to decide what should be entered on the Register;
  - The Register must be available for public inspection and published on the website (including parish registers);
  - A "Pecuniary Interest" is a "disclosable pecuniary interest" which will be described in Regulations;
  - The Head of Paid Service, in consultation with the Monitoring Officer, will deal with exemption applications relating to politically restricted posts.
11. In due course the Committee will need to make recommendations to Council in respect of the following:
- the adoption of a new code of conduct;
  - appropriate arrangements to deal with allegations of breach, investigations and determining allegations of breach;
  - the appointment of at least one independent person;
  - guidance on what is to be entered in the Register of Interests; and
  - training of district and parish councillors on the new procedures.

## Standards Committee

12. The provisions for the establishment of statutory Standards Committees (s.55 of the LGA2000) are omitted. Accordingly, if an authority decides to delegate any standards functions to a committee or sub-committee, that would be an ordinary committee or sub-committee established under s.102 of the LGA 1972. That means:

- (a) The new Independent Persons (see below) would not be able to be voting members unless the committee or sub-committee was merely advisory (i.e., recommending to Council);
- (b) Any such Standards Committee is now subject to the normal political proportionality rules;
- (c) Standards Committees would be subject to the same requirements on confidential and exempt information under ss.100A to K of, and Schedule 12A to, the LGA 1972 as any other Committee. This means that the initial assessment process is no longer automatically confidential;
- (d) Up until the very last minute, at 3<sup>rd</sup> Reading, the Government's intention was that parish councils should deal with allegations against their own members. However, in a last minute change the Government required district and unitary authorities to be responsible for having arrangements for investigating and determining allegations against parish councillors. No provision has been made for how this might be done in practice and the standards authorities have been given no powers to require parish councils or parish councillors to co-operate in this process.

### **Code of Conduct**

- 13. Each authority is required to adopt a Code of Conduct, which can only apply to members and co-opted members when acting in their capacity as a member or co-opted member. The General Principles and the Model Code are revoked, but an authority's Code must comply with seven principles, which are similar to the ten General Principles that we had before, and provide for the registration of "non-disclosable pecuniary interests" and "non-pecuniary interests". Otherwise, authorities are free to determine what they put in or leave out of a Code. Any decision to adopt or not to adopt a local Code must be taken at full Council.
- 14. The abolition of a Model Code means that different authorities may have very different Codes. A councillor who is a member of more than one authority could be subject to significantly different Codes, according to whether he/she is currently acting on this or that authority. In order to try and address this issue Monitoring Officers from across Cambridgeshire are meeting on 6<sup>th</sup> December with the aim of agreeing, if possible, that a standard code of conduct should be adopted across the county. An oral update on these discussions will be given by the Deputy Monitoring Officer at the meeting.

### **Preliminary draft of model code of conduct for members**

- 15. The Association of Council Secretaries and Solicitors (ACSeS) has produced a preliminary draft Code of Conduct Council. This was prepared *prior* to the last minute amendments to the Act and will be amended in due course to incorporate those changes. A copy of the draft is attached at **Appendix A** for information and comment.

### **Pre-determination**

- 16. The new statutory clause on predetermination comes into force on 15 January 2011. The effect of this is to make it clear that just because a Councillor has given a view on an issue, it does not automatically follow that the Councillor has a closed mind on the matter. As a result if a Councillor has campaigned on an issue or made public statements about their approach to an item of Council business, he or she will not necessarily be precluded from participating in the debate and voting.

## **Registers of members' interests**

17. The Monitoring Officer is required to establish a register of members' interests for each authority (i.e., also for parish councils within their area) and to define what interests must be registered. The content of any such register must be approved by full Council. It must contain "disclosable pecuniary interests" (which will be defined in regulations), but the drafting also provides that an authority's Code must require registration of 'interests other than pecuniary interests', for which no definition is provided. The lack of standard definition of such interests, and the degree of local discretion creates scope for considerable local variation, so that a councillor may be subject to very different requirements in different capacities.
18. The Monitoring Officer is responsible for ensuring that each authority's register of interests is kept within the principal authority's area (e.g., at the principal authority's offices). For parish councils, the district council's Monitoring Officer must ensure that every parish council's register is available for inspection within the principal authority's, rather than the parish council's area. Copies of both the District Council's Register of Interests and those of every parish council must be published on the District Council's website and, if the parish council has a website, the parish council must ensure that its own register is accessible on that website.
19. Every elected or co-opted member is required to notify the Monitoring Officer within 28 days of being elected or co-opted onto the authority of all current "disclosable pecuniary interests", and update the register within 28 days of being re-elected or re-appointed. However, there does not appear to be an express continuing duty to update the register due to a change of circumstances. The Secretary of State will prescribe by regulation what constitutes a "disclosable pecuniary interest", but it will cover the interests of the member, his / her spouse, civil partner or person with whom he / she lives as if they were spouses or civil partners, in so far as the member is aware of his / her partner's interests.
20. Failure to register any such interest, to do so within 28 days of election or co-option, or the provision of misleading information on registration without reasonable excuse will be criminal offences, potentially carrying a Scale 5 fine (£5000) and / or disqualification from being a councillor for up to five years. Prosecution is at the instigation of the Director of Public Prosecutions and it may be that Monitoring Officers will only seek to involve the Police when a member fails to respond when reminded of their obligations by the Monitoring Officer. Notably the provision under which a member who fails to make such registration automatically ceases to be a member is repealed and, once a member has made the initial registration, there is no requirement to update such registrations for changes of circumstances, such as the acquisition of development land, unless and until a relevant item of business arises at a meeting which the member attends.

## **Duty to disclose interests**

21. The requirement for disclosure of interests at meetings applies to the same range of "disclosable pecuniary interests" as the initial registration requirement, and only if the member is aware of the interest. It appears that members will be required to disclose just the interest, rather than the existence and nature of the interest, although the provisions on sensitive interests (below) imply that otherwise the member must disclose both existence and nature so this may be a drafting error.
22. Where the interest is already on the authority's register of interests, or is in the process of entry onto the register having been notified to the Monitoring Officer, the

member is under no obligation to disclose the interest at the meeting. Where it is an unregistered interest, the member is required both to disclose it at the meeting and to register it within 28 days of the meeting at which relevant business is considered.

23. The duty to disclose arises if the member attends the meeting, as opposed to the present code requirement to disclose before the start of consideration of the matter in which the member has an interest. This would appear to mean that the member cannot avoid the need to disclose merely by withdrawing during that part of the meeting when the particular item of business is considered. If he / she attends any part of the meeting and a relevant item of business is to be considered, he / she must make disclosure. Failure to disclose is made a criminal offence

### **Prohibition on participation**

24. The concept of a personal interest, which requires disclosure but not withdrawal, disappears. Instead, where the member has a disclosable pecuniary interest in any item of business at a meeting, or which he / she would deal with as a single executive member or ward councillor, if he / she has a disclosable pecuniary interest he/she is simply barred from participating in discussion or voting on the matter at the meeting, or (as a single member) taking any steps in respect of the matter.
25. The sole exception to this exclusion arises as a result of a dispensation (below), so that the right of a councillor to speak as a member of the public and then depart for the consideration of the matter under paragraph 12(2) of the current code appears to have been lost. There will no doubt be further debate about what constitutes "discussion of the matter". Participation in the "discussion of the matter", or taking steps in respect of the matter, in the face of these prohibitions is made a criminal offence.

### **Exclusion from the meeting**

26. The requirement for the member to withdraw from the meeting room is not set out on the face of the statute, but the statute provides that it may be dealt with in the authority's standing orders. This means that the sanction for a member who fails to withdraw as required in standing orders would be the standard provision enabling a meeting to vote to exclude a disruptive member.

### **Sensitive Interests**

27. The provision introduced in the last Code revision is re-enacted, enabling a member to ask the Monitoring Officer to exclude from the public register any details which, if disclosed, might lead to a threat of violence or intimidation to the member or any person in the member's household, and allowing the member merely to recite at the meeting that he / she has a disclosable pecuniary interest, rather than giving details of that interest.

### **Dispensations**

28. The current provisions on dispensations, allowing members with a prejudicial interest to get the consent of Standards Committee to participate despite the that interest, did not always work effectively, e.g., the first ground for a dispensation, that more than 50% of the members of the body were conflicted out, can be difficult to apply as members rarely knew how many members would be conflicted out in sufficient time to allow for convening Standards Committee. Now the grounds on which a dispensation may be granted are extended, and the power to grant a dispensation can be

delegated, for example to the Monitoring Officer, enabling dispensations to be granted at relatively short notice.

29. The original ground for granting a dispensation (above) remains, but now restricted to a circumstance where the number of members unable to participate would make the meeting inquorate. But now dispensations may also be granted if:
- it would be in the interests of persons living in the authority's area;
  - without dispensation the representation of different political groups on the Council would be so upset as to alter the likely outcome of any vote;
  - every member of the authority's executive is otherwise precluded from participating; or
  - the authority considers that it is otherwise appropriate to grant a dispensation.

### **Independent person(s)**

30. At the last moment, the Government amended the Act to require every principal authority to appoint one or more Independent Persons. Independent persons would be appointed by advertisement and application, and there are strict rules preventing a person from being appointed if they are a friend or relative to any member or officer of the authority, or of any Parish Council within the authority's area.

The functions of the Independent Person are as follows:

- They **must** be consulted before the authority takes a decision to investigate any allegation. So it would be possible to delegate this decision to the Monitoring Officer after consulting the Independent Person;
  - They **may** be consulted by a member of the authority against whom an allegation has been made, as well as by a parish councillor in similar circumstances. But, if they were consulted before the Monitoring Officer consulted them on a decision whether to investigate, it may affect their impartiality. If consulted by the member once the investigation had been completed, that would make it hard for them to play any impartial or moderating role on any decision as to whether the authority should take any action on the breach. As co-opted members, the Independent Person cannot exercise any decision-making functions.
  - They **may** be consulted by the principal authority in circumstances where the authority is not taking a decision whether to investigate the allegation. It may be sensible to allow the Independent Person to act as a moderator sitting alongside any Hearing Panel, but that would not be practicable if their impartiality had been prejudiced by previously being consulted by the member concerned.
31. An article discussing whether existing independent members of the Standards Committee would be eligible for the new role of "Independent person" is attached at **Appendix B**.

### **New arrangements for dealing with standards allegations**

32. After an authority adopts a Code, it is then under a duty to "have in place arrangements" to deal with complaints of breach of the Code. This must comprise arrangements for investigation of complaints and arrangements "under which decisions on allegations can be made". In the case of district and unitary authorities, this also applies to allegations in respect of parish councillors in their areas. The key differences from the previous regime are:

- The rigidity of the Assessment, Review and Hearing panel process is repealed, so that authorities have discretion to set their own procedures and to delegate more of the process. It would be possible for an authority to provide that the initial assessment and decision whether to investigate to be undertaken by the Monitoring Officer, perhaps after consultation with the Independent Person. There is no requirement for a review stage. The statutory requirement for a hearing disappears, and the Act speaks of the possibility of the authority finding that a member has broken the Code without even having held an investigation. However, there would be strong arguments that natural justice would demand that no decision on whether there had been a breach of code or as to any consequent action could be taken without giving the member an opportunity to be heard and to test the evidence. It may not be appropriate to delegate substantive decisions solely to the Monitoring Officer, and full Council would be inappropriate as a forum for conducting such a hearing, so it is likely that most authorities will still need a Standards Committee or for it to be incorporated within the role of Corporate Governance Panel, to undertake these functions at member level.
- The abolition of statutory Standards Committees means the removal of the exclusion of Assessment and Review Panels from public access to information provisions. As normal Section 101 Committees, they are now subject to the normal rules, so that their agenda and reports must be published five clear days before the meeting, and the meetings must be conducted in public unless there are over-riding reasons to the contrary.
- There is greater scope to enable the Monitoring Officer to seek local resolution of a complaint before a decision is taken as to whether the complaint merits investigation. This may enable the more minor or tit-for-tat complaints to be taken out of the system without the full process previously required.
- The Act gives no powers to undertake investigations or to conduct hearings. So there is no power to require access to documents or to require members or officers to attend interviews and no power to require the member to attend a hearing.
- The Act gives authorities no powers to take any action in respect of a breach of the local Code. Amendments which would have given authorities an express power to suspend a member from Committees for up to 6 months were never moved, and the Secretary of State suggested in debate that authorities could do so under existing powers. However, as it stands, such removal would require the consent of the member's group leader. Authorities have been given no powers to impose alternative sanctions, such as requiring an apology or training. Accordingly, other than naming and shaming the individual member, it is unclear whether the authority can take any action, beyond administrative actions to secure that it can continue to discharge its functions effectively per *R v Broadland DC ex p Lashley [2001] EWCA Civ 179*. This is more problematic in respect of parish councils, over whom the district or unitary council has no powers, and who are under no obligation to have regard to any findings of the district or unitary authority.
- As set out above, district and unitary authorities are now responsible for having arrangements for investigating and determining allegations against parish councillors; however, the Lords' amendments do not provide how this

might be done, and they did not give district and unitary authorities any powers to require parish councils or parish councillors to co-operate in this process.

33. Peter Keith-Lucas, of Bevan Brittan Solicitors, has drafted a set of model arrangements for the new standards regime which are attached for discussion at **Appendix C**.

### **Sanctions**

34. During the debate the following was said about sanctions:

*“In an investigation, where a complaint was dismissed, that would be the end of the matter. Where a complaint was upheld, a council would then have a number of options open to it under existing provisions. These are not there by amendment; they are existing provisions. In relatively minor cases, the council might conclude that a formal letter or other form of recording the matter was appropriate. Where a case involved a bigger breach of the rules, a council might conclude that formal censure—for example, through a motion on the floor of the council—was required. In more serious cases of misconduct, the council might go further and use its existing powers to remove the member from the committee or committees for a time. We believe that this approach provides effective and robust sanctions, ensuring that the high standards of conduct in public life can be maintained, while avoiding the unnecessary bureaucracy of the standards board regime.”*

35. There will be criminal sanctions if a Councillor:
- Fails to register pecuniary interests within 28 days of taking office;
  - Fails to declare pecuniary interests at meetings;
  - Fails to register pecuniary interests within 28 days of disclosure;
  - Participates in any discussion or votes on a matter in which the member has a pecuniary interest;
  - Makes an executive decision in which the member has a pecuniary interest.
- As outlined above these will be dealt with outside of the Standards regime by the Police and CPS, with offences punishable by a fine not exceeding £5,000. The court may also disqualify a councillor for a period not exceeding five years.
36. Potential non-criminal sanctions that could be applied as a sanction include the following:
- (a) Reporting its findings to Council [*or to the Parish Council*] for information;
  - (b) Recommending to the member’s Group Leader (or in the case of un-grouped members, recommend to Council or to Committees) that he/she be removed from any or all Committees or Sub-Committees of the Council;
  - (c) Recommending to the Leader of the Council that the member be removed from the Cabinet, or removed from particular Portfolio responsibilities;
  - (d) Instructing the Monitoring Officer to [*or recommend that the Parish Council*] arrange training for the member;
  - (e) Removing [*or recommend to the Parish Council that the member be removed*] from all outside appointments to which he/she has been appointed or nominated by the authority [*or by the Parish Council*];
  - (f) Withdrawing [*or recommend to the Parish Council that it withdraws*] facilities provided to the member by the Council, such as a computer, website and/or email and Internet access; or
  - (g) Excluding [*or recommend that the Parish Council exclude*] the member from the Council’s offices or other premises, with the exception of meeting rooms as necessary for attending Council, Committee and Sub-Committee meetings.



### **Implementation Date**

37. The Government continues to talk of 1 April 2012 as the implementation date. It remains to be seen if this allows adequate time for proper consultation and consideration of the regulations required to introduce the Register of Disclosable Pecuniary Interests. It may be that the beginning of the municipal year following elections will be a more appropriate commencement date.

### **Transitional provisions**

38. The Act makes provision for the Secretary of State to make transitional provisions by statutory instrument, providing that matters under investigation by Standards for England be transferred to the local authority. Earlier proposals suggested that authorities would have a period of two months to resolve all outstanding complaints, but with no power of suspension and no appeal.

**Background Papers:** the following background papers were used in the preparation of this report:

Localism Act 2011

**Contact officer:** Fiona McMillan – Legal & Democratic Services Officer & Deputy Monitoring Officer

**Telephone:** (01954) 713027