

TITLE OF REPORT: CHANGES TO THE STANDARDS REGIME

REPORT OF THE MONITORING OFFICER

1. SUMMARY

- 1.1 This report informs the Committee of the changes being introduced to the Standards Regime by the Localism Act and recommends next steps.

2. FORWARD PLAN

- 2.1 This matter is not a key decision and therefore is not included in the forward plan.

3. BACKGROUND

- 3.1 The Local Government Act 2000 introduced a framework relating to standards of members conduct. This included the adoption of a Members Code of Conduct and the creation of a statutory Standards Committee.
- 3.2 Complaints made under the Code of Conduct were passed to the Standards Board for England, the national regulatory body. Subsequently Regulations came into force on 8 May 2008 that required the Council's Standards Committee to take on the role of assessment of complaints locally. This resulted in Sub Committees to the Council's Standards Committee being established. The Standards Committee also adopted Local Assessment Criteria on 22 June 2009 to assist in its consideration of complaints made under the Code of Conduct.
- 3.3 The Localism Act ("The Act") introduces significant changes to the framework that is in place. It received royal assent on 15th November 2011.
- 3.4 In the House of Lords, the Government brought forward extensive amendments at both Report and Third Reading stages. There is commentary that those amendments show evidence of rapid drafting that is less well formulated than it could be, leaving problems of interpretation and implementation.
- 3.5 The 1 April 2012 is currently the expected implementation date for the Localism Act.

4. ISSUES

4.1 The Localism Act

- 4.1.1 The Localism Act will abolish the current Standards regime including Standards for England, statutory Standards Committees, the ten General Principles and the model Code of Conduct.

- 4.1.2 The First-tier Tribunal (Local Government Standards in England), was an independent judicial tribunal established as a disciplinary body to hear and determine references and appeals concerning the conduct of local authority councillors, it will lose its jurisdiction over the conduct of local authority members.
- 4.1.3 The existing regime will remain in place until a fixed date being the “appointed day”. After that date no new complaints can be made under the existing regime. Transitional arrangements have been outlined to confirm what should happen with any complaints that are outstanding on the appointed day. The transitional arrangements give two months to resolve outstanding complaints. This is something of a challenging timetable given experience to date of concluding complaints.
- 4.1.4 There will remain a statutory obligation on the Council/Monitoring Officer to promote high standards of conduct.

Code of Conduct

- 4.1.5 Each “relevant authority”, which includes District and Parish Councils must adopt, amend or replace a Code of Conduct dealing with conduct that is expected of members when they act in their capacity as a Member. An authority’s Code must be consistent with seven principles. Those are set out at Appendix 1 and compared against the current 10 General Principles for ease of reference. The Code must also provide for the registration of non-disclosable pecuniary interests and non-pecuniary interests.
- 4.1.6 Having adopted a Code, relevant authorities (other than Parish Councils) must have in place “arrangements” to deal with complaints of a breach of a Code. This must include:
- Arrangements under which allegations can be investigated, and
 - Arrangements under which decisions on allegations can be made
- 4.1.7 Any breach of the Code can only be dealt with under the approved Arrangements and decisions can be delegated to Committees, Sub Committees or Officers.
- 4.1.8 There is greater scope to enable a Monitoring Officer to effect informal local resolution of complaints before a decision is taken on whether to investigate.
- 4.1.9 If the authority finds failure to comply with the Code, it may have regard to that failure in deciding whether to take any action, and what action to take in relation to the member. However 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 already 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, and the new General Power of Competence (also introduced by the Localism Act) would not be applicable here. Accordingly, other than naming and shaming, it is unclear whether the authority can take any action, beyond administrative actions to secure that it can continue to discharge its functions effectively. It therefore remains that whilst an Authority will define standards of conduct in their local Code, and must consider and investigate breaches of the Code, an Authority will have no ability to impose sanctions or prevent a member continuing to act in exactly the same manner.

Standards Committees

4.1.10 Given that Standards Committees will no longer be statutory committees if NHDC wished to delegate any standards functions to a committee or sub-committee, that would be to an ordinary committee or subcommittee established under s.102 Local Government Act 1972.

4.1.11 This means that:

- The new Independent Person(s) (see below) and any co-opted members would not be able to vote unless the committee or sub-committee was merely advisory (i.e. recommending to Council);
- Any Committee will need to be chaired by an elected member unless the Committee is advisory only. This is because a chair must have a second and casting vote and the Independent Persons can not vote if the Committee has decision making power;
- The normal proportionality rules will apply;
- Standards Committees would be subject to the same requirements on confidential and exempt information under ss.100A to K of, and Sch.12A to, Local Government Act 1972 as any other Committee. This means that the initial assessment process is no longer confidential and there is no provision for a Hearing Panel to withdraw in order to deliberate. Normal Schedule 12A rules apply regarding the exclusion of the press and public;
- A District Council Standards Committee will have no jurisdiction over Parish Councils;
- Any Standards Committee will be need to be delegated all requisite matters by full Council.

Independent Person

4.1.12 Relevant Authorities (other than Parish Councils) must appoint at least one Independent Person ("IP"). They must be appointed by advertisement and application.

4.1.13 A person cannot be appointed as an IP if they have within the past five years been a co-opted voting member of a committee of the authority.

4.1.14 The functions of the IP are:

- To be consulted before the authority takes a decision to investigate any allegation.
- The IP may be consulted by a member of the authority against whom an allegation has been made. However if they were so consulted, it is hard to see how they could then participate impartially in the determination of that allegation. It is also hard to see what such consultation could achieve as the IP cannot exercise any decision making functions.
- The IP may be consulted by a parish councillor against whom an allegation has been made.
- The IP may be consulted by the principal authority in circumstances where the authority is not taking a decision whether to investigate the allegation.

4.1.15 An Independent Person can be paid allowances and expenses.

Register of Interests

- 4.1.16 The Monitoring Officer is required to establish a register of members' interests for each authority (to include parish councils within their area). The content of any such register must be approved by full Council, so the interests that must be registered must be defined.
- 4.1.17 It must contain "disclosable pecuniary interests" (which will be defined in regulations) but the Act also provides that an authority's Code must require registration of non-disclosable pecuniary interests and non-pecuniary interests, for which no definition is provided. So, it would appear that each authority must include in its Code provisions for the registration (and disclosure) of some non-disclosable pecuniary interests and some non-pecuniary interests, but has discretion as to how far it goes in defining such interests for this purpose.
- 4.1.18 The Register must be maintained at the principal authority's offices and on the authority's website. For parish councils, the 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. In addition, if the parish council has a website, the parish council must ensure that the register is accessible on that website.
- 4.1.19 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" of which they are aware, and update the register within 28 days of being re-elected or re-appointed. Regulations will prescribe what constitutes a "disclosable pecuniary interest". However, there is no ongoing or continuing duty to update the register due to a change of circumstances.
- 4.1.20 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 and/or disqualification from being a councillor for up to five years.
- 4.1.21 The requirement for disclosure of interests at meetings applies to the same range of "disclosable pecuniary interests" as the initial registration requirement, plus any non-disclosable pecuniary interests and non-pecuniary interests which the authority's Code requires to be disclosed. However, the duty to disclose only arises if the member is aware of the interest. There is only a requirement to disclose the interest rather than the "existence and nature" of the interest as is the case under the current regime.
- 4.1.22 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.
- 4.1.23 Failure to disclose a disclosable pecuniary interest at a meeting (that is not already disclosed on the Register or in the process of being registered) is also made a criminal offence (see para 4.1.20 above). Although where an interest is registered, or in the process of being registered, there is no requirement to disclose it to any meeting.
- 4.1.24 If a member has a disclosable pecuniary interest in such a matter, 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 other than referring it to someone else for determination. The sole exception to this exclusion arises as a result of a dispensation. Therefore the right of a councillor to speak as a member of the public and then depart for the consideration of the matter as currently exists, appears to have been removed. However, some interesting debate about what constitutes “discussion of the matter” is anticipated. Participation in the discussion of the matter, or taking steps in respect of the matter, in the face of these prohibitions is also made a criminal offence.

- 4.1.25 The current 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. Indeed, it is left open to authorities to make no provision for such members to withdraw.
- 4.1.26 The provision introduced in the 2008 Code revision is re-enacted, enabling a member to ask the Monitoring Officer to exclude from the public register any details of sensitive interests, which, if disclosed, might lead to a threat of violence or intimidation to the member or any person in the member’s household. This allows the member merely to recite at the meeting that he /she has a disclosable pecuniary interest, rather than giving details of that interest. The scope of sensitive interests is slightly extended, from the member and members of his/her household, to cover “any person connected with the member”.
- 4.1.27 There are provisions enabling dispensations to be granted. 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.

4.2 What else will remain in addition to the Localism Act?

4.2.1 Local Protocols

The Council has adopted a number of local protocols. These include:

- A Member and Officer Protocol that sets out the way in which members and officers will engage with each other.
- A Planning and Lobbying Protocol
- Councillors use of IT
- Gifts and Hospitality

It may be timely to review any that have not been recently reviewed.

4.2.2 Recourse to the Press/Ballot Box

The electorate has the power of the ballot box by which it can express concern about matters of conduct if it so wishes. There is also the ability for matters of discourse to be referred to the Press.

4.2.3 Criminal Law

There is existing criminal law that is/may be relevant.

- The Bribery Act 2010 came into force on 1 July 2011. The Act includes two general offences involving, firstly, the offering or paying of bribes (“active” bribery) and secondly, the request or receipt of bribes (“passive” bribery). The offences carry criminal penalties for individuals and organisations. The Council has an adopted Policy in relation to this approved by Council on 14 June 2011.
- Theft by false accounting.

- Misconduct in public office. This may be relevant if a public office holder acts in breach of the duties of their position. Generally any breach of the duties will have to be significant and serious.
- As referred to above, the Localism Act introduces a new criminal sanction for deliberate or wilful failure to register or declare a personal interest in a matter. However it is as yet unclear how effectively that will be enforced.
- A councillor using their position to support or influence a planning application for a project or venture in which they have a financial interest or otherwise using their position for self financial gain for any other reason, would be committing an offence under the Fraud Act 2006. Conviction under this Act carries a maximum penalty of 10 years imprisonment or an unlimited fine or both.
- There are a number of electoral offences specified in the Representation of the People Act 1983 and 1985, The Political Parties, Elections and Referendums Act 2000 and The Electoral Administration Act 2006.
- A councillor sentenced to a term of imprisonment of not less than 3 months is disqualified from office by virtue of Section 80 of the Local Government Act 1972.

4.2.4 Civil Liability

There is existing relevant civil law (both statutory and case law) that exists.

- Statutory Immunity (Section 265 Public Health Act 1875 amended by s39 Local Government Misc Provisions Act 1976):
The Council and all Councillors owe a fiduciary duty to apply Council assets in the public interest. Ordinarily a Member takes a decision as a Councillor not as a private individual, this means that a Member is not individually liable. The statutory immunity from personal liability does not apply to a Councillor who goes outside their powers and is therefore acting as a private individual, acts in bad faith, for personal gain or out of malice.
- Misfeasance in public office (actionable as a civil tort).
- Case law (Moore v Bude Stratton TC) held that the Council had liability for the conduct of its members in relation to a Council Officer alleging constructive dismissal.
- Defamation is the overall term which covers libel (written defamation) and slander (verbal defamation). Essentially defamation covers unjust attacks to reputation and a successful claim can recover damages and/or obtain an injunction preventing future publication of the same or similar statements. To prove defamation the statement must be defamatory, the victim must be identifiable from what is published and the allegations must have been published to at least one other individual.
- Equalities and discrimination law governs the right of individuals not be treated less favourably than others on grounds that include sex, race, religion, sexual orientation, age and disability. It also deals with the duty of public bodies to promote equality. Councillors may, of course, be specifically named as a party to proceedings by claimants in discrimination proceedings.

4.2.5 Power of Self regulation

The power of a Council to take action in order to regulate itself and enable it to carry out its functions was confirmed in a Court of Appeal case in 2001. (R v Broadland DC ex p Lashley). This is a power to take such administrative action as may be required to protect the interests of the Council and the people that it serves, it would need to be necessary in order to protect the Council's ability to continue to provide efficient and effective services to citizens or to protect its credibility. Therefore it would be more

appropriate if there is a risk of recurrence of a particular behaviour, that was current. A lengthy delay would not support the argument that action was necessary. Any action can not override the democratic election of a Member or their rights as a councillor. The options are:

- The Council could make a public statement of disapproval
- Prevent access to particular facilities otherwise provided by the Council
- Exclusion from Council Offices
- Limiting access to Officers
- Removal from representation on outside bodies
- Removal from positions of responsibility within the Council
- Exclusion from meetings within the discretion of the chair if there is disruption

The Council must act fairly in exercising this power of self regulation and any councillor affected would need to be offered the opportunity of a hearing. Powers of self regulation would rest with full Council unless this was delegated.

4.2.6 Impact on decision making

The Council and individual members must consider principles of good and fair decision making. Aside from considerations around the Code of Conduct, there have always been additional considerations regarding the potential for bias or predetermination in relation to a decision. Case law makes clear that a predisposition to a particular outcome is permissible, however predetermination (akin to a closed mind) is inappropriate and could lead to a Council decision being challenged by way of judicial review. It had been indicated that the Localism Act would serve to clarify some of the lack of clarity that has developed as a result of case law, however it is currently unclear the extent to which the detailed legal drafting contained within the Act does actually give effect to this stated intention. Further case law testing the new legislation may be required to assist with clarification.

4.2.7 Ombudsman

The Local Government Ombudsman will continue to exist. It considers maladministration which is not currently defined in law but the Local Government Ombudsman currently defines its' mandate as follows: *"We can consider complaints about things that have gone wrong in the way a service has been given or the way a decision has been made, if this has caused problems for you"*. Individual or collective actions or failings of councillors may amount to maladministration. Conventionally the Ombudsman will not deal with a complaint where there are other avenues for a complainant.

4.2.8 Members may wish to consider what role group and party discipline could have in ensuring good conduct amongst elected Members

4.3 Remaining uncertainties

4.3.1 Parish Councils will be under the same duty as the District Council to promote and maintain high standards of conduct. The Monitoring Officer currently provides statutory support and assistance to Parish Councils and it remains unclear what level of statutory support and assistance the Council's Monitoring Officer should provide to Parish Councils regarding conduct and standards issues in the future beyond receiving and dealing with complaints.

- 4.3.2 The abolition of the Model Code means that different authorities may have very different Codes of Conduct. A councillor who is a member of more than one authority is likely to be subject to different Codes, according to whether he/she is currently acting on this or that authority, and different members of the same joint committee are similarly going to be subject to the varied Codes of their parent authorities.
- 4.3.3 There is no provision for a statutory Model Code or for statutory guidance on what a Code might contain. An authority could decide to adopt a slightly revised version of paragraphs 3-7 of the existing Code of Conduct (See Appendix 2). Alternatively the Association of Council Secretaries and Solicitors (ACSeS) who are the professional association for managers in legal and corporate governance, have been working on the creation of a Model Code of Conduct. That was discussed at the ACSeS Conference on 16th November 2011 and is to be amended and a revised draft produced by the end of November 2011. It is currently unclear whether the Local Government Association/NALC will look to work with this to create a non-statutory national standard model Code.
- 4.3.4 There remain a number of general uncertainties, regarding interpretation of the legislation and timescales for the implementation of the secondary legislation.

4.4 Matters to consider

- 4.4.1 The Committee is asked to consider and resolve comments on the following matters:
- 4.4.2 Local Codes
- How are we going to adopt a new Code? For example, do we want Standards Committee to recommend to Council?
 - Does the Committee wish to improve on Paragraphs 3-7 of the Model Code?
 - If so, could the ACSeS draft Code be appropriate?
- 4.4.3 Withdrawal from meetings
- Should the Standards Committee recommend a new Standing Order to Council for approval?
 - Should members withdraw for Disclosable Pecuniary Interests, or all Pecuniary Interests?
 - Should withdrawal preclude the member from sitting in the public gallery for that item of business?
- 4.4.4 Independent Persons
- What role do we expect Independent Persons to play?
 - How many Independent Persons do we need?
 - Should the Independent Persons be co-opted as non-voting members of a new Standards Committee?
 - What allowances should the Independent Persons receive?
- 4.4.5 Standards Committee
- Do we need a Standards Committee?
 - Who should it comprise? Particularly, should it include co-opted Independent Persons and/or parish council representatives?
 - Should it actually be a Joint Standards Committee with the parish councils?

4.4.6 Allegations

- Who should be the recipient of allegations of misconduct? The Monitoring Officer or the Independent Person?
- Do we need a formal investigation where there is clear evidence of misconduct?
- Who should take the decision whether an allegation merits investigation?
 - Council?
 - Standards Committee?
 - A Sub-Committee of Standards Committee?
 - The Monitoring Officer (perhaps after consultation with the Independent Person and/or the Chair of Standards Committee)
- Who should arrange the investigation?

4.4.7 “Arrangements”

- Do we need to hold a hearing where there is evidence of misconduct?
- Where an investigation finds evidence of misconduct, should the matter go direct to a hearing?
- Should any hearing be conducted by:
 - Council
 - Standards Committee
 - A Hearings Panel
- Should the results of hearings be reported for information or approval to:
 - Council
 - Standards Committee
- What sanctions should the hearing be able to impose?

4.4.8 Dispensations

- Who should receive requests for dispensations?
- Who should have power to grant dispensations?
 - Council
 - Standards Committee
 - A Dispensations Panel
 - The Monitoring Officer (perhaps after consultation with the Independent Person and/or Chair of Standards Committee)
- Should the member have an appeal if his/her application for a dispensation is refused?

4.4.9 What role should party groups have in standards?

4.4.10 How can we secure the co-operation of the Police and parish councils?

5. LEGAL IMPLICATIONS

5.1 Section 37 Local Government Act 2000 requires the Council to have in place a constitution and to keep that constitution under review. This Report concerns constitutional amendments in the form of changes to the local standards framework and are matters for full Council to consider and decide.

5.2 This Report is presented to the Standards Committee in accordance with their Terms of Reference.

5.3 Section 27 of the Localism Act states that there remains a duty on the Council/Monitoring Officer to promote high standards of conduct.

- 5.4 The Relevant Authorities (General Principles) Order 2001, which sets out the principles which govern the conduct of members and co-opted members of relevant authorities in England and police authorities in Wales, will be revoked as will the Local Authorities (Model Code of Conduct) Order 2007 (S.I 2007/1159) which prescribes the model code of conduct to apply to members of relevant authorities.
- 5.5 Section 102(3) and (4) of the Local Government Act 1972 enables an authority to appoint co-opted members to a new Standards Committee, but Section 13 of the Local Government and Housing Act 1989 would mean that any such co-opted Members were non-voting, unless the Standards Committee was merely advisory, i.e. that it made recommendations to Council.
- 5.6 The legal implications are otherwise contained throughout the Report.

6. FINANCIAL AND RISK IMPLICATIONS

- 6.1 None arising from this report.

7. HUMAN RESOURCE AND EQUALITIES IMPLICATIONS

- 7.1 None arising from this report.

8. CONSULTATION WITH EXTERNAL ORGANISATIONS AND WARD MEMBERS

- 8.1 None arising from this report.

9. RECOMMENDATIONS

- 9.1 That the Committee:

9.1.1 Note the content of the Report

9.1.2 Provide to the Monitoring Officer comment on the Report generally

9.1.3 Provide to the Monitoring Officer detailed comment on the matters outlined at paragraph 4.4 above.

10. REASONS FOR RECOMMENDATIONS

To ensure the Council meets its statutory obligations and continues to improve its working practices

11. ALTERNATIVE OPTIONS CONSIDERED

None.

12. APPENDICES

Appendix 1: New Seven Principles compared against the old 10 General Principles.

Appendix 2: Extracted paragraphs 3-7 (renumbered) from the existing Code of Conduct

13. CONTACT OFFICERS

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14. BACKGROUND PAPERS

None.

Appendix 1: Localism Act (comparison of new and old Code of Conduct Principles)

The General Principles (From the Relevant Authorities (General Principles) Order 2001	The New Principles from the Localism Act clause 28(1)
Selflessness	Selflessness
Honesty and Integrity	Integrity
	Honesty
Objectivity	Objectivity
Accountability	Accountability
Openness	Openness
Leadership.	Leadership.
Personal Judgment	
Respect for others	
Duty to uphold the law	
Stewardship	

Appendix 2

Extracted paragraphs 3-7 (renumbered) from the existing Code of Conduct

General obligations

1.1 You must treat others with respect.

1.2 You must not –

- (a) do anything which may cause your authority to breach any of the equality enactments (as defined in section 33 of the Equality Act 2006
- (b) bully any person
- (c) intimidate or attempt to intimidate any person who is or is likely to be
 - (i) a complainant
 - (ii) a witness, or
 - (iii) involved in the administration of any investigation or proceedings, in relation to an allegation that a member (including yourself) has failed to comply with his or her authority's code of conduct; or
- (d) do anything which compromises or is likely to compromise the impartiality of those who work for, or on behalf of, your authority.

2. You must not –

- (a) disclose information given to you in confidence by anyone or information acquired by you which you believe, or ought reasonably to be aware, is of a confidential nature, except where –
 - (i) you have the consent of a person authorised to give it;
 - (ii) you are required by law to do so;
 - (iii) the disclosure is made to a third party for the purpose of obtaining professional advice provided that the third party agrees not to disclose the information to any other person; or
 - (iii) the disclosure is –
 - (aa) reasonable and in the public interest; and
 - (bb) made in good faith and in compliance with the reasonable requirements of the authority; or
- (b) prevent another person from gaining access to information to which that person is entitled by law.

3. You must not conduct yourself in a manner which could reasonably .be regarded as bringing your office or authority into disrepute.

4. You –

- (a) must not use or attempt to use your position as a member improperly to confer on or secure for yourself or any other person, an advantage or disadvantage; and
- (b) must, when using or authorising the use by others of the resources of your authority –
 - (i) act in accordance with your authority's reasonable requirements;
 - (ii) ensure that such resources are not used improperly for political purposes (including party political purposes); and
- (c) must have regard to any applicable Local Authority Code of Publicity made under the Local Government Act 1986(a)

5.1 When reaching decisions on any matter you must have regard to any relevant advice provided to you by –

- (a) your authority's Chief Finance Officer; or
- (b) your authority's Monitoring Officer,

Where that officer is acting pursuant to his or her statutory duties.

5.2 You must give reasons for all decisions in accordance with any statutory requirements and any reasonable additional requirements imposed by your authority.