

ST 35
FOR DECISION
WARD(S): ALL

STANDARDS COMMITTEE

17 May 2004

LOCAL INVESTIGATION AND DETERMINATION OF COMPLAINTS – RESPONSE TO CONSULTATION PAPERS

REPORT OF CITY SECRETARY AND SOLICITOR

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RECENT REFERENCES:

ST33 – Local Authorities (Code of Conduct) Regulations 2003 – 22 September 2003

EXECUTIVE SUMMARY:

The Office of the Deputy Prime Minister and the Standards Board have produced consultation papers on proposed regulations and statutory guidance. The purpose is to introduce a scheme whereby ethical standards officers may refer allegations of misconduct by Members for local investigation by Monitoring Officers. The Monitoring Officer would then refer the matter to the local Standards Committee for determination.

Currently all investigations are undertaken by the ethical standards officers (ESOs) employed by the Standards Board.

The proposals would allow more matters to be dealt with locally – although complaints would be still made initially through the Board.

The proposals are complementary to regulations and guidance made last year (Report ST33 refers), which enabled some more routine complaints to be referred to local Standards Committees for determination after an investigation undertaken by an ESO. To date no such referrals have been made in the Winchester District.

The report outlines the principal points arising in the consultation and suggests possible responses, which need to be forwarded to the ODPM and Standards Board by 18 May.

RECOMMENDATION:

That Members consider the proposed responses as set out in the report and determine the responses to be made to the Consultation papers.

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DETAIL:

1 Introduction

1.1 The Consultation Paper on the draft Regulations has been prepared by the ODPM. The Standards Board has produced the Consultation Paper on the draft statutory guidance. Both documents are complementary to each other and highlight some key points on which responses are requested. These are set out below.

2. The Standards Board Draft Guidance

2.1 The Draft Guidance is set out in Annex A. Responses have been requested on the following points:

- (a) Page 4 – Are the circumstances that an ESO will consider when deciding whether to refer an allegation for local investigation reasonable? Are there other factors which they should consider?

Proposed Response: The suggested criteria are reasonable. However, regard should also be given to the resources available to the Monitoring Officer to undertake the investigation, particularly in smaller authorities with a large number of parish councils. The Board has faced major difficulties with the number of complaints it has received in relation to the resources available to it. This problem should not simply be transferred to local authorities. The number and type of other cases already referred by the Board should be taken into account. Although Monitoring Officers will be able to obtain some assistance from other authorities, their own senior staff or outside consultants, the ability to make use of such additional resources will be limited. The Monitoring Officer role is normally only one aspect of a senior officer's job. Funding will also be an issue.

Another relevant factor will be potential conflict of interest. Monitoring Officers often view their primary role as being to give advice to Members at an early stage to avoid potential problems arising. Such involvement may be perceived by a complainant as "tainting" a subsequent investigation – even if the Monitoring Officer makes arrangements for someone else to undertake the investigation, and a third person to advise the Committee. The Monitoring Officer will still be required to co-ordinate activities, even if particular tasks are given to others.

Another question which should be asked is – are there any reasons for concern as to whether the matter could be dealt with fairly at a local hearing?

- (b) Pages 5 and 6 – Are there other circumstances in which cases might be referred back to an ESO? Are the circumstances outlined in the Guidance reasonable?

Proposed Response: The Guidance and Regulations should allow either the Monitoring Officer or the Standards Committee to refer a matter back if, on investigation, it transpires that a matter is more serious than first thought and so potentially could mean that the local maximum sanction of three months suspension would be inadequate. The proposed regulation 5(4) would not allow this facility to the Standards Committee which is unfortunate – as further information may become available at the hearing which would affect the view as to whether the potential sanctions available to the local Standards Committee are sufficient.

- (c) Pages 6 and 7 – Is the Board correct to want to maintain confidentiality of an investigation and is the Guidance clear?

Proposed Response: It is understood why it is desirable to maintain confidentiality at the investigation stage. However, the Guidance underestimates the difficulty of achieving this in many instances in politically led organisations. The Guidance also suggests that the Monitoring Officer may wish to treat the information as exempt when it goes before the Standards Committee. This implies that this is a significant possibility. However, the earlier guidance on Standards Committee hearings makes it clear that hearings should normally be held in public to maintain public confidence and information made available in public reports. Normally only the Committee deliberation would be held in exempt session. The hearing and the announcement of the decision would be made in public. These two sets of guidance are not consistent. Members may expect to be treated the same way as officers facing a disciplinary complaint – to be dealt with in confidence unless an adverse finding is necessary. The latest Guidance could be misinterpreted as to the stages at which confidentiality is still to be maintained.

- (d) Pages 7 and 8 – Is it appropriate not to have to produce draft reports in all cases? Are the factors to be taken into account when considering whether to produce a draft and final report comprehensive?

Proposed Response: It is useful to produce draft reports in all cases as it may reveal different understandings or interpretations as to what occurred.

The checklist refers to a finding of fact by the Monitoring Officer. It does not recognise the likelihood that in some instances he/she may not be able to come to a conclusive view. It implies that a clear finding as to whether a breach has occurred or not are the only options. In practice, insufficient evidence to come to a view is a likely outcome in many instances. The Standards Committee may also find this difficulty, even with the benefit of a hearing.

- (e) Pages 9 and 10 – When appointing someone else to conduct an investigation on their behalf should the Guidance give direction as to how Monitoring Officers can delegate their investigative role – and to whom?

Proposed Response: The Guidance given in page 10 is adequate on how delegation can be achieved. However, it does not recognise the limited capacity that such measures can achieve in practice given that the Monitoring Officer will still need to be involved to some degree and usually has many other functions to undertake.

- (f) Pages 9 and 10 – Is the section on conflicts of interest clear and appropriate? Is the Board right to suggest that the Monitoring Officer's chief role is to advise the Standards Committee rather than to investigate? Would Monitoring Officers find a guide on how to conduct an investigation helpful?

Proposed Response: Monitoring Officers generally would consider their role is to advise the Committee rather than to undertake the investigation. However, the primary role is to give advice to try and prevent Members getting into difficulty in the first place.

The Guidance implies that Monitoring Officers also have a role in advising Members who are the subject of an allegation, and persons making a complaint. This could be misinterpreted as a role of giving full advice in a case – rather than giving information as to the procedure for dealing with complaints. To require Monitoring Officers to do more clearly gives rise to impossible conflicts of interest. In any event, the law does not permit an authority to fund legal advice for a Member in difficulty or the complainant. The guidance is misleading and should point out that the Monitoring Officer's only role in these circumstances is to give information on procedure – and not on the merits of individual cases. Individuals often want advice on the merits of their case and when a complaint is being made the Monitoring Officer is not able to do this and it is not reasonable (or lawful) to suggest he/she finds someone else to do it. The Monitoring Officer is often approached by more than one party in these circumstances.

- (g) Other points where the Board has not asked specific questions:

Page 8 – Consideration of the Final Report - The Guidance suggests that if the Monitoring Officer report has made a finding that there has not been a breach of the Code then it will be necessary to deal with the matter in two hearings should the Standards Committee disagree and consider there is a case to be heard. This may not always be necessary if the Member involved is present and wants the matter to proceed at the same meeting. The Guidance should give local discretion on the point.

Generally – The proposals envisage a significant delegation of work from the Standards Board to local authorities. However, the possibility of some authorities facing similar capacity problems to that faced by the Board is not recognised – nor is the funding provided to deal with such situations.

In Winchester there have been comparatively few complaints to the Board. One involved a District Councillor and there were also four parish issues. None of these have resulted in any findings of significance. In addition two parish issues are still awaiting investigation. However, if all these cases had been referred to the Monitoring Officer and the Standards Committee to deal with, this would have resulted in at least several weeks work for one person, given the time consuming procedures that have to be followed. This would be

in addition to the advice role, which can involve several District/Parish queries in a week.

The proposals still require all complaints to be passed through the Standards Board initially. This is a cumbersome process and does little to help resolve minor local complaints. It would be helpful if the complainant had the option of asking for minor matters to be dealt with locally without the need to refer them to the Standards Board. Another example where such an approach would help would be in situations where the Member has admitted the mistake and made a public apology. This would streamline the procedures significantly.

When the ESOs undertake their own investigations they determine whom they want to interview. Rarely do they contact the Monitoring Officer to see if he/she has had any involvement or knowledge of the situation. This procedure could be improved, as it is likely that Monitoring Officers will have had some contact from the parties involved.

3 Local Authorities (Code of Conduct) (Local Determination) (Amendment) Regulations 2004.

3.1 These Regulations amend the 2003 Regulations to make provision for ESOs to refer cases for local investigation by Monitoring Officers. A summary of the provisions is contained in Annex B. However, many of the substantive points that arise have been covered in the commentary on the Guidance above and are not repeated here. Additional points which arise are:

- (a) Page 14 – Regulations 6 and 7 – Although it is sensible to require that a hearing should take place within three months, practical problems that can occur during an investigation may prevent this. It should be made clear that the provision is directory only and the Committee will still have jurisdiction to deal with a matter after three months.

The Regulations do not recognise the possibility that the Monitoring Officer may not be able to take a view on the evidence as to whether there has been a breach of the Code or not.

- (b) Generally - There is a criminal offence for failure to co-operate with an ESO investigation – but there is no similar provision for a Monitoring Officer investigation. While the introduction of a potential criminal offence is not appropriate at local level, should the Monitoring Officer be able to refer the matter back to the ESO?

OTHER CONSIDERATIONS:

4 CORPORATE STRATEGY (RELEVANCE TO):

4.1 Relevant to the aim of being “open and democratic” in the way business is conducted.

5 RESOURCE IMPLICATIONS:

5.1 If more than one or two complaints are received per year the procedures involved would have a significant impact on workload, which would either require additional resources or have an adverse impact on other work programmes.

BACKGROUND DOCUMENTS:

Joint letter from Standards Board and ODPM.

APPENDICES:

Annex A – Summary of Guidance

Annex B – Summary of Regulations