

STANDARDS COMMITTEE

30 January 2012

LOCALISM ACT 2011

REPORT OF CORPORATE DIRECTOR (GOVERNANCE)

Contact Officers: Stephen Whetnall/Chris Ashcroft Tel No: 01962 848220/848284

RECENT REFERENCES:

[ST89 – Future of Standards Framework](#)

EXECUTIVE SUMMARY:

The Localism Act 2011 received Royal Assent on 15 November 2011. It contains a wide range of provisions covering local government, including future arrangements for the Standards framework, following the abolition of the Standards for England organisation later this year.

Attached as Appendix 1 is a very useful summary of those future arrangements, which we have reproduced with the kind permission of the authors (Eversheds Solicitors).

The Monitoring Officer will provide more detail at the meeting, but the Committee will wish to note the following key points arising from the Act:-

1. Standards for England will cease to consider cases as from 31 January 2012 and will refer back to the local authority concerned any matters which are not concluded by that date. Any cases being handled locally must continue to be dealt with by the local authority until they have been concluded.
2. The Standards for England offices will finally close on 31 March 2012.
3. A late change to the transitional arrangements is that the Standards framework, as we currently operate it locally, will be allowed to continue until 1 July 2012 if required. This is principally to give local authorities time to have their revised local arrangements approved, amend their Constitutions, appoint an Independent Person(s) etc. It also takes account of the fact that the detailed Regulations are not yet available.

4. Standards Committees will become voluntary to establish and subject to the same proportionality rules as any other local government committee.
5. There will be no national Model Code of Conduct and each local authority is free to produce its own Code with provisions, as it sees fit. The Code can only apply to councillors acting in their official capacity; private life cannot be covered.
6. Local authorities must have in place procedures to deal with complaints made against councillors under its Code, including parish councillors. However, there is no obligation on a parish council to have any regard to the findings of the district council.
7. The Monitoring Officer is given greater scope to seek resolution of a complaint before asking the appropriate group of councillors whether it merits investigation.
8. The previous sanctions available against a district councillor found to have breached the Code have been removed and now there appears no real penalty beyond naming and shaming, or removing access to Council facilities, or recommending to a political group that a councillor be removed from a committee. As mentioned above, there is no obligation on a parish council to have any regard to the findings of the district council.
9. At least one 'Independent Person' will need to be appointed, via public advertisement. The 'Independent Person' must be consulted and their views taken into account by a local authority before a decision is taken on any allegation. The current Independent Members and Parish Representatives cannot apply to be an 'Independent Person' for a period of five years after their current term of office ceases.
10. A Members Register of Interests is still required but the content must be approved by the Council. It must cover both 'disclosable and non-disclosable pecuniary and non-pecuniary interests', although further definition of these terms is awaited. The Act also requires that the Register entries of each councillor are published on the Council's website.
11. The issue of pre-determination is addressed, by recognising that councillors may make statements outside of meetings, without it being assumed that they have a 'closed mind' when they reach the point of decision. However, the expression of extreme views is still likely to give the impression of a 'closed mind' and the Act does not change matters to that extent.

Information on detailed aspects of the new Standards framework continues to emerge from the Government, not least in response to the work of bodies such as the Association of Secretaries & Solicitors and the National Association of Local Councils, both of whom are aiming to achieve a clearer understanding of certain proposals.

The scope for producing a 'standard' Code of Conduct, at least on a countywide basis, is also being pursued, although the Government will not be involved in this. Therefore, Members should note that further (albeit minor) amendments to some of the provisions mentioned above may well be made over the coming weeks.

RECOMMENDATIONS:

1. That the Monitoring Officer be requested to produce a draft local Standards framework, including a revised Code of Conduct, having regard to the above points and the guidance which is still emerging from the Government and relevant national bodies.
2. That the Committee further considers the position at a special meeting during March/April 2012, to take account of any developments at national or regional level.
3. That the Committee considers whether it has any preliminary views on the issues raised by the new framework.

OTHER CONSIDERATIONS:

SUSTAINABLE COMMUNITY STRATEGY AND CHANGE PLANS (RELEVANCE TO):

An Efficient and Effective Council.

RESOURCE IMPLICATIONS:

The 2012/13 budget has been prepared on the basis of a similar resource requirement to previous years. The fact that the Localism Bill was amended at a late stage, to re-introduce a role for district councils in relation to parish complaints, means that it is unlikely any significant savings can be made.

RISK MANAGEMENT ISSUES

None

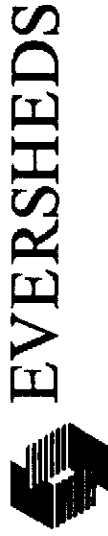
BACKGROUND DOCUMENTS:

None

APPENDICES:

Appendix 1 – Localism Act 2011 – The new Standards regime (Briefing paper prepared by Eversheds Solicitors)

Welcome to Eversheds' Local Government briefing note 83/2011



23 December 2011

LA Law Localism Act 2011 - The new Standards regime

During the passage of the Localism Bill, the issue of standards proved to be one of its most controversial aspects and one of the very last matters to be finalised before Royal Assent on 15th November 2011. The roots of this controversy go back to the introduction of a national regime under the Local Government Act 2000 when a mandatory Code of Conduct was introduced, the Standards Board for England was created and given custody of a national process. (In Wales responsibility was given to the Ombudsman). Many elected members resented what they saw as a stifling regime and there was particular concern about the apparent differences in the regime affecting local authority members and MPs. This view was reinforced by the scandal surrounding MPs expenses. Subsequent changes, to try to impart more local accountability, did not move the critics and this, coupled with a topical concern about the so called "gagging" of members wishing to speak on local issues, gave birth to the pressure reflected in the Coalition Agreement to scrap the system.

The new standards provisions relating to local authorities in England and police authorities in Wales are set out in Part 1 Chapter 7 Sections 26 – 37 of and Schedule 4 to, the Localism Act. These provisions apply to all "relevant authorities", which are defined in section 27(6) to include both principal authorities and parish councils, fire and rescue authorities, economic prosperity boards, National Park authorities, the Broads Authority and Police Authorities in England and Wales, until abolition of the latter and replacement by Police and Crime Commissioners. The arrangements for Welsh local authorities will not change.

Local authority includes Police Authority but not the new Police Commissioner and Panel. The Police Reform and Social Responsibility Act 2011 at section 31 and Schedule 7, allows the Secretary of State to make provision by regulations relating to complaints and conduct matters of Police and Crime Commissioners; Deputy Police and Crime Commissioners; the Mayor's Office for Policing and Crime, and the Deputy Mayor for Policing and Crime.

Every authority will be under a duty to promote and maintain high standards of conduct by elected and co-opted members of the authority.

The provisions apply to elected members and co-opted members when acting as members. There are no requirements in relation to private life, though disqualification as a result of a sentence of imprisonment for three months or more (whether suspended or not) in s 80 of the Local Government Act 1972 remains. The definition of "co-opted member" does not include non-voting members.

Transitional provisions

The Secretary of State may make transitional provisions by statutory instrument, providing that matters under investigation by the Standards Board for England be transferred to the relevant local authority. The Government has now clarified the timetable for abolition of Standards for England in response to a parliamentary question from Lord Greaves, (and circulated a letter with details to Monitoring Officers) although this is still subject to formal confirmation through regulations. It is the Government's intention that abolition will take effect on 31 March 2012. Prior to this, the regulatory role in handling cases and issuing guidance will stop from a date that will be set out in regulations but anticipated to be 31 January 2012. From this date, Standards for England will no longer have powers to accept new referrals from local standards committees or conduct investigations into complaints against members. Any existing referrals or investigations will be transferred back to the relevant authority for completion. However, any complaints which are being handled locally on that date will need to continue through to a conclusion; and similarly any matters relating to completed investigations or appeals that have been referred to the First Tier Tribunal will continue to conclusion.

DCLG have also advised in the last few days that they envisage that the remaining local elements of the current regime, including statutory standards committees with the power to suspend councillors, will be abolished on 1 July 2012.

From 1 July forward, all standards matters – including consideration and determination of outstanding complaints made during the period the Standards Board regime was operating - will be the responsibility of local authorities, to be handled under the new arrangements. 1 July will also see the new standards arrangements, which include a 'Nolan-based' code, the involvement of an independent person in allegations of misconduct, and a new criminal offence for failing to declare or register interests, coming into force.

DCLG believe that such a timetable would seem appropriate given the timing of councils' elections and annual meetings. It also recognises that local authorities will have to take action to implement the changes to the standards arrangements. For example, authorities will need sufficient time to adopt any new code and procedures. Moreover, they will need time to advertise for and then appoint an 'independent person' and put in place arrangements for handling allegations of breaches of their code. Finally, principal authorities will have to put in place, and agree, arrangements with parish councils for both a code and register of interest related activity.

Standards Committees

The special provisions for the establishment of statutory Standards Committees are removed in England. Any voluntary Standards Committee or Sub-committee established by the authority would be an ordinary committee or sub-committee established under s101 and s102 of the Local Government Act 1972. The role of independent members will change as the new Independent Persons would not be able to be voting members, unless the committee or sub-committee was merely advisory. Any such Standards Committee is now subject to the normal proportionality rules. Standards Committees would be subject to the same requirements on confidential and exempt information as any other Committee under ss.100A to K of and Sch.12A to the Local Government Act 1972. The Standards Committee would assist in discharging the duty of the authority to promote and maintain high standards of conduct and along with arrangements for regulation, albeit this is limited in scope.

The Code

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. Private life is not covered. The powers of the Secretary of State to specify general principles and issue a model code are revoked, along with the current 10 General Principles of Conduct and the Model Code, but the Act requires an authority's Code to be consistent with the seven Nolan principles of conduct in public life.

Authorities are free to determine what they put in or leave out of a Code though section 28(2) does require the inclusion of the provisions the authority considers appropriate in respect of the registration (in its register) and disclosure, of interests. Any decision to adopt a local Code must be taken at full Council, and all standards matters are to be non-executive functions.

The abolition of the Model Code means that different authorities may have different Codes. A councillor who is a member of more than one authority is likely to be subject to different Codes, according to which authority he/she is currently acting on. Different members of the same joint committee will be subject to the varied Codes of their different parent authorities.

The requirement for members to give an undertaking to comply with the Code of Conduct is removed although it might be considered reasonable to expect compliance from responsible members of a public body! The previous consequence of not being able to act as a member where the undertaking was not provided, has gone.

A relevant authority (other than a parish council) must have in place arrangements to deal with complaints of breach of its Code of Conduct, including 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. It is likely that most authorities will decide that they need a Standards Committee of some nature to undertake these functions at member level, even if some sanctions, such as removal from Committees, will have to be applied by full Council.

District and unitary authorities are responsible for having arrangements in place to investigate and determine allegations against Parish Councillors but the Act does not provide how this might be done (other than requiring the views of an Independent Person). Specifically, Parish Councils are under no obligation to have regard to any findings of the district or unitary authority or its Standards Committee.

Authorities have discretion to set their own processes and to delegate more of the process. There is no requirement for a review stage. The statutory requirement for a hearing has gone and the authority can find that a member has broken the Code without even having conducted an investigation (although we would expect authorities to ensure that the principles of natural justice would be observed).

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. We might see a return to the pre-2000 Act culture where Monitoring Officers and Chief Executives sorted things with the help of group leaders/whips.

The Act gives no explicit powers to undertake investigations or to conduct hearings

(any such action required would be implied as appropriate). 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 explicit powers to take any action in respect of a breach of the local Code. 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. This takes us back to reliance on *R v Broadland DC ex parte Lashley [2001] All ER (D) 71* where the principle of local action through a common law standards committee and Council, to ensure no disruption to the proper administration of the Council's affairs, was upheld.

The Independent Person

Every principal authority must appoint one or more Independent Persons. Independent persons would be appointed by advertisement and application and there are very strict rules preventing a person from being appointed if they are a friend or relative of any member or officer of the authority or of any Parish Council within the authority's area. They can they be paid a fee and/or expenses and the Act provides that a person does not cease to be independent merely because such payments are made.

It is believed that a person cannot be appointed as an Independent Person if they have within the past 5 years been a co-opted voting member of a Committee of the authority. This means that all existing independent co-opted members of Standards Committees are ineligible to be appointed as Independent Persons. This has become something of an issue for local government lawyers who are debating whether this result was intended or even achieved by the wording of the Act. ACSeS is seeking legal advice on this point.

The functions of the Independent Person are:

- The IP must be consulted and views taken into account before the authority takes a decision on any allegation it has decided to investigate.
- The IP may be consulted by the principal authority in circumstances where the authority is not taking a decision whether to investigate the allegation.
- The IP may be consulted by a member of the authority against whom an allegation has been made.
- The IP may be consulted by a parish councillor against whom an allegation has been made.

It is important to ensure that the impartiality of the Independent Person is not compromised by undertaking more than one of these roles where it would be inappropriate to do so. Hence the appointment of more than one is sensible.

Interests

The Monitoring Officer is required to establish a register of members' interests for each authority including for parish councils within their area. The content of any such register must be approved by full Council. It must contain "disclosable pecuniary interests" (to 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 as yet. The absence of standard definitions 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.

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) and on the authority's website. For parish councils, the district or unitary authority'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 and, if the parish council has a website, the parish council must ensure that the register is accessible on that website.

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. The Secretary of State will prescribe by regulation what constitutes a "disclosable pecuniary interest". The Act provides that this will cover the interests not just of the member, but also of 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. That feels like a return to pre-2000!

A member may 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 connected with the member, and allow 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".

Failure to register any such interest, failure to register 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. Prosecution is at the instigation of the Director of Public Prosecutions. 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, (unlike the pre 2000 Act regime in s19 Local Government and Housing Act 1989 and the regulations under that Act).

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. The duty to disclose only arises if the member is aware of the interest. However, 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, so members of the public attending meetings might well not be aware of a member's interests in a matter under debate unless he/she had also previously inspected the authority's register. 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.

The duty to disclose arises if the member attends the meeting, as opposed to the present code requirement to disclose "at the commencement of" consideration of the matter in which the member has an interest. In future 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. Failure to disclose a disclosable pecuniary interest is a criminal offence. There is no such sanction for failing to disclose non-disclosable pecuniary interests or non-pecuniary interests, even where disclosure is required by the authority's Code of Conduct.

Disclosure and withdrawal, is required to cover a member's disclosable pecuniary interest in any item of business at a meeting, or in any matter which he/she would deal with as a single executive member or ward councillor. If he/she 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. 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. The equivalent of merely personal interests, requiring disclosure but not withdrawal, will be covered by the requirement for the authority's Code to make some provision for disclosure of non-disclosable pecuniary interests and of non-pecuniary interests.

The requirement for the member to withdraw from the meeting room 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, leaving them present and liable to influence other members during the discussion. This means that a member who fails to withdraw as required in standing orders does not commit any criminal offence and the sanction, if the member became disruptive, would be the standard provision enabling a meeting to vote to exclude such a member.

Dispensations

The previous grounds for dispensations, allowing members with a pecuniary interest to get the consent of Standards Committee to participate are extended by section 33. The ground that more than 50% of the members of the body were conflicted out remains, but now effectively restricted to a circumstance where the number of members unable to participate would make the meeting inquorate. The second ground, that exclusion would disturb the political composition of the meeting and so affect the outcome of the vote remains but now dispensations may also be granted if:

- every member of the authority's executive is otherwise precluded from participating;
- it would be in the interests of persons living in the authority's area; and
- the authority considers that it is otherwise appropriate to grant a dispensation.

The authority may wish to delegate this function to its Standards Committee or an officer, but the process starts with a written request by a member or co-opted member, to the proper officer. An officer would therefore need to be designated for the purpose, and this could for example be the Monitoring Officer or the Head of Paid Service.

Pre-determination

Section 25 introduces provisions for dealing with allegations of bias or pre-determination or matters that otherwise raise an issue about the validity of a decision, where the decision-maker(s) had or appeared to have a closed mind (to any extent) when making the decision. It provides that the decision maker(s) is not to be taken to have had a closed mind "just because" (sic) the decision-maker(s)

had previously done anything relevant to the decision, that directly or indirectly, indicated what view the decision-maker took, or would or might take, in relation to a matter.

The courts have, of course, gone a long way in recognising that politicians need to be politicians and that not all that they say is necessarily what they do at the point of decision making. In effect, the courts already apply a presumption against bias in relation to local elected representatives to enable democracy to work in the way it has developed, and we have seen a string of cases including *National Assembly for Wales v Condron* and another 27 November 2006 to support that proposition.

The Government's position is that this provision does not involve a change in the law, which begs the question why the section is necessary in the first place. It is difficult to understand how this can be so, given that the ability of the courts to intervene is being curtailed by the new "presumption".

If the legislative presumption of "no closed mind" is applied then one must assume that the presumption is rebuttable. In a situation where a member said something like "over my dead body" in respect of voting a particular way on an issue, the view must be that whilst the provision on predetermination in the Localism Act might be useful in giving councillors confidence about making their views on particular issues known, it didn't change the legal position that if a member could be shown to have approached a decision with a closed mind, that could affect the validity of the decision. Equally, if a member had expressed views on a particular issue but could show that when taking the decision they had approached this with an open mind and taken account of all the relevant information, they could reasonably participate in a valid decision. If a member has expressed particularly extreme views, it will be more difficult in practice to be able to get away from the impression that they would approach the decision with a closed mind. It may therefore be appropriate for Monitoring Officers to warn members against making such extreme comments and to provide them with guidance. This provision is effective from 15 January 2012.

Conclusion

There is legitimate concern that different Codes of Conduct across principal councils and presumably parish councils will give rise to confusion in their application and understanding. As the representative bodies of principal authorities and parish councils respectively, there is logic in the Local Government Association and the National Association of Local Councils accepting leadership responsibility for producing uniform recommended code provisions.

The Act does not provide a clear and cohesive framework for local government to work to, partly due to the haste with which some of the provisions were introduced at the last minute. One cannot help thinking that Parliament will have no option but to again review the application of standards to local government in due course. In the meantime, as we await regulations local authority practitioners will endeavour, as always, to give effect to the new requirements.

For more information or advice, please contact:

Judith Barnes
Partner

Tel: 0845 498 4059
Intl: +44 113 200 4059

judithbarnes@eversheds.com

Denis Cooper
Senior Associate

Tel: 0845 497 8216
Intl: +44 161 831 8216
deniscooper@eversheds.com

Frances Woodhead
Consultant
Tel: 0845 498 4305
Intl: +44 113 200 4305
franceswoodhead@eversheds.com

Peter McKay
Consultant
Tel: 0845 497 7553
Intl: +44 115 950 7553
petermckay@eversheds.com

Clare Hardy
Solicitor
Tel: 0845 498 4355
Intl: +44 113 200 4355
clarehardy@eversheds.com

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