

TITLE OF REPORT: REVIEW OF CHANGES TO THE STANDARDS REGIME IN 2012

REPORT OF THE MONITORING OFFICER

1. SUMMARY

- 1.1 The Localism Act required the Council to make a number of changes to its standards regime in 2012, which were implemented following decisions of Full Council on 17 May and 12 July 2012. Given the extent of the changes being made (and the timescales required to be met) it was suggested by the Monitoring Officer that the changes be reviewed after a period of time to ensure that they had achieved what was intended.

2. RECOMMENDATIONS

- 2.1 That the Standards Committee note the content of the report.
- 2.2 That the Committee request that the Monitoring Officer review and amend the Member Code of Conduct, as set out at paragraph 8.4, for consideration at a future meeting of the Committee.
- 2.3 That the Standards Committee comment on the role of the Independent Person.

3. REASONS FOR RECOMMENDATIONS

- 3.1 To ensure the Council meets its statutory obligations and continues to improve its working practices in order to ensure good governance within the Council.

4. ALTERNATIVE OPTIONS CONSIDERED

- 4.1 None.

5. CONSULTATION WITH EXTERNAL ORGANISATIONS AND WARD MEMBERS

- 5.1 None, although clerks of the parish councils will receive copies of this report.

6. FORWARD PLAN

- 6.1 This report does not contain matters referred to in the Forward Plan.

7. BACKGROUND

- 7.1 The Localism Act 2011 required the Council to make a number of changes to its standards regime, including:-
- Adoption of a Code of Conduct (the old model code having been revoked)
 - Adoption of arrangements for dealing with complaints (the previous required approach having been revoked)
 - Appointment of an independent person
 - Registration of Member interests
 - Member participation in meetings when an interest is declared

- 7.2 The Localism Act also required Parish Councils to change their approach and the District Council is required to have systems in place to investigate and make decisions on any complaints against parish councillors.
- 7.3 Section 25 of the Localism Act also sought to clarify pre-determination and how decision makers can act prior to making decisions.
- 7.4 The new systems have been in place for seven months and it is considered an appropriate time to review the approach the Council chose to adopt. It is worth noting the recent criticisms of the new standards regime within the 14th report from the Committee on Standards in Public Life. The most damning quote in respect of local government standards is *"The new, slimmed down arrangements have yet to prove themselves sufficient for their purpose. We have considerable doubt that they will succeed in doing so and intend to monitor the situation closely"*. On 24 January 2013 the President of ACSeS (a professional association for Monitoring Officers) wrote an open letter to Brandon Lewis MP in which he stated *"ACSeS has raised with your department a number of issues concerning interpretation of the standards provisions where the drafting has given rise to doubt and ambiguity. However, we have not received a response which has the benefit of apparent legal input. In the absence of certainty from the legislation, some authorities have properly and reasonably sought external legal advice. As you will appreciate, the wording of the Act and relevant Regulations does not always lend itself to the particular interpretation that Ministers might desire."*
- 7.5 The terms of reference of the Standards Committee, attached at Appendix A, set out that the responsibilities of the committee include "To receive reports from the Monitoring Officer and assess the operation and effectiveness of the Members' Code of Conduct".

8. ISSUES

Member Code of Conduct

- 8.1 The Council adopted its Code of Conduct on 12 July 2012, attached at Appendix B. The report to Council noted that there was no consistency locally as to the approaches followed (which is of course fully compliant with the spirit of the legislation on this point) and that some of the codes promoted by national bodies were considered to be very difficult to enforce. It was therefore recommended, and Council chose to adopt, a Code of Conduct which was a revised version of the former model code of conduct. This was fully compliant with the legislation which states at section 28(5)(a) Localism Act "A relevant authority may – revise its existing code of conduct".
- 8.2 The Code of Conduct has not been 'tested' from the point of view of dealing with a formal complaint, but has been used to provide advice particularly in respect of Member interests. Working with the Code of Conduct has identified areas which could be improved (see paragraph 8.4 below).
- 8.3 In preparing for this Committee the Monitoring Officer has looked at the Codes of Conduct adopted by two authorities locally which follow the drafts promoted by the LGA and DCLG and the issue identified in July 2012 of difficulty to enforce remain. They also lack clarity generally which does not assist Members, officers, or the public in understanding the requirements. Authorities in Essex all adopted the same Code of Conduct, drafted by the Public Law Partnership collaboration of Essex, Hertfordshire and Sussex legal teams. This Code of Conduct was the subject of a critical letter dated 19 November 2012 from DCLG which suggested that the approach adopted was

incorrect as it was too close to the previous standards regime and that the Councils should adopt a different approach.

8.4 It is considered that the Council chose the correct approach with its Code of Conduct, however upon reviewing there are areas where improvements could be made whilst maintaining the current approach:-

- The pre-amble needs to be updated as the Committee on Standards in Public Life has recently updated their definitions of the principles of conduct. Consideration could be given to moving the pre-amble into part of Part 1 of the Code.
- Part 1 (the general obligations) could be better worded whilst retaining similar principles.
- Part 2 (Member's interests) would benefit from being clearer and simplified. Ideas include moving the list of Disclosable Pecuniary Interests into an appendix to the document; bringing together the Other Pecuniary and Non-Pecuniary into one single category; simplify the effect of interests on participation including relaxing the current interpretation that where there is a DPI the member cannot be present for any of the item (including initial speeches prior to debate).
- Tie in explicit references to other policies which govern Member conduct, including the Gifts and Hospitality Policy and Member/Officer Working Protocol.
- Generally seek to simplify, shorten and make less legalistic.

Arrangements for dealing with complaints

8.5 As stated at paragraph 8.2 above, no formal complaints have been received and therefore the new arrangements have not been used. The arrangements adopted by Council in 2012 seem reasonable and proportionate and therefore no amendments are proposed at this time.

8.6 Council on 12 July 2012 delegated to the Monitoring Officer, in consultation with the Independent Person, authority to make minor amendments to the Complaints Procedure Arrangements. There is therefore already a process to review the Arrangements as complaints are received and processed to ensure they are working as intended. It may be necessary to make minor amendments as a consequence. Any major amendments identified will be referred back to Council for approval.

8.7 The Council decided that there should be Parish Council input into the Standards Committee and on 24 January 2013 Council confirmed the appointments of Councillor William Peter Long (Ashwell Parish Council) and Councillor Robert Logan (Great Ashby Community Council) as non-voting co-optees of the Standards Committee.

Role of Independent Person

8.8 The Council appointed an Independent Person and a Reserve Independent Person. As no complaints have been received the IP role has not been used for its main purpose as set out in the legislation. Attached at Appendix C is the role description for the IP. Standards Committee is asked to consider and provide views on how proactive a role the IP could take, for example in seeking to head off complaints before they are received (something the Monitoring Officer currently does) or whether it should be a more reactive role (ie being consulted when complaints are received, as required by the legislation).

Registration of Member Interests

- 8.9 Section 29 of the Localism Act requires the Monitoring Officer to maintain a register of interests for members and publish it on the website. Section 30 requires members to register their interests within 28 days of taking office or they potentially commit a criminal offence. Given timing of the legislation and that members are elected by thirds, the Council's Code of Conduct required members to register their interests within 28 days of adoption of the Code of Conduct (the NALC model code for parishes requires the same). The Register of Interests adopted by the Council only requires members to register what they are required to by legislation, there are no additional interests that have to be included on the register as some Councils have chosen to do.
- 8.10 It has taken a significant amount of time and effort to get all Councillors (district and parish, a total of approximately 270) to complete and return their Registers of Interest. Although strictly a breach of the code of conduct if the form was not returned within 28 days it was decided not to enforce this point, but rather to adopt an approach of encouraging and assisting members to return their forms. The final District Councillor returned their form in mid-December 2012 (ie 4 months after the deadline for returning). The final Parish Councillor forms were returned in mid-February 2013 (ie 6 months after deadline for returning).
- 8.11 If Members take this long to return the forms in future (after they are elected or re-elected) they will potentially be committing a criminal offence. This might focus minds, but consideration will also need to be given as to how this process is undertaken. Whilst in future we should not have a repeat of all Councillors having to complete their forms at the same time (and therefore the size of the task will be smaller), Members should be aware of the significant amount of time that the failure to complete the forms has placed on the Monitoring Officer Technical Support role in having to chase Members to comply.
- 8.12 Members are also reminded of the need to keep their Register of Interest updated should there be any changes in circumstances.
- 8.13 The contents of the Register of Interest forms were compiled onto a spreadsheet (one for District and one for Parish) which was then uploaded on the Council's website as a pdf document.

Parish Councils

- 8.14 Attached at Appendix D is a table setting out the Code of Conduct which has been adopted by each Parish Council. The vast majority have all adopted the Code promoted by the National Association of Local Councils, which from the point of view of enforcement (a District Council function) will make consideration of complaints easier.

Pre-determination

- 8.15 The issue that has attracted the most attention, certainly recently, is that of pre-determination (or perception of pre-determination). Section 25 of the Localism Act is set out in full at Appendix E. The explanatory notes that accompanied the legislation set out the intention behind this part of the legislation:-

"Section 25 clarifies how the common law concept of "predetermination" applies to councillors in England and Wales. Predetermination occurs where someone has a closed mind, with the effect that they are unable to apply their judgment fully and properly to an issue requiring a decision. Decisions made by councillors later judged to have predetermined views have been quashed. The section makes it clear that if a

councillor has given a view on an issue, this does not show that the councillor has a closed mind on that issue, so that that 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 be able to participate in discussion of that issue in the council and to vote on it if it arises in an item of council business requiring a decision.”

- 8.16 There has been a great deal of discussion amongst local government lawyers as to how section 25 should be applied. What is clear from those discussions is that the way section 25 has been drafted (particularly the use of “indicated” and “just because”) does leave open that there are matters which could still be considered to be predetermination, which does not seem to meet the Government’s intentions. One such detailed consideration has been carried out by Pannone Solicitors (see http://www.pannone.com/_data/assets/pdf_file/0020/91622/Predetermination-following-the-Localism-Act-2011.pdf). Two paragraphs in particular show the difficulty that the Council will face at times:-

“72. Clearly, the precise legal meaning of section 25(2) will have to await judicial interpretation which will no doubt appear following a challenge by someone (probably a commercial organisation) having the resources to test the measure in a particular situation where an authority has made a decision to that person’s disadvantage.”

“89. However, whilst council members should certainly not be inhibited from vigorously fulfilling their political, democratic and representative role, they must equally be careful to take decisions properly and be seen to do so. Over cautious behaviour in this context by advisors and otherwise is unnecessary and inappropriate. But equally inappropriate is incautious (or rash) member behaviour which may reasonably give the impression that the member has already firmly decided an issue which falls yet to be determined. As in all situations, context is important. Quasi-judicial forums, such as licensing, need significantly more care than do more political forums where a range of different views may be expected. In any event, whatever the predisposition, a member should go into a decision meeting with an open mind, prepared to listen to argument and having careful and appropriate regard to the material provided concerning the proposed decision.”

- 8.17 There is also doubt about whether section 25 has actually changed the approach that the Courts had reached. The Court of Appeal case of R (Island Farm Development Ltd) v Bridgend CBC considered the issue and stated:-

“Councillors will inevitably be bound to have views on and may well have expressed them about issues of public interest locally. It would be quite impossible for decisions to be made by the elected members whom the law required to make them if their observations could disqualify them because it might appear that they had formed a view in advance. Whatever their views, they must approach their decision-making with an open mind in the sense that they must have regard to all material considerations and must be prepared to change their views if persuaded that they should”.

- 8.17 The consequences of a Member pre-determining a decision is that it provides a potential ground of legal challenge to that decision, by way of judicial review. This could result in a decision being quashed and the Council facing a bill for legal costs. It should also be noted that if a Member has taken part in the decision contrary to the advice of a statutory officer then they could lose their immunity from personal liability if that decision is overturned.

- 8.18 It will therefore be necessary to look at issues on a case by case basis. Factors that are considered include:-

- What the member has said/done (or is planning to say/do)
- Who the decision maker is
- What the decision is likely to be
- Whether there is likely to be a legal challenge to the decision
- Who is likely to be able to challenge the decision
- What the consequences of a successful challenge would be

It should also be noted that on the same issue different advice could be issued to different members, for example if one has gone much further than another with their actions. The overriding responsibility that local authorities must take reasonable decisions after consideration of all material factors has not changed.

9. LEGAL IMPLICATIONS

- 9.1 The terms of reference of the Standards Committee are attached at Appendix A. The Localism Act set out various requirements that Councils must meet in order to promote and maintain high standards of conduct by members. Where relevant these are referenced within the body of the report.

10. FINANCIAL IMPLICATIONS

- 10.1 There are no implications for revenue or capital costs within the report.

11. RISK IMPLICATIONS

- 11.1 Appropriate policy frameworks help to ensure good governance of the Council and therefore reduce risk of poor practice or unsafe decision making. The Council needs to ensure it complies with its statutory obligations as set out in the Localism Act 2011.

12. EQUALITIES IMPLICATIONS

- 12.1 The Equality Act 2010 came into force on the 1st October 2010, a major piece of legislation. The Act also created a new Public Sector Equality Duty, which came into force on the 5th April 2011. There is a General duty, described in 7.2, that public bodies must meet, underpinned by more specific duties which are designed to help meet them.
- 12.2 In line with the Public Sector Equality Duty, public bodies must, in the exercise of their functions, give due regard to the need to eliminate discrimination, harassment, victimisation, to advance equality of opportunity and foster good relations between those who share a protected characteristic and those who do not. There are no direct equalities implications arising from this report.

13. SOCIAL VALUE IMPLICATIONS

- 13.1 None.

14. HUMAN RESOURCE IMPLICATIONS

- 14.1 None. The work outlined within the report is within the Monitoring Officer's workstream.

15. APPENDICES

- 15.1 Appendix A – Terms of Reference of Standards Committee.

Appendix B - Member Code of Conduct.

Appendix C – Role of Independent Person.

Appendix D – Codes of Conduct adopted by Parish Councils.

Appendix E – s.25 Localism Act 2011.

16. CONTACT OFFICERS

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17. BACKGROUND PAPERS

17.1 None.

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