

AGENDA ITEM : 5

**STANDARDS COMMITTEE**

27<sup>th</sup> May 2008

**LOCAL ASSESSMENT OF COMPLAINTS - GUIDANCE**

**1. PURPOSE OF REPORT**

- 1.1. To give the Committee information regarding the Local Assessment of Complaints and the Code of Conduct.

**2. BACKGROUND**

- 2.1. The Committee will be aware from previous reports that as from the 8<sup>th</sup> May the Council is now responsible for dealing with most complaints against Councillors. Attached to this report as Appendix 1 is a set of papers prepared by barristers from 39 Essex Street giving details of the Code of Conduct and investigations. Also attached is a copy of the Standards Board Guidance "Local Assessment of Complaints".

**3. RECOMMENDATIONS**

- 3.1 That the Committee note the Guidance.

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*Standards: the Code of Conduct, investigations and the  
Local Government and Public Involvement in Health Act  
2007*

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*April 2008*

## Introduction

1. The Code of Conduct: a new Model Code was issued on 3 May 2007 under Local Government Act 2000. When adopted by a local authority it will be binding on individual members. Failure to comply with Code may result in investigation by Standards Board or local Monitoring Officer, and possible sanctions by the Adjudication Panel or the local standards committee.
2. In this paper:
  - a. The present Standards investigation machinery is explained;
  - b. The revised standards regime introduced by the Local Government and Public Involvement in Health Act 2007 is considered;
  - c. Finally the paper deals with keeping up appearances: judge-made rules about “predetermination” and “apparent bias”. Importance of members participating in decisions impartially and with an open mind. Breach of these principles can result in the local authority’s decision being quashed or declared unlawful – irrespective of whether any individual has breached the Code.

## The Code of Conduct: background

3. 1997 Report of Lord Nolan's Committee on Standards in Public Life recommended a new system of standards for local government, based on the Ten General Principles of Public Life (see SBE May 07 Guidance, p. 7). Parliament enacted Part 3 of the Local Government Act 2000, providing for a model Code of Conduct and a system of investigation and punishment of breaches (see *section 5 – The Standards Machinery*).
4. Section 50(1) of the Local Government Act 2000 provides that the Secretary of State 'may by order issue a model code as regards the conduct which is expected of members and co-opted members' of local and police authorities. Authorities are required to adopt a code of conduct which includes the mandatory provisions of the model code.<sup>1</sup> Each member of the authorities is required to give an undertaking that 'in performing his functions he will observe the authority's code of conduct'.<sup>2</sup>
5. Model Codes of Conduct for different kinds of authority (district, parish, etc) were originally issued in 2001. The Code itself, and approach of Standards Board to enforcement, has been subject to criticism – e.g. complicated provisions about "prejudicial interests" in some cases preventing councillors from playing community leadership role; numerous trivial complaints submitted by personal and political rivals. Court cases revealed lack of clarity on some points, for example, how far Code extended to "off duty" behaviour -- Ken Livingstone case held that it couldn't.
6. Standards Board conducted a review in 2005-2006 and recommended changes to Code. Government responded with issues paper "Conduct in English Local Government – The Future" (December 2005). October 2006 White Paper, "Strong and Prosperous Communities", maintained commitment to high standards of conduct "to maintain public confidence and trust" but proposed a "clearer, simpler and more proportionate" code. The Government consulted on a draft of the new Code between 22<sup>nd</sup> January and 9<sup>th</sup> March 2007. This six week period was half the 12 week period required by the Government's Code of Practice on Consultations.
7. The consultation produced 906 responses and significant amendments to the draft Code were within three weeks of the end of the consultation.
8. On 2<sup>nd</sup> April 2007 the Secretary of State made the Local Authorities (Model Code of Conduct) Order 2007 (S.I. 2007 No.1159), intending to replace, with amendments, the previous orders.

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<sup>1</sup> Section 51, Local Government Act 2000.

<sup>2</sup> Section 52, Local Government Act 2000.

9. New Model Code of Conduct Order in force on 3 May 2007. Some provisions are mandatory only for certain kinds of authority. Individual parish councils can 'opt in' to non-mandatory provisions.
  
10. Councils have been required to adopt new Codes of Conduct within 6 months of the making of the new Order, that is, 2<sup>nd</sup> October 2007, replacing existing Codes based on 2001 model. This was intended to avoid new members having to learn the old Code. However even for councillors newly elected in 2007, there would have been a overlap with the old regime. As a result of government changes during the passage of the Local Government and Public Involvement in Health Act, further amendments will shortly be made to the Code.

## The Code at a gallop

11. Key provisions of Model Code:
12. When does it apply?
13. Most of Code applies in member's "official capacity": conducting business of authority or acting as representative of authority (para. 2(1))
14. But some provisions apply at other times if conduct results in conviction for criminal offence (even if committed before election) – para. 2(3) – the validity of this following the Livingstone case is covered below.
15. These provisions are intimidation (para. 3(2)(c)), disrepute (para. 5) and misuse of the member's position (para. 6(a)).
16. General obligations: para. 3:
17. Equality and discrimination: must not do anything which may cause authority to breach the equality enactments – para. 3(2)(a). Those are statutes and regulations prohibiting discrimination on grounds of gender, race, disability, religion/belief, age, sexual orientation. Member must not discriminate directly/indirectly, harass, or victimise someone who has complained. Also positive duties to prevent discrimination and promote equality.
18. Bullying: must not bully any person (para. 3(2)(b)). SBE Guidance May 07 page 9 distinguishes between bullying – e.g. intimidating, malicious, insulting or humiliating behaviour – and "legitimate challenges" to officers and fellow councillors. Bullying may occur in a single incident or as a course of conduct.
19. Intimidation of people involved in Code proceedings: must not intimidate/attempt to intimidate a complainant or witness in a case against you under the Code (para. 3(2)(c)). Applies off duty to conduct resulting in conviction. Replaces the invidious "shop your colleagues" provision – para. 7 -- of the 2001 Code.
20. Officer impartiality: must not compromise impartiality of officers (para. 3(2)(d)).
21. Disclosing confidential information: para. 4(a) prohibits disclosure of confidential information – e.g. "exempt information" revealed to members in closed session, unless one of four exceptions applies – see later.
22. Obstructing access to information: must not frustrate disclosure e.g. pursuant to FOI (para. 4(b)).
23. Disrepute: conduct "reasonably regarded as bringing your office or authority into disrepute" – para. 5. Applies off duty to conduct resulting in conviction.

24. Improper advantage: must not use position improperly to secure advantage/disadvantage to yourself or anyone else (para. 6(a)). Applies off duty to conduct resulting in conviction
25. Misuse of resources: Must use authority's resources in accordance with reasonable requirements and not for political purposes (para. 6(b), (c)). Important in relation to political publicity material: SBE May 07 Guidance pp. 14-15.
26. Interests: Personal and prejudicial interests are dealt with in paras. 8 -14
27. Basic scheme: designed to prevent conflicts of interest and achieve transparency where a member (or someone associated with the member) has a "personal interest" – i.e. any interest, financial or otherwise – in the outcome of a decision over and above the interest of ordinary members of the public, or an interest resulting from membership of another public body. See SBE May 07 Guidance pp. 16-21.
28. Must register a personal interest (SBE May 07 Guidance pp. 29, 31). Must also declare it, usually at the start of the meeting. But if the interest is significant enough, it becomes a prejudicial interest. Member must not participate in business – unless granted dispensation or relying on paragraph 12(2) – see later. General advice in SBE May 07 Guidance pp. 22-27. Overlaps with legal rules about bias/predetermination.



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Acts not in an official capacity – the Livingstone Case

29. The Model Code of Conduct is contained in the Schedule to the Order. Paragraphs 2(2)-(4) of the Schedule provide:

- a. “(2) Subject to sub-paragraphs (3) and (4), this Code does not have effect in relation to your conduct other than where it is in your official capacity.
- b. (3) In addition to having effect in relation to conduct in your official capacity, paragraphs 3(2)(c), 5 and 6(a) also have effect, at any other time, where that conduct constitutes a criminal offence for which you have been convicted.
- c. (4) Conduct to which this Code applies (whether that is conduct in your official capacity or conduct mentioned in sub-paragraph (3)) includes a criminal offence for which you are convicted (including an offence you committed before the date you took office, but for which you are convicted after that date).”

30. The paragraphs which may apply to actions other than in an official capacity say:

- a. “3(2) You must not ...
  - i. (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;”
  - ii. “5. You must not conduct yourself in a manner which could reasonably be regarded as bringing your office or authority into disrepute.”
  - iii. “6. 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;”

*The Ken Livingstone case*

31. The High Court considered the scope of matters that could be covered by the Code of Conduct in October 2006 in *Livingstone v Adjudication Panel for England*.<sup>3</sup> The Mayor of London, Ken Livingstone, had been referred to the Adjudication Panel by an Ethical Standards Officer (“ESO”) of the Standards

<sup>3</sup> [2006] EWHC 2533 (Admin).

Board for England over comments he made to an *Evening Standard* journalist. The ESO alleged that Mr Livingstone had been in breach of the equivalent provision to paragraph 5 (“A member must not in his official capacity, or any other circumstance, conduct himself in a manner which could reasonably be regarded as bringing his office or authority into disrespect”).<sup>4</sup> The Panel found that whilst Mr Livingstone was not acting in an official capacity, he had breached the provision.

32. In the High Court Mr Livingstone argued that the effect of s.52 of the Act was to prevent a Code of Conduct from covering activities which were carried out in a member's private life.<sup>5</sup> Mr Justice Collins found that whilst the Code of Conduct could extend to a member's acts outside an official capacity, those acts had to be ‘in performing his functions’ and ‘any other circumstance’ was to be construed narrowly to that effect. He explained one effect of this interpretation:<sup>6</sup>

- i. “It seems to me that unlawful conduct is not necessarily covered. Thus a councillor who shoplifts or is guilty of drunken driving will not if my construction is followed be caught by the Code if the offending had nothing to do with his position as a councillor.”

#### *The 2007 Order*

33. Paragraph 2(3) of the Model Code in the 2007 Order applies three provisions of the code ‘at any other time’ where the conduct is criminal. Paragraphs 3(2)(c) and 6(a) do not pose a problem as intimidating witnesses in code of conduct investigations and using a position as a member to improperly secure an advantage, would be in performing the member's functions.<sup>7</sup> However the disrepute provision applies to criminal conduct at any time, whether or not it is in the performance of the member's functions. The explicit statements in paragraphs 2(3) and 2(4), with the removal of the ‘any other circumstance’ provision in paragraph 5, mean that the provision cannot be construed as confirmed to acts in the performance of the member's functions. The Explanatory Memorandum for the Order confirms that the new Model Code is intended to cover criminal conduct ‘in a member's private capacity’.<sup>8</sup>

#### *The Government's response to the Livingstone decision*

34. No appeal was brought in the *Livingstone* case and the Government did not attempt to intervene in the proceedings. It accepted that Mr Justice Collins' decision represents the law and that even criminal conduct in a private capacity could not be covered by the Code in its original form.

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<sup>4</sup> Set out at judgment, para 19.

<sup>5</sup> Judgment, para 21.

<sup>6</sup> Judgment, para 30.

<sup>7</sup> See *Livingstone*, para 28.

<sup>8</sup> Paragraph 7.5, fourth bullet point.

35. Section 183 of the Local Government and Public Involvement in Health 2007 Act addresses the *Livingstone* judgment. A member will no longer only agree to comply with the code 'in performing his functions'. The Government had intended that the principles and code of conduct may 'apply at all times'. In the face of criticism from the House of Lords the government retreated. The Act now provides that the principles and code will (in England) say whether provisions apply only when a member is acting in an official capacity or other than in an official capacity. Actions outside a member's official capacity are only covered if the conduct would constitute a criminal offence of a description specified by secondary legislation.
36. In the Report Stage debate on 15<sup>th</sup> October 2007, the minister said:
- i. that only serious criminal offences, to be defined in secondary legislation, should be subject to the Code (Hansard, col.549-550);
  - ii. that there should only be a breach of the Code if the action has subsequently resulted in a criminal conviction (col.554-555);
  - iii. new model codes of conduct will need to be issued (col.549).
37. Serious criminal offences were said to include assault, harassment, fraud and child pornography. Examples of offences that might be excluded from the code would be fixed penalty offences such as minor motoring offences, parking offences and dropping litter. The Minister insisted that it was not possible to put into the statute that a criminal conviction had to be obtained first, even though the present Code of Conduct does that.
38. The Act does not alter Collins J's interpretation of acts which may bring a member's office or authority into disrepute. So it does not follow that conviction for a criminal offence capable of being covered by the Code, is actually a breach of the code.

## **A closer look: disrepute, disclosure**

### *Disrepute:*

39. Putting aside the private/official capacity issue, the Livingstone case recognised a difference between bringing oneself into disrepute and bringing one's office or authority into disrepute.
40. SBE May 07 Guidance (p. 13) gives example of "dishonest and deceitful behaviour" in official capacity, or conduct in private life producing conviction for "dishonest, threatening or violent behaviour". The disrepute paragraph has been used as a catch-all for conduct not covered by the rest of the Code. For example, Councillor Woodrow of Camden Council was accused of bringing his office into disrepute by acting with an appearance of bias in the King's Cross planning matter. Bias was not in fact found, although he was found to have brought his office into disrepute by improperly attempting to influence English Heritage.
41. It is worth remembering that conduct which is inappropriate or which is unlawful in a public law sense will not in itself bring a member's office or authority into disrepute. A much higher threshold has to be reached.

### *Disclosing confidential information:*

42. The first question is whether the information is confidential. Much information which councillors come into contact with is published or is not of a confidential character. Material which would be disclosed under the Freedom of Information Act is not confidential – but who balances the public interest when information is potentially exempt. There are four exceptions to the prohibition on disclosing confidential information:
  - i. with consent of authorised person,
  - ii. required by law to disclose,
  - iii. obtaining professional advice, or...
  - iv. disclosure reasonable, in the public interest, made in good faith and in compliance with authority's reasonable requirements. This is a new exception following the Paul Dimoldenberg case (Westminster councillor making disclosure about recovery of surcharge from Shirley Porter). "Reasonable requirements" refer to "whistleblowing" procedures – exhaust proper channels before going to a third party. See SBE Guidance May 07 pp. 10-12.

### **Personal interests:**

43. You have a personal interest in an item of business if:

The Council business is “likely to affect” any of the things listed in para. 8(1)(a) – includes ‘public service’ interests viz. membership of body to which appointed by the authority, and body “exercising functions of a public nature”. The interests also include employment, significant local shareholdings, contracts with the authority, land in the authority’s area and the interests of those who gave gifts or hospitality worth at least £25.

a. or

Para. 8(1)(b) – decision on that business reasonably regarded as affecting your well-being or financial position, or that of a “relevant person”, to a greater extent than the majority of inhabitants of the affected ward.

44. “Well-being” vague. SBE May 07 Guidance p. 20 suggests “a condition of contentedness and happiness... anything that could affect your quality of life...”

45. “Relevant person” – para. 8(2). “Family”, “close association”; SBE May 07 Guidance advises wide interpretation (p. 20). Also employment/partnership, significant shareholding, body to which appointed by authority, body exercising public functions.

46. Inhabitants of ward: if no wards, comparison is with whole area of authority.

47. Must declare nature as well as existence of interest. A sentence or two will do.

48. In case of “public service” interest, need not declare unless speaking (para. 9(2)).

## **Prejudicial Interests**

49. Where a personal interest is also prejudicial:
50. Test: *“the interest is one which a member of the public with knowledge of the relevant facts would reasonably regard as so significant that it is likely to prejudice your judgement of the public interest”* (Para. 10(1)).
51. But a member does not have a prejudicial interest in the situations listed in para. 10(2) (this is a relaxation of the old rules):
- a. Does not affect the member’s financial position or that of a paragraph 8 person/body (see above);
  - b. not determination of a licence, consent etc. ‘in relation to’ the member or a paragraph 8 person/body; or
  - c. relates to statutory sick pay, members’ allowances etc., ceremonial honours, setting council tax/precept.
52. The (c) categories reflect previous exclusions and are designed to avoid situations where all councillors would be prejudiced by the fact they are councillors, or exclusions would risk unbalancing the decision. The (a) and (b) categories are considerably more difficult. The Government consulted on a proposal to change prejudicial interests by having less onerous requirements for ‘public service interests’. After criticism of the draft the government have now considerably widened the range of matters which are not ‘prejudicial interests’.
53. These changes mean that a member does not have a prejudicial interest if:
- a. he approves a planning brief for a major site which he lives next to as a council tenant (so his financial position is not affected), even if the terms of the brief may affect or protect his home from noise, shadowing or TV interference;
  - b. he votes to take enforcement action against an unlawful development next to his mother’s rented flat;
  - c. he votes to appoint the amenity society which he chairs to a council working group.
54. It is unclear whether ‘in relation to’ means a prejudicial interest arises only where that person receives an approval or whether it includes other approvals which that person might be interested in. If the former, then a councillor can determine a licensing application for a pub next to his home. The SBE guidance gives examples of applications by bodies in which the member has an interest: ‘considering a planning or licensing application made by you or a body on your register of interests’.<sup>9</sup> However it then gives as an example of a significant interest ‘you would have a prejudicial interest in a planning application proposal

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<sup>9</sup> Page 23.



if a member of your family lives next to the proposed site' without addressing whether there is a financial interest or this is a 'relation to' case.

55. There are four possible categories of 'relation to':
- a. where the interested person has made the application;
  - b. where the interested person is part of the scheme albeit not an application – such as a landowner or proposed occupier (e.g., registered social landlord). This would seem to be a 'relation to' situation, but a financial benefit would probably arise in any event;
  - c. where the interested person might be directly or indirectly affected by the decision, for example, a neighbour of a proposed development;
  - d. where the interested person has made representations on the application but is not directly affected by the outcome, for example, an amenity society.

(a) and (b) seem to be 'relation to' cases, but (c) and (d) are more problematic.

56. A member with a prejudicial interest must leave the room and not seek improperly to influence decision. (Para. 12(1)(a), (c)), unless para 12(2) is applied. Paragraph 12(2) is not mandatory for parish councils, but it is referred to in paragraph 12(1) which is mandatory.

57. But -- in a further relaxation of the old rules and a reversal of part of the effect of *R v North Yorkshire County Council ex p Richardson* -- by paragraph 12(2), you can stay and address the meeting (though you must leave once your representations are concluded) "for the purpose of making representations, answering questions or giving evidence", so long as members of the public can do the same. The intention is a prejudicial interest should put you in no worse position than if you were a member of the public, attending to the interests of yourself or the affected section of the community. However a councillor with a prejudicial interest is not able to attend simply to listen to the item, he is only allowed in for the purpose of making representations.

58. The paragraph 12(2) exception only applies to councillors attending for the same purpose as the public can speak. This means that a councillor with a prejudicial interest can only speak in a 'public' slot, rather than as, say, a ward councillor. On its face the Code does prevent Executive members from being questioned as councillors on decisions they have taken. However, section 21(13) of the Local Government Act 2000 which allows overview and scrutiny committees to require members of the executive to attend to answer questions must prevail.

59. Dispensation: the standards committee may grant a dispensation in restricted circumstances.

## Local Government and Public Involvement in Health Act 2007

60. Part 10 of the Local Government and Public Involvement in Health Act 2007 institutes significant changes to the machinery of investigation. In broad terms, these changes are intended to devolve most decision-making on conduct to local authorities, with the Standards Board playing a supervisory role. Many of the relevant provisions have now been brought into force, but the regulations that are required to flesh out the bones have not been laid before Parliament.<sup>10</sup> The intention is that the new regime will take final effect from in May 2008.

### *The old regime*

61. Under the old regime, the Standards Boards for England (SBE) considered written allegations of breach of code. May refer to Ethical Standards Officer for investigation. ESO made one of four “findings”:

- a. no evidence of any failure to comply
- b. no action need be taken
- c. matters subject of investigation should be referred to authority’s monitoring officer
- d. (d) matters subject of investigation should be referred to the Adjudication Panel for England (APE)

62. In cases a. and b., the ESO may produce a report. In cases c. and d, ESO must produce a report. Where the monitoring officer receives a report, s/he must convene a standards committee meeting to consider it.

63. On reference to the APE, a case tribunal decides “whether or not any person to whom the matter on which it adjudicates relates has failed to comply with the code of conduct of the relevant authority”. May punish failure to comply by:

- a. Suspension or partial suspension from the authority for up to one year;
- b. Disqualification from that or any relevant authority for up to five years;

64. If does neither, must “name and shame” to standards committee.

65. Member may appeal case tribunal decisions to High Court: s. 79(15).

66. ESOs could – and frequently did – delegate their investigatory functions to monitoring officers. SBE Guidance suggests that ESOs are more likely to refer those cases in which:

- a. the matter does not appear to need the heavier penalties available only to

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<sup>10</sup>Required to amend and re-enact the Local Authorities (Code of Conduct) (Local Determination) Regulations 2003 and to the Relevant Authorities (standards committees) Regulations 2001.

the APE;

- b. the allegation is of an entirely local nature and does not raise matters of principle;
- c. the initial ESO investigation has highlighted issues that are more to do with the effective governance of the authority than an individual's misconduct.

67. Conversely, SBE suggests that ESO less likely to refer cases if there is evidence that a local investigation would be perceived as unfair or biased or there are local political issues that may have a bearing on the investigation.

68. Monitoring officers can, in turn, delegate their investigatory function to a nominated individual, who must carry out those functions personally. References to the monitoring officer in the following section should therefore be read to include also references to individuals to whom the monitoring officer has delegated their functions.

69. Where a matter is referred to a monitoring officer for investigation, the monitoring officer must (unless otherwise directed by the ESO):

- a. Inform:
  - i. any member who is the subject of the allegation of failure to comply with the code of conduct;
  - ii. the person who made the allegation; and
  - iii. any parish council concerned
- b. that the matter has been referred to him for investigation;
  - i. conduct an investigation into the matter referred to him/her; and
  - ii. give any member who is the subject of the investigation the opportunity to comment on the allegation made.

70. Where the monitoring officer conducts an investigation he must, following the investigation:

- a. Make one of the following findings:
  - i. that he considers that there has been a failure to comply with the Code (“a finding of failure”); or
  - ii. that he considers that there has not been a failure to comply with the Code (a “finding of no failure”);
- b. prepare a written report concerning her investigation and her findings;

- c. send a copy of that report to the member who was the subject of the investigation;
- d. where the report concerns a finding of failure, refer the report to the standards committee for a hearing under the provisions of the Local Authorities (Code of Conduct) (Local Determination) Regulations 2003;
- e. where the report concerns a finding of no failure, refer the report to the standards committee.

71. A standards committee which receives a report containing a finding of no failure must consider it and make one of the following findings –

- a. that it accepts the monitoring officer's finding of no failure (“a finding of acceptance”), or
- b. that the matter should be considered at a hearing of the standards committee.

72. If the standards committee accepts the finding, it must as soon as reasonably practicable:

- a. give written notice of that finding to –
  - b. the member who is the subject of the finding of no failure;
    - i. the ESO;
    - ii. the standards committee of the authority concerned, if not the standards committee that made the finding;
    - iii. the standards committee of any other authority concerned, if not the standards committee that made the finding;
    - iv. any parish council concerned; and
    - v. any person who made an allegation that gave rise to the investigation; and
- c. arrange (unless the member concerned requests otherwise) for a notice to be published in at least one newspaper circulating in the area of the authority concerned stating that the standards committee have found that there has not been a failure on the part of the member to whom the finding relates to comply with the Code.

73. Where, following a hearing, the standards committee finds that a member has failed to comply with the Code, it may:

- a. censure the member;
- b. restrict (for up to three months) the member's access to the premises of the authority and the member's use of resources, provided the restrictions are reasonable and proportionate to the nature of the breach and do not unduly restrict the member's ability to perform his functions as a member;
- c. partially suspend the member for up to three months;
- d. suspend the member for up to three months;
- e. require the member to submit a written apology in a form specified by the standards committee;
- f. require the member to undertake training as specified by the standards committee;
- g. require the member to undertake conciliation as specified by the standards committee;
- h. suspend or partially suspend the member for up to three months or until he submits a written apology in a form specified by the standards committee;
- i. suspend or partially suspend the member for a period up to three months or until he undertakes such training or conciliation as the standards committee may specify.

74. The member can appeal the standards committee's decision to the APE.

*The new regime*

75. The key changes to the framework set out above introduced by the Local Government etc Act 2007 are as follows:

- a. Standards committees will be responsible for receiving allegations and deciding whether any action needs to be taken (referred to as 'local assessment').
- b. Standards committees must be chaired by an independent member.
- c. Standards committees will report periodically to the Standards Board.
- d. Standards committees will be allowed to enter into joint working arrangements with other standards committees.

- e. The Standards Board will be responsible for monitoring and ensuring the effectiveness of local arrangements, including supporting authorities which are experiencing difficulties and driving up their performance.

76. standards committees will therefore change both form and function:

- a. As of 1.4.08, standards committees must have an independent chair (s.187 of the 2007 Act, amending s.53(4) LGA 2000)<sup>11</sup>;
- b. They must have a minimum of:
  - i. Three members (two elected members and one independent member).
  - ii. 25% as independent lay members if the committee is more than three people.
  - iii. One parish or town council member if the authority has responsibilities for those councils.<sup>12</sup>

#### *Form of standards committees*

77. The Standards Board (and common sense) suggests, and regulations<sup>13</sup> will provide, that members who carry out a local assessment decision should not be involved in a review of the same decision, should one be requested.

78. In practice, this means that standards committees will have to establish at least two separate sub-committees:<sup>14</sup> one for taking initial assessment decisions and one for taking decisions on reviews. It appears that regulations will provide that any subcommittee should have an independent chair.

79. The suggestion from the Standards Board and in the consultation issued by DCLG is that a member who was involved in an initial assessment decision, or following referral of a complaint back to the standards committee from the monitoring officer or Standards Board for another assessment decision, can be a member of the committee that hears and determines the complaint. This is because an assessment decision only relates to whether a complaint discloses something that needs to be investigated. It does not require deliberation of whether the conduct

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<sup>11</sup> Brought into force by Local Government and Public Involvement in Health Act 2007 (Commencement No.2 and Savings) Order 2008, SI 2008 No. 172.

<sup>12</sup> The Standards Board recommends: at least six people as a minimum (three elected members and three independent members), with two, or possibly three, parish or town council members if the authority has responsibilities for those councils:

<http://www.standardsboard.gov.uk/Localassessment/Latestnews/title,6457,en.html>

<sup>13</sup> See the consultation paper at <http://www.communities.gov.uk/publications/localgovernment/laconduct>.

<sup>14</sup> Under the power granted by s.188 of the 2007 Act.

did or did not take place and so no conflict of interest will arise in hearing and determining the complaint

### *Functions*

80. Thanks to the insertion of ss.57A and 57B LGA 2000 by s.185 of the 2007 Act, standards committees will have three distinct roles in relation to complaints brought against members:

- a. Reviewing and assessing the initial complaint;
- b. Reviewing local assessment decisions;<sup>15</sup>
- c. Conducting hearings following investigation (including, where appropriate referring the matter to the APE if it considers that the action that it can take against the person is insufficient: new s.66A, introduced by s.195).

81. The Government proposes that the initial assessment and any review will take place behind closed doors, without public access either to the meeting or the documentation (i.e. that the meetings fall outside the scope of Part 5A LGA 1972).

82. If the standards committee considers (either initially or on review) that the allegation requires action, the standards committee can refer it to a monitoring officer for investigation (new s.57A(2)(a)). The Government has proposed that the monitoring officer be entitled – as at present – to investigate and make a report or recommendations. However, the Government has also proposed that the standards committee can direct the monitoring officer deal with the allegation other than by investigation: for instance by the provision of training or mediation or making amendments to the authority's internal procedure.<sup>16</sup> The Government suggests that this:

*“is intended to address situations where the standards committee considers that a case has relevance for the ethical governance of the authority, e.g. where there are disagreements between members or cases of repeated poor behaviour, which do not require a full investigation, but where a committee feels that some action should be taken.”*

83. Regulations will provide as to the circumstances under which a monitoring officer can refer a matter back to the standards committee under s.66(2)(f) LGA 2000 (as amended). The proposal is that the Committee will then conduct a further assessment of the allegation and a new decision under ss.57A(2)-(4) LGA 2000.

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<sup>15</sup> In the case of initial reviews of allegations, on the written application of the person making the complaint: s.57B(2).

<sup>16</sup> See the consultation paper at <http://www.communities.gov.uk/publications/localgovernment/laconduct>.

84. New s.57C(2) LGA 2000 will require the standards committee to take reasonable steps to give a written summary of an allegation to the person who is the subject of it, although it is anticipated that regulations will provide for exceptions to this requirement, for instance where there is a real possibility of intimidation of the complainant or witnesses by the subject of the allegation. Ss. 57A and 58 of the LGA 2000, as amended, will require the standards committee to provide written notice of a decision to take no further action.

*Assessment criteria and procedures*

85. The Standards Board will issue guidance on developing local assessment criteria. An interesting issue may well arise where a member is a member of more than one authority. This could well mean that the allegation is considered by two different standards committees, operating two different sets of local assessment criteria. The Government appears, however, to be curiously relaxed about this, suggesting in the consultation paper that:

*“in the spirit of the new devolved conduct regime, we consider that decisions on whether to deal with a particular allegation should be taken by standards committees themselves, following discussion with each other and taking advice as necessary from the Standards Board. This would enable a cooperative approach to be adopted, including the sharing of knowledge and information about the local circumstances and cooperation in the carrying out of investigations to ensure effective use of resources.*

*Two standards committees might, for example, consider it would be appropriate for both of them to consider similar allegations or the same allegation against the same individual, and even to reach a different decision on the matter. Under the new locally based regime standards committees will be encouraged to take into account local factors which affect their authorities and communities. Allegations of misconduct constituting a particular criminal offence might, for example, be taken more seriously by a standards committee of a police authority, than of another type of authority. And this could lead to the two standards committees reaching a different decision on the matter.”*

86. One might suspect, however, that this relaxed approach will not survive too many starkly inconsistent decisions.
87. In line with the Government’s stated “light touch” approach, it appears that timescales for operation of the new local assessment procedure will be a matter for guidance by the Standards Board, rather than the subject of statutory time limits. The standards committee will have to provide reports to the Standards Board outlining its performance by completing periodic online returns and producing an annual report (new s.66B LGA 2000). A seriously underperforming



standards committee will face having its local assessment functions suspended (by new s.57D LGA 2000 and associated regulations) and, potentially, having to pay the costs incurred by the carrying out of its functions by another standards committee (if the regulations proposed in the consultation paper are brought into force).

88. The Government wants to ensure that conduct matters are resolved at a local level wherever possible, and therefore intends to amend the maximum sanction that a standards committee can impose from 3 months partial suspension or suspension to six months.

*Miscellaneous amendments*

89. Section 189 provides for regulations to be made governing the establishment of joint standards committees. The intention is that the regulations will provide a considerable degree of flexibility in the establishment and remit of such committees. Interestingly, the majority of those authorities taking part in the pilot of the new procedures intended to operate jointly only the initial assessment functions under new s.57A LGA 2000.
90. By s.191 of the 2007 Act, s.63 of the LGA 2000 is amended to allow Ethical Standards Officers to disclose information to allow monitoring officers to carry out their duties (and also to the Ombudsman or the Electoral Commission for the purpose of their functions). The Secretary of State has also been given an order-making power to extend the disclosure power to other people. These powers do not completely address issues in practice:
- a. the section 63 of the Local Government Act 2000 imposes a blanket ban on the disclosure of information obtained by ESOs in their investigations, subject to limited exceptions. The prohibition is not restricted to confidential information and applies to information which could otherwise have been disclosed under the Freedom of Information Act 2000;
  - b. ESOs have taken to marking their reports confidential even where there is no confidential information in them. Whilst there may be circumstances where confidential information has to be in a report and should be protected, that can be dealt with by producing an edited report with the confidential material summarised in a non-confidential way.
91. A detailed set of Opposition amendments were tabled to address these issues, but did not found favour with the Government.
92. By s.192, monitoring officers can disclose to an officer or member of the authority a report received from the ESO on the outcome of his investigation (or an interim report), but only where the monitoring officer believes it will assist in promoting high standards of conduct by the members and co-opted members of

the relevant authority.

93. By s.197, amending s.78 LGA 200, a decision of an interim case tribunal of the APE that a member is to be suspended will have immediate effect. Furthermore, an appeal to the High Court against a decision of such a tribunal is now only possible with the permission of the High Court.
94. The scope of standards committees is extended by s.202 of the 2007 Act to cover the power to grant and the supervision of exemptions from political restrictions on officers of relevant authorities (it previously being the role of the Independent Adjudicator).

### **Bias and predetermination**

95. Over and above the requirements of the Code are to be found the principles laid down in administrative law. Of these, by the far the most importance in the planning context are those concerning bias and predetermination.
96. If a decision is taken by a biased decision-maker, the decision will have been taken in bad faith and should be quashed. Bias can take two forms:
- a. ‘Actual’ bias, where the decision-maker has a personal interest in the outcome of the case.<sup>17</sup> In such a case, the decision must be quashed unless the interest was so small that it could have played no part in the swaying the decision-maker’s mind.<sup>18</sup> This may arise in a judicial context.<sup>19</sup>
  - b. “Apparent bias,” where the circumstances are such that a “*fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased.*”<sup>20</sup>
97. Traditionally, questions of bias arose in the context of actual or apparent personal interests. For instance, in *R (Chorley) v Hendon RDC*<sup>21</sup> a member of a local authority had an interest in a development and voted on the decision to grant planning permission, and it was held that bias was present.

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<sup>17</sup> *Dimes v Proprietors of Grand Junction Canal* (1852) 3 HL Cas 759; *R v Bow Street Stipendiary Magistrate, ex p Pinochet Ugarte (No. 2)* [2000] 1 AC 119; and *Locabail (UK) Ltd v Bayfield* [2000] QB 451. The interest can be pecuniary, but it need not be.

<sup>18</sup> In cases of judicial bias, a second exception is that the party with an irresistible right to object to the judge hearing or continuing to hear a case waives that objection clearly and unequivocally: *Locabail (UK) Ltd v Bayfield Properties* [2000] QB 451 at 475C-D. Theoretically this would also apply to those engaged in either quasi-judicial or administrative decision making, but it is difficult to see how this would happen in practice.

<sup>19</sup> *Bovis Homes Limited v New Forest District Council*.

<sup>20</sup> *Porter v Magill* [2002] 2 AC 359 at 494H per Lord Hope.

<sup>21</sup> *R v Hendon RDC, ex p Chorley* [1933] 2 KB 696.

98. In recent years, though, courts have been increasingly ready to take into consideration when analysing the existence of actual or apparent bias the question of whether the decision-maker can be said to have predetermined the issue (in other words, to have approached the decision with a closed mind).<sup>22</sup>
99. Perhaps the best example of a case involving pre-determination is *Georgiou v. Enfield LBC* [2004] LGR 497. The Borough planning committee voted 8-7 in favour of proposals to build a nursing home in the curtilage of a listed building. But four members of the planning committee were also members of the Conservation Advisory Group, a non-executive committee of the Council. The CAG had previously considered and supported the proposals. The judge, Richards J, noted that while “*CAG’s remit was to consider only the conservation implications of the applications, its conclusion was expressed in simple terms of support for the applications, without any qualification.*” He concluded:

*“...though not without a degree of hesitation, that a fair-minded and informed observer would conclude that there was a real possibility of bias, in the sense of the decisions being approached with closed minds and without impartial consideration of all the planning issues, as a result of the support expressed by the CAG being carried over into support for the applications in the context of the planning committee’s decisions.”*

100. It is particularly important to act with discretion in dealings with developers/objectors generally. Perhaps the best advice is to avoid expressing a concluded view ahead of the meeting, and at the meeting disclose previous contacts with interested parties.
101. Note that these issues are quite separate from the Code provisions about interests – no need for personal interest in outcome or personal connection with anyone involved. But in an extreme case, participating when affected by predetermination could be treated as bringing your office or authority into disrepute under Code para. 5.

#### *Recent cases on bias and predetermination*

102. By way of update, the concluding section of this paper deals with a number of recent cases on bias.

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<sup>22</sup> Stemming, in large part, from the decision in *R v Secretary of State for the Environment ex parte Kirkstall Valley Campaign Ltd* [1996] 3 All ER 304. See also, in particular, *R(Costas Georgiou) v London Borough of Enfield* [2004] EWHC 779 (Admin); [2004] BLGR 497.

*R (Port Regis School Limited) v North Dorset District Council & Shaftsbury Agricultural Society*<sup>23</sup>

103. In this case, the allegation of bias concerned Freemasonry. There, the challenge arose from a proposal that one of the rooms of a pavilion to be erected on a new agricultural showground would be set aside for a use by a Masonic lodge. The allegation of apparent bias arose from the fact that two of the councillors who had attended and voted at the meeting were freemasons. Whilst not seeking to revise general principles, this case throws up a number of issues as to how apparent bias is applied. In this, it is crucial that the Courts have considered that the test is objective, looking at the facts as they are shown to the Court, rather than inquiring into the state of mind and state of knowledge of the person alleging bias or the decision maker. There may appear to be a real possibility of bias on what is known to the person in the public gallery of the council chamber, but not when all matters are disclosed. Conversely, that the decision maker may be able to say that they have assessed the matter impartially does not alter the Court's assessment.
104. In the present case the bias argument arose out of an erroneous belief of council members (and perhaps others) that the Masonic lodge was still interested in the planning application. One of the objective facts being assessed by the Court was that it was wrongly believed that the Lodge intended to take a room.
105. The case then revolved around the constitutional arrangements of Masons without it being clear what the two councillors who were Masons knew at the time. Resolving the formal meaning of the 'oath of mutual assistance', does not settle whether there was a real possibility of bias arising from the particular relationships. The case appears to have proceeded on the basis that the particular nature of Masonic rules and relationships gave rise to a real possibility of bias. The Court considered that Masonic oaths did not require councillors to act contrary to law or exercise partiality towards Masons or freemasonry. In the terms in which the issue was addressed, the conclusion was hardly surprising.
106. 'Interest' bias does not usually arise out of any impropriety in the relationship. The cases have considered perfectly proper interests (often public service appointments) which have led to a real possibility of bias. As Newman J indicated, the case could have been fought on the basis of an advancement of common interests. In that sense the case would have been little different to a councillor being a leader of a scout group, and a planning application benefiting another scout group. The issue arises where there is a body with a branch organisation or membership. There may be different financial and control relationships in the various possible organisations. The role of the councillor in the particular organisations may also be important. Looked at in

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<sup>23</sup> [2006] EWHC 1373 (Admin); [2006] JPL 1695

those terms, the case could have been seen to be finely balanced.

107. It is not clear from the judgment whether the councillors declared personal interests at the meeting as Masons. Whether such an interest was a prejudicial interest, requiring withdrawal from the meeting, was a similar question to there being a real possibility of bias arising from the interest. However, a personal interest has to be declared if the decision relates to an interest on the member's declaration of interests or otherwise differentially affected the well-being or financial position of themselves or certain other persons (see paragraph 8.03 of the Code). A planning application benefiting one Masonic Lodge would seem to relate to a councillor's membership of other Masonic Lodges.

*R (Island Farm Development Limited) v Bridgend County Borough Council*<sup>24</sup>

108. This case arose out of a council's refusal to sell land to a developer. The 'Island Farm' site, of some 13.5 hectares, had been acquired by the predecessor to the council for the purposes of commercial development and planning permission was in place for such a use. In the 2000s, the leader of the council pushed the scheme forward, in conjunction with training facilities for the Welsh Rugby Union. By 2004 the Council's cabinet had agreed Heads of Terms for the disposal of their property. However the contract was not signed before the majority group lost power in elections. The opposition parties had campaigned against the Island Farm scheme in the elections and on forming a coalition administration instructed officers to freeze the Island Farm disposal process. One member of the new cabinet had been secretary of the Island Farm Action Group which had campaigned against the scheme. In January 2005 the Council's coalition cabinet decided not to proceed with the sale and to retain the land.
109. The developer attacked the decision for pre-determination bias, arising primarily from the election manifesto, the councillor's involvement in IFAG and as Mr Justice Collins said "*the fact that the majority of the cabinet disapproved of the development was well known to all interested in the matter.*" However, the judge found that the minutes showed that the Cabinet considered the matter without preconceptions.
110. He considered that the councillors were entitled to act on their election policies and seek to stop the sale if they lawfully could. The judge expressed some doubts about the approach of Richards J in *R(Georgiou) v Enfield LBC*, saying:

*"Councillors will inevitably be bound to have views on and may well have expressed them about issues of public interest locally. Such may, as here, have been raised as election issues. It would be quite impossible for decisions to be made by the elected members*

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<sup>24</sup> [2006] EWHC 2189 (Admin).

*whom the law requires to make them if their observations could disqualify them because it might appear that they had formed a view in advance. The decision of the Court of Appeal in Baxter's case, of the New Zealand Court of Appeal in the Lower Hutt case and of Woolf J in the Amber Valley case do not support this approach. Nor is it consistent with those authorities that no weight should be attached to their own witness statements. Porter v Magill was a very different situation and involved what amounted to a quasi-judicial decision by the Auditor. In such a case, it is easy to see why the appearance of bias tests should apply to its full extent"*

111. He concluded:

*"The reality is that Councillors must be trusted to abide by the rules which the law lays down, namely that, 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 be prepared to change their views if persuaded that they should."*

112. Perhaps the distinction is between an open mind and an empty mind. The democratic process cannot function if parties and candidates are not able to have policies which they can then implement in power. In carrying out those policies, councillors do need to consider the circumstances at the time of the decision and decide whether that policy should be brought into effect.

*Condrón v National Assembly for Wales*<sup>25</sup>

113. Here, the apparent bias issue arose from an alleged remark made in a chance meeting between the Chair of the Planning Decision Committee, Carwyn Jones AM, and one of the objectors to a highly controversial opencast mining scheme, Mrs Jennie Jones. The application had received a favourable recommendation from an Inspector and the Assembly's Committee was to debate the report the following day. Mr Jones was alleged to have said that he was "*going to go with the Inspector's Report.*" The Committee then resolved that it was minded to grant the application and permission, the subject of the challenge, was formally issued in due course. It was found at first instance that Mr Jones was biased. Before the Court of Appeal, however, the view was taken that the attributed words went no further than indicating a predisposition to follow the inspector's report and not a closed mind. It did not matter how the person to whom those words were addressed had interpreted them. The question was whether the fears expressed by the complainant were objectively justified. Accordingly, the Court must look at all the circumstances as they appear from the material before it, not just at the facts known to the objectors

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<sup>25</sup> [2006] EWCA Civ 1573, [2007] J.P.L. 938.

or available to the hypothetical observer at the time of the decision. There was a clear distinction between a legitimate predisposition towards a particular outcome and an illegitimate predetermination of the outcome. The wider context of a chance meeting and a casual remark was also important in assessing the significance of the words used. Having regard to the terms of the inspector's report, the fact that the members of the committee had relevant training and were subject to a code of conduct, and the nature of their discussions, which were unusually prolonged, a fair-minded and informed observer would not conclude that there was a real possibility that Mr Jones, himself, or the Committee as a whole was biased.

*R(Ware) v Neath Port Talbot CBC*<sup>26</sup>

114. Although not strictly a bias case, this case is of considerable relevance to planning matters, and represents something of a cautionary tale for monitoring officers. Here, the authority had granted planning permission and a hazardous waste consent to National Grid for an above ground installation or facility that allowed high-pressure gas to be reduced in pressure so as to be suitable for local gas supply. The Claimant, Mrs Ware, had objected to National Grid's planning application for the proposed development. Four of the local authority's councillors who sat on the local authority's planning committee and who formed a non-politically aligned group attended a meeting where opponents of the proposed development discussed their objections. The councillors did not express any view as to the planning application at the meeting and later made a declaration to that effect. Before the planning committee convened to reach a decision about the development, a monitoring officer advised that the individual members should make a site visit to the proposed development and that a failure to do so, whilst not precluding a member from the decision-making process, might call into question the decision-making process and result in a challenge to any decision reached. Subsequently when the planning committee convened to consider the planning application, a monitoring officer asked the four councillors if they would consider making another declaration about their attendance at the earlier meeting at which the application had been discussed. The councillors asked if it would be better for them to leave. The monitoring officer told the councillors that it was a matter for them, but he warned them of the possibility of a complaint to the ombudsman if they participated in the decision-making process. The four councillors having regard to that advice did not participate further. National Grid's planning application was approved by 13 votes to 12. Mrs Ware contended that the four councillors had recused themselves from considering National Grid's planning application on the basis of wrong advice from the monitoring officer so that the decision to grant planning permission reached without the councillors' participation was flawed and should be quashed.

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<sup>26</sup> [2007] EWHC 913 (Admin), [2007] J.P.L. 1615; [2007] EWCA Civ 1359

115. Collins J reiterated that any decision reached by a councillor on a planning application was to be made fairly and without predetermination. He emphasised that councillors should approach the decision with an open mind and though they might be predisposed to a particular view they should be prepared to change their minds in response to the argument. Councillors had to be sure that they acted with propriety and did not do anything that would make a fair-minded and informed observer conclude that there was a reasonable prospect of bias. It was, however, equally important that councillors should not be prevented from carrying out the duties imposed on them by the democratic system by overcautious advice from monitoring officers. They should not participate in a decision only if there was a real risk that a fair-minded and informed observer would perceive bias.
116. In the instant case, Collins J held that there was no doubt that the four councillors had felt under pressure not to participate in the decision-making process. He found that the advice given to them by the monitoring officer had been wrong in the impression that it gave and was intended to give. The proper advice would have been that since the councillors had not reached any predetermination there was no reason at all why they should not stay and vote. Moreover, in all the circumstances a site visit was not so essential as to make it wrong for the councillors who had not taken part in a site visit to participate in the decision-making process.<sup>27</sup> If wrong advice from a monitoring officer had been the cause of a councillor's decision not to vote on a decision of the local authority, Collins J find that this could affect the lawfulness of the decision ultimately reached, since it would amount to the consideration of immaterial factors. It would, however, depend on the individual circumstances of a particular case. In the exceptional circumstances of the instant case, the advice given to the councillors had been tantamount to a suggestion that the councillors had better not remain and take part in the decision-making process. On the evidence it was plain that the councillors had wanted to remain and take part in the process but for the advice that they received. They had not had the opportunity of independent advice and their absence might have affected the planning committee's vote and the decision reached. Accordingly, the grant of planning permission was quashed and as the hazardous waste consent was parasitic to the planning application it fell with it.
117. The Council appealed. The Court of Appeal allowed their appeal. It did not criticise the approach taken by Collins J (and expressly declined to consider a number of detailed arguments advanced by the Council as to, for instance, the limits on the ability of the court to go behind the exercise of the discretion to abstain from voting). However, the Court of Appeal found that Collins J had erred in his consideration of the facts: it found that in substance, the relevant (and unchallenged) evidence of the four councillors in the court below had been that they were left to make their own decisions and to exercise their own

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<sup>27</sup> In this, Collins J took into account the recent case of *Chichester DC v First Secretary of State* [2006] EWHC 1876.



judgment about voting on the National Grid item in the relevant meeting. They had not been pressured to abstain from voting, and the judge's summary of the advice given to the four councillors was inaccurate in several significant respects. In particular, the advice that the judge had held to be wrong was not the advice that was, in fact, given. Therefore there had been no procedural irregularity vitiating the grant of the consents.

*R(Lewis) v Redcar & Cleveland BC*<sup>28</sup>

118. Here, Mr Lewis, a homeowner, applied for judicial review of the defendant local authority's decision to grant outline planning permission for a mixed residential and leisure development on neighbouring land. The local authority-owned site was near a Special Protection Area which was also a European site for the purposes of Regulation 48 of the Conservation (Natural Habitats &c.) Regulations 1994. Heads of terms were signed by the council's cabinet and the local authority's development partner. The development was controversial and had been the subject of public debate for some years; the coalition which controlled the council at the time had been strongly in favour of the development, and the opposition party had been against. The local authority issued guidance suggesting that the council should avoid making decisions on controversial matters during the upcoming election period. Local authority officers took the view that the progress of the application did not need to be suspended during the election period, and it was resolved at a planning committee meeting, at which a member of the cabinet and all other coalition members voted in favour of the development, to grant outline permission. As a result of the elections, control of the council passed to the former opposition party. The Claimant argued that the planning committee's decision had been unlawful by reason of apparent bias or predetermination<sup>29</sup>.
119. In considering the question of bias, Jackson J emphasised that, so as not to render local authority decision making unduly difficult or impossible, the test had to be applied with appropriate caution; it was necessary to assume that the notional observer was cognisant of the practicalities of local government. Consequently, the notional observer would not take it amiss that councillors had previously expressed views on the relevant matters and would trust councillors to approach the decision-making process with an open mind.<sup>30</sup> Before the court could make a finding of apparent bias or predetermination, it had firstly to identify with precision the facts which would drive the notional observer to a conclusion that there was a real possibility of bias or predetermination.

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<sup>28</sup> [2007] EWHC 3166 (Admin).

<sup>29</sup> A further ground of challenge revolved around the application of Regulation 48. It is not relevant to the issue of bias and is not discussed further here.

<sup>30</sup> Applying *Gillies v Secretary of State for Work and Pensions* [2006] 1 WLR 781, *Georgiou v Enfield LBC* [2004] BLGR 497 and *Island Farm*

120. Jackson J found that the fact that the scheme was essentially promoted by the local authority and involved its own land would not arouse the notional observer's suspicions; that situation was not unusual. The fact that coalition members had previously expressed support for the scheme would not arouse suspicion. What would tip the balance and cause the notional observer to conclude that there was a real possibility of bias or predetermination was the decision, contrary to the local authority guidance, to hold the planning committee meeting during the election period when the merits of the project had clearly become a party political issue in the imminent election. The facts that a relevant member had voted at the meeting, that no coalition member had abstained or voted against the motion and that the coalition had effectively tied the hands of its successors by entering into a binding development agreement with the partner two days before the election would increase the notional observer's concerns. He therefore granted this ground of the application for judicial review.

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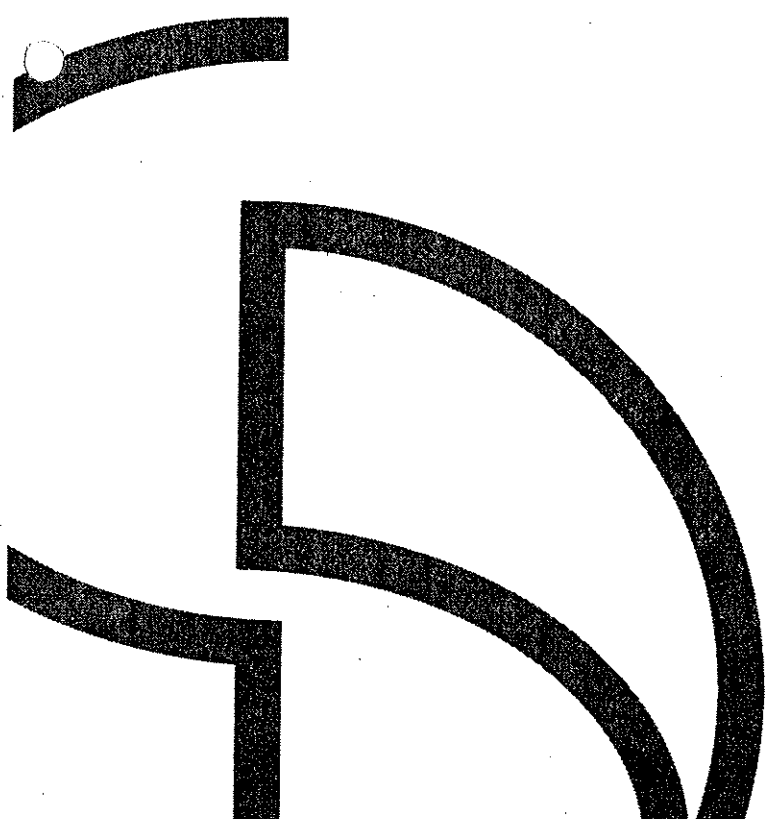
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# LOCAL ASSESSMENT OF COMPLAINTS

## Contents

- introduction
- pre-assessment
- assessment
- decision
- review
- other issues to consider



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# introduction

This guidance is designed to help members and officers in relevant authorities who are involved in the assessment of complaints that a member may have breached the Code of Conduct.

It details each stage of the assessment of complaints and offers suggestions for effective practice. In addition, it provides a toolkit of useful document templates that may be used or adapted by authorities as required.

The guide is aimed primarily at members of standards committees and monitoring officers, but will also provide a useful reference tool for all members and officers involved in the assessment of complaints.

It applies to:

- district, unitary, metropolitan, county and London borough councils
- English police authorities
- fire and rescue authorities (including fire and civil defence authorities)
- the London Fire and Emergency Planning Authority
- passenger transport authorities
- the Broads Authority
- national park authorities
- the Greater London Authority
- the Common Council of the City of London
- the Council of the Isles of Scilly

Each authority must develop effective procedures to fulfil its legislative requirements. Members and officers involved in the assessment of complaints must take this guidance into account when doing so.

You can contact the Standards Board for England on **0845 078 8181** or email [enquiries@standardsboard.gov.uk](mailto:enquiries@standardsboard.gov.uk)

# introduction

## Regulations

The Standards Board for England has issued this guidance to reflect the Standards Committee (England) Regulations 2008 (the regulations) in respect of the local assessment of complaints. These regulations derive from the Local Government Act 2000, as amended by the Local Government and Public Involvement in Health Act 2007.

The regulations set out the framework for the operation of a locally based system for the assessment, referral, investigation and hearing of complaints of member misconduct. Under the regulations, standards committees must take this guidance into account.

The regulations do not cover joint working between authorities. The government plans to issue more regulations to provide a framework for authorities to work jointly on the assessment, referral, investigation and hearing of complaints of misconduct by their members.

## Background

More than 100,000 people give their time as members of authorities. The majority do so with the very best motives, and they conduct themselves in a way that is beyond reproach. However, public perception tends to focus on a minority who in some way abuse their positions or behave badly.

Anyone who considers that a member may have breached the Code of Conduct may make a complaint to that member's local

standards committee. Each complaint must then be assessed to see if it falls within the authority's legal jurisdiction. A decision must then be made on whether some action should be taken, either as an investigation or some other form of action.

When a matter is referred for investigation or other action, it does not mean that the committee assessing the complaint has made up its mind about the allegation. It simply means that the committee believes the alleged conduct, if proven, may amount to a failure to comply with the Code and that some action should be taken in response to the complaint.

The process for dealing with matters at a local level should be the same for all members. It must be fair and be seen to be fair.

## Responsibilities

The assessment of complaints that a member may have breached the Code of Conduct is a new function for standards committees. It was previously undertaken centrally by the Standards Board for England.

Where a member is the subject of an allegation, we shall refer to that member as a **subject member**.

We shall use the term **independent member** to describe a person – not a member or officer of that or any other relevant authority – who is appointed to an authority's standards committee. Independent members work with the

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authority to develop and maintain standards of conduct for members and are appointed under Section 53 of the Local Government Act 2000 and Regulation 5 of the regulations. At least 25% of the members of a standards committee must be independent members.

In order to carry out its functions efficiently and effectively, the standards committee must establish sub-committees. Creating sub-committees will allow the separate functions involved in the handling of cases to be carried out without conflicts of interest. These functions are:

- the **initial assessment** of a complaint received by the standards committee
- any **request** a standards committee receives from a complainant **to review its decision to take no action in relation to a complaint**

The standards committee must establish a sub-committee which is responsible for assessing complaints that a member may have breached the Code. We shall refer to this as the **assessment sub-committee**.

The assessment sub-committee will need to consist of no less than three members of the standards committee, including an independent member. They must also be chaired by an independent member. A complainant may make a request for a review of a standards committee's decision where it decides to take no further action on a complaint. The standards committee must establish a sub-committee which is responsible for carrying out these reviews.

We shall refer to this as the **review sub-committee**.

This committee will also need to consist of no less than three members of the standards committee, including an independent member. They must also be chaired by an independent member.

There should be a minimum of three independent members on the standards committee to ensure that there is an independent member available without a conflict of interest for both the assessment and review sub-committees.

The standards committee can then effectively carry out these statutory functions, allowing for the situation of one independent member of the standards committee being absent or unavailable.

If the authority is responsible for any parish or town councils there should also be a minimum of three parish or town council representatives on the standards committee. This will ensure that there is a parish or town council representative available without a conflict of interest for both the assessment and review sub-committees when a complaint is considered about a member of a parish or town council.

The assessment and review sub-committees are not required to have fixed membership or a fixed chair.

Standards committee members who have been involved in decision making on the initial assessment of a complaint must not



# introduction

take part in the review of that decision. This is to minimise the risk of conflicts of interest and ensure fairness for all parties.

Standards committee members involved in a complaint's initial assessment, or in a review of a standards committee's previous decision to take no further action, can take part in any subsequent standards committee hearing.

The purpose of the initial assessment decision or review is simply to decide whether any action should be taken on the complaint – either as an investigation or some other action. The assessment and review sub-committees make no findings of fact. Therefore, a member involved at the initial stage or the review stage may participate in a subsequent hearing, because a conflict of interest does not automatically arise.

# pre-assessment

## **Publicising the complaints system**

Each authority is required to publish a notice detailing where Code of Conduct complaints should be sent to. This is to ensure that members of the public are aware of the change of responsibility for handling Code complaints and what the process entails. If an authority is responsible for parish and town councils, the notice should make this clear.

The complaints system may be publicised through:

- an authority's website
- advertising in one or more local newspapers
- an authority's own newspaper or circular
- notices in public areas such as local libraries or authority reception areas

It is important that the public notice reaches as many people as possible so that members of the public know how to complain if necessary.

The standards committee must also continue to publicise regularly the address that misconduct complaints should be sent to. In addition, the standards committee needs to alert the public to any changes in such arrangements.

Authorities need to think carefully about how publicity for their complaints system is worded. This is to ensure that members of the public are clear about how to complain, who to complain to, and if there may be an alternative to a formal complaint to the standards committee.

Authorities should also consider whether their constitution requires an amendment to reflect the introduction of the local assessment of complaints. The constitution should make it clear that the citizen's right is to complain to the local standards committee and not to the Standards Board for England.

The standards committee must publish, in whatever manner it considers appropriate, details of the procedures it will follow in relation to any written allegation received about a member.

## **The submission of complaints and accessibility**

There are two main ways in which authorities can set up procedures for the submission of complaints that a member may have breached the Code of Conduct:

- Authorities may choose to integrate the making of Code complaints into the existing complaints framework. This will mean that when a complaint is received, it can be analysed to decide which of the complaints processes is most appropriate. The authority can then advise the complainant accordingly.
- Authorities may choose to develop a separate process for Code complaints so the process for such complaints is distinct from all other complaints.

When deciding which option is most appropriate, authorities should consider that some complainants will not know where to direct their complaint.

# pre-assessment

Some complaints may also need to be considered through more than one of an authority's complaint processes.

Officers dealing with incoming complaints will need to be alert to a complaint that a member may have breached the Code. If a written complaint specifies or appears to specify that it is in relation to the Code, then it should be passed to the assessment sub-committee for consideration.

Where an authority is responsible for parish and town councils, it should make this clear. It should also consider whether a separate complaint form or section of a complaint form should be used.

Where an existing complaint system is used, complaint forms may need to be amended to take into account complaints under the Code. Alternatively, authorities that choose to develop a separate system for the submission of Code complaints may produce a separate complaint form for this.

Without using a separate complaint form, authorities may find it sufficient to give clear guidelines as to the information that complainants need to provide.

This should include:

- the complainant's name, address and other contact details
- complainant status, for example, member of the public, fellow member or officer

- who the complaint is about and the authority or authorities that the member belongs to
- details of the alleged misconduct including, where possible, dates, witness details and other supporting information
- equality monitoring data if applicable, for example nationality of the complainant
- a warning that the complainant's identity will normally be disclosed to the subject member. **Note:** in exceptional circumstances, if it meets relevant criteria and at the discretion of the standards committee, this information may be withheld.

Complaints must be submitted in writing. This includes fax and electronic submissions. However, the requirement for complaints to be submitted in writing must be read in conjunction with the Disability Discrimination Act 2000 and the requirement to make reasonable adjustments.

An example of this would be in assisting a complainant who has a disability that prevents them from making their complaint in writing. In such cases, authorities may need to transcribe a verbal complaint and then produce a written copy for approval by the complainant or the complainant's representative.

Authorities should also consider what support should be made available to

# pre-assessment

complainants where English is not the complainant's first language.

When a complaint is addressed to the authority's monitoring officer, the monitoring officer should determine whether the complaint should be directed to the assessment sub-committee or whether another course of action is appropriate. If the complaint is clearly not about member conduct, then the monitoring officer does not have to pass it to the assessment sub-committee.

A complaint may not necessarily be made in writing, for example it may be a concern raised with the monitoring officer verbally. In such cases, the monitoring officer should ask the complainant whether they want to formally put the matter in writing to the standards committee. If the complainant does not, then the monitoring officer should consider the options for informal resolution to satisfy the complainant.

## **Acknowledging receipt of a complaint**

The monitoring officer has the discretion to take the administrative step of acknowledging receipt of a complaint and telling the subject member that a complaint has been made about them. When considering whether to do so, they should bear in mind the standards committee's procedures with regard to withholding summaries. Please see the section on **Notification requirements on page 18** for further information.

The notification can say that a complaint has been made, and state the name of the

complainant (unless the complainant has requested confidentiality and the standards committee has not yet considered whether or not to grant it) and the relevant paragraphs of the Code of Conduct that may have been breached. It should also state that a written summary of the allegation will only be provided to the subject member once the assessment sub-committee has met to consider the complaint, and the date of this meeting, if known.

If a monitoring officer chooses to tell a subject member, the monitoring officer will need to be satisfied that they have the legal power to disclose the information they choose to reveal. In particular, the monitoring officer will need to consider any of the restrictions set out in Section 63 of the Local Government Act 2000 and as modified by Regulation 12 of the regulations. These are the provisions which deal with restrictions on disclosure of information. Additionally, the impact of the Data Protection Act 1998 should be considered.

Only the standards committee has the power, under Section 57C(2) of the Local Government Act 2000, as amended, to give a written summary of the allegation to a subject member.

The administrative processes that the authority adopts should be agreed with the standards committee as part of the processes and procedures that they must publish.

# pre-assessment

## Pre-assessment reports and enquiries

Authorities may decide that they want the monitoring officer, or other officer, to prepare a short summary of a complaint for the assessment sub-committee to consider. This could, for example, set out the following details:

- whether the complaint is within jurisdiction
- the paragraphs of the Code of Conduct the complaint might relate to, or the paragraphs the complainant has identified
- a summary of key aspects of the complaint if it is lengthy or complex
- any further information that the officer has obtained to assist the assessment sub-committee with its decision – this may include:
  - a) obtaining a copy of a declaration of acceptance of office form and an undertaking to observe the Code
  - b) minutes of meetings
  - c) a copy of a member's entry in the register of interests
  - d) information from Companies House or the Land Registry
  - e) other easily obtainable documents

Officers may also contact complainants for clarification of their complaint if they are unable to understand the document submitted.

Pre-assessment enquiries should not be carried out in such a way as to amount to an investigation. For example, they should not extend to interviewing potential witnesses, the complainant, or the subject member.

Officers should not seek opinions on an allegation rather than factual information as this may prejudice any subsequent investigation. They should also ensure their report does not influence improperly the assessment sub-committee's decision or make the decision for it.

# assessment

## Initial tests

Before assessment of a complaint begins, the assessment sub-committee should be satisfied that the complaint meets the following tests:

- it is a complaint against one or more named members of the authority or an authority covered by the standards committee
- the named member was in office at the time of the alleged conduct and the Code of Conduct was in force at the time
- the complaint, if proven, would be a breach of the Code under which the member was operating at the time of the alleged misconduct

If the complaint fails one or more of these tests it cannot be investigated as a breach of the Code, and the complainant must be informed that no further action will be taken in respect of the complaint.

## Developing assessment criteria

The standards committee or its assessment sub-committee will need to develop criteria against which it assesses new complaints and decides what action, if any, to take. These criteria should reflect local circumstances and priorities and be simple, clear and open. They should ensure fairness for both the complainant and the subject member.

Assessing all new complaints by established criteria will also protect the committee members from accusations of bias. Assessment criteria can be reviewed and amended as necessary but this should not be done during consideration of a matter.

In drawing up assessment criteria, standards committees should bear in mind the importance of ensuring that complainants are confident that complaints about member conduct are taken seriously and dealt with appropriately. They should also consider that deciding to investigate a complaint or to take other action will cost both public money and the officers' and members' time. This is an important consideration where the matter is relatively minor.

Authorities need to take into account the public benefit in investigating complaints which are less serious, politically motivated, malicious or vexatious. Assessment criteria should be adopted which take this into account so that authorities can be seen to be treating all complaints in a fair and balanced way.

To assist in developing the criteria for accepting a complaint or for deciding to take no further action on it, a standards committee or assessment sub-committee may want to ask itself the following questions and consider the following response statements. These will provide a good foundation for developing assessment criteria in the context of local knowledge and experience:

# assessment

**Q: Has the complainant submitted enough information to satisfy the assessment sub-committee that the complaint should be referred for investigation or other action?**

If the answer is **no**: "The information provided was insufficient to make a decision as to whether the complaint should be referred for investigation or other action. So unless, or until, further information is received, the assessment sub-committee is taking no further action on this complaint."

**Q: Is the complaint about someone who is no longer a member of the authority, but is a member of another authority? If so, does the assessment sub-committee wish to refer the complaint to the monitoring officer of that other authority?**

If the answer is **yes**: "Where the member is no longer a member of our authority but is a member of another authority, the complaint will be referred to the standards committee of that authority to consider."

**Q: Has the complaint already been the subject of an investigation or other action relating to the Code of Conduct? Similarly, has the complaint been the subject of an investigation by other regulatory authorities?**

If the answer is **yes**: "The matter of complaint has already been subject to a

previous investigation or other action and there is nothing more to be gained by further action being taken."

**Q: Is the complaint about something that happened so long ago that there would be little benefit in taking action now?**

If the answer is **yes**: "The period of time that has passed since the alleged conduct occurred was taken into account when deciding whether this matter should be referred for investigation or further action. It was decided under the circumstances that further action was not warranted."

**Q: Is the complaint too trivial to warrant further action?**

If the answer is **yes**: "The matter is not considered to be sufficiently serious to warrant further action."

**Q: Does the complaint appear to be simply malicious, politically motivated or tit-for-tat?**

If the answer is **yes**: "The matter appears to be simply malicious, politically motivated or tit-for-tat, and not sufficiently serious, and it was decided that further action was not warranted"

The assessment criteria that the standards committee adopts should be made publicly available.

# decision

## Initial assessment decisions

The assessment sub-committee should complete its initial assessment of an allegation within an average of 20 working days, to reach a decision on what should happen with the complaint.

The assessment sub-committee is required to reach one of the three following decisions on a complaint about a member's actions in relation to the Code of Conduct:

- referral of the complaint to the monitoring officer of the authority concerned, which under section 57A(3) of the Local Government Act 2000, as amended, may be another authority
- referral of the complaint to the Standards Board for England
- no action should be taken in respect of the complaint

New rules have been made about what the assessment sub-committee must do when a decision has been made. Please see the section on **Access to meetings and decision making** on page 22 for further information.

The time that the assessment sub-committee takes to carry out its initial assessment of a complaint is key in terms of being fair to the complainant and the subject member. It is also in the public interest to make a timely decision within an average of 20 working days. The assessment sub-committee should

therefore aim to achieve this target wherever possible.

## Referral for local investigation

When the assessment sub-committee considers a new complaint, it can decide that it should be referred to the monitoring officer for investigation.

The monitoring officer must write to the relevant parties informing them of the decision and, if appropriate, advising who will be responsible for conducting the investigation. Please see the section on **Notification requirements** on page 18 for further information.

## Referral to the Standards Board for England

In most cases, authorities will be able to deal with the investigation of complaints concerning members of their authorities and, where relevant, the parish and town councils they are responsible for.

However, there will sometimes be issues in a case, or public interest considerations, which make it difficult for the authority to deal with the case fairly and speedily. In such cases, the assessment sub-committee may wish to refer a complaint to the Standards Board to be investigated by an ethical standards officer.

If the assessment sub-committee believes that a complaint should be investigated by the Standards Board, it must take immediate steps to refer the matter. It would be helpful if the assessment



# decision

sub-committee let us know the paragraph or paragraphs of the Code of Conduct that it believes the allegation refers to and the reasons why it cannot be dealt with locally.

We may accept cases for investigation by an ethical standards officer, take no action, or refer cases back to the standards committee which referred them. When deciding which of these actions to take, we will be principally concerned with supporting the ethical framework nationally and locally.

We will take the following matters into account in deciding which cases we should accept in the public interest:

- Does the standards committee believe that the status of the member or members, or the number of members about whom the complaint is made, would make it difficult for them to deal with the complaint? For example, is the member a group leader, elected mayor or a member of the authority's cabinet or standards committee?
- Does the standards committee believe that the status of the complainant or complainants would make it difficult for the standards committee to deal with the complaint? For example, is the complainant a group leader, elected mayor or a member of the authority's cabinet or standards committee, the chief executive, the monitoring officer or other senior officer?
- Does the standards committee believe that there is a potential conflict of interest of so many members of the standards committee that it could not properly monitor the investigation?
- Does the standards committee believe that there is a potential conflict of interest of the monitoring officer or other officers and that suitable alternative arrangements cannot be put in place to address the conflict?
- Is the case so serious or complex, or involving so many members, that it cannot be handled locally?
- Will the complaint require substantial amounts of evidence beyond that available from the authority's documents, its members or officers?
- Is there substantial governance dysfunction in the authority or its standards committee?
- Does the complaint relate to long-term or systemic member/officer bullying which could be more effectively investigated by someone outside the authority?
- Does the complaint raise significant or unresolved legal issues on which a national ruling would be helpful?
- Might the public perceive the authority to have an interest in the outcome of a case? For example if the authority could be liable to be judicially reviewed if the complaint is upheld.
- Are there exceptional circumstances which would prevent the authority or its

# decision

standards committee investigating the complaint competently, fairly and in a reasonable period of time, or meaning that it would be unreasonable for local provision to be made for an investigation?

We will normally inform the monitoring officer within ten working days whether we will accept a case or whether we will refer it back to the standards committee, with reasons for doing so. There is no appeal mechanism against our decision.

## **Referral back to a standards committee from the Standards Board for England**

If we decline to investigate a complaint referred to us, we will normally send it back to the authority's standards committee with the reasons why. The standards committee must then decide what action should be taken next.

The assessment sub-committee must again take an assessment decision and should complete this within an average of 20 working days.

This may be a decision not to take any further action, to refer the matter for local investigation, or to refer the matter for some other form of action. As the assessment sub-committee initially decided that the matter was serious enough to be referred to the Standards Board for investigation, it is likely that it will still think that it should be investigated.

However, if the circumstances of the complaint have changed since the

assessment sub-committee's original decision, it may be reasonable to take a different decision. This decision will again need to be communicated to relevant parties in the same way as the original decision was. Please see the section on **Notification requirements on page 18** for further information.

If we decline to investigate a case referred to us, we may, in the circumstances, offer guidance or give a direction to the standards committee, which may assist with the standards committee's decision.

In exceptional circumstances, we may decide to take no further action on a complaint referred to us by a standards committee. This is likely to be where circumstances have changed so much that there would be little benefit arising from investigation or other action, or because we do not consider that the complaint discloses a breach of the Code of Conduct.

## **Referral for other action**

When the assessment sub-committee considers a new complaint, it can decide that other action to an investigation should be taken and it can refer the matter to the monitoring officer to carry this out. It may not always be in the interests of good governance to undertake or complete an investigation into an allegation of misconduct. The assessment sub-committee must consult its monitoring officer before reaching a decision to take other action.

# decision

The suitability of other action is dependent on the nature of the complaint. Certain complaints that a member has breached the Code of Conduct will lend themselves to being resolved in this way. They can also indicate a wider problem at the authority concerned. Deciding to deal pro-actively with a matter in a positive way that does not involve an investigation can be a good way to resolve matters that are less serious. Other action can be the simplest and most cost effective way of getting the matter resolved, helping the authority to work more effectively, and of avoiding similar complaints in the future.

The assessment sub-committee can choose this option in response to an individual complaint or a series of complaints. The action decided upon does not have to be limited to the subject member or members. In some cases, it may be less costly to choose to deal with a matter in this way rather than through an investigation, and it may produce a more effective result.

It is not possible to set out all the circumstances where other action may be appropriate, but an example is where the authority to which the subject member belongs appears to have a poor understanding of the Code and authority procedures. Evidence for this may include:

- a number of members failing to comply with the same paragraph of the Code
- officers giving incorrect advice
- failure to adopt the Code
- inadequate or incomplete protocols for use of authority resources

Other action may also be appropriate where a breakdown in relationships within the authority is apparent, evidence of which may include:

- a) a pattern of allegations of disrespect, bullying or harassment
- b) factionalised groupings within the authority
- c) a series of 'tit-for-tat' allegations
- d) ongoing employment issues, which may include resolved or ongoing employment tribunals, or grievance procedures

The assessment sub-committee is encouraged to consider other action on a practical basis, taking into account the needs of their own authority and of the parish and town councils which they serve. Everyone involved in the process will need to understand that the purpose of other action is not to find out whether the member breached the Code – the decision is made as an alternative to investigation. If the monitoring officer embarks on a course of other action, they should emphasise to the parties concerned that no conclusion has been reached on whether the subject member failed to comply with the Code.

Complaints that have been referred to the monitoring officer for other action should not then be referred back to the standards committee if the other action is perceived to have failed. This is unfair to the subject member, and a case may be jeopardised if it has been discussed as part of a mediation process. There is also a difficulty with defining 'failure' in terms of

# decision

the other action undertaken. The decision to take other action closes the opportunity to investigate and the assessment sub-committee should communicate this clearly to all parties.

Standards committees may find it helpful to introduce a requirement for the parties involved to confirm in writing that they will co-operate with the process of other action proposed. An example of this would be writing to the relevant parties outlining:

- what is being proposed
- why it is being proposed
- why they should co-operate
- what the standards committee hopes to achieve

However authorities choose to take this forward, the important thing is that all parties are clear about what is, and what is not, going to happen in response to the complaint.

The following are some examples of alternatives to investigation:

- arranging for the subject member to attend a training course
- arranging for that member and the complainant to engage in a process of conciliation
- instituting changes to the procedures of the authority if they have given rise to the complaint

Standards committees may find that resolving a matter in this way is relatively

quick and straightforward compared to a full investigation.

## **Decision to take no action**

The assessment sub-committee can decide that no action is required in respect of a complaint. For example, this could be because the assessment sub-committee does not consider the complaint to be sufficiently serious to warrant any action. Alternatively, it could be due to the length of time that has elapsed since the alleged conduct took place and the complaint was made. The decision reached by the assessment sub-committee and the reasons for it should adhere to the assessment criteria that the standards committee or assessment sub-committee have agreed.

It is important to underline that where no potential breach of the Code of Conduct is disclosed by the complaint, no matter what its source or whoever the subject member, no action can be taken by the standards committee in respect of it. The matter of referral for investigation or other action therefore does not arise.

The complainant should be advised of their right to ask for a review of a decision to take no action. They should be told that they can exercise this right by writing to the standards committee with their reasons for requesting a review. The complainant should be advised of the date by which their review request should be received by the standards committee.

# decision

That date is 30 working days after the initial assessment decision is received.

## **Notification requirements – local assessment decisions**

If the assessment sub-committee decides to take no action over a complaint, then as soon as possible after making the decision it must give notice in writing of the decision and set out clearly the reasons for that decision. Where no potential breach of the Code is disclosed, the assessment sub-committee must explain in the decision notice what the allegation was and why they believe this to be the case. This notice must be given to the relevant parties.

The relevant parties will be the complainant and the subject member. If the subject member is a parish or town councillor, their parish or town council must also be notified. We suggest that the standards committee sends out its decision notice within five working days of the decision being made.

If the assessment sub-committee decides that the complaint should be referred to the monitoring officer or to the Standards Board for England, it must send a summary of the complaint to the relevant parties. It should state what the allegation was and what type of referral it made, for example whether it referred the complaint to the monitoring officer or to the Standards Board for investigation. The decision notice must explain why a particular referral decision has been made. After it has made its decision, the assessment sub-committee does not have

to give the subject member a summary of the complaint, if it decides that doing so would be against the public interest or would prejudice any future investigation.

This could happen where it is considered likely that the subject member may intimidate the complainant or the witnesses involved. It could also happen where early disclosure of the complaint may lead to evidence being compromised or destroyed. The assessment sub-committee needs to take such possibilities into account when developing with its monitoring officer any process that notifies a member about a complaint made against them.

The assessment sub-committee should take advice from the monitoring officer in deciding whether it is against the public interest to inform the subject member of the details of the complaint made against them. It should also take advice from the monitoring officer in deciding whether informing the subject member of the details of the complaint would prejudice a person's ability to investigate it.

The monitoring officer will need to carry out an assessment of the potential risks to the investigation. This is to determine whether the risk of the case being prejudiced by the subject member being informed of the details of the complaint at that stage may outweigh the fairness of notifying the subject member. An example of this is allowing the subject member to preserve any evidence. The monitoring officer should then advise the assessment sub-committee accordingly.

# decision

The assessment sub-committee can use its discretion to give limited information to the subject member if it decides this would not be against the public interest or prejudice any investigation. Any decision to withhold the summary must be kept under review as circumstances change.

# review

## Reviews of 'no further action' decisions

If the assessment sub-committee decides not to take any action on a complaint, then the complainant has a right of review over that decision.

The review sub-committee must carry out its review within a maximum of three months of receiving the request. We recommend that the review sub-committee adopts a policy of undertaking the review within the same timescale as the initial assessment decision is taken, aiming to complete the review within an average of 20 working days.

The review must be, and must be seen to be, independent of the original decision. Members of the assessment sub-committee who made the original decision must not take part in the review of that decision. A separate review sub-committee, made up of members of the standards committee, must consider the review.

The review sub-committee should apply the same criteria used for initial assessment. The review sub-committee has the same decisions available to it as the assessment sub-committee.

There may be cases where further information is made available in support of a complaint that changes its nature or gives rise to a potential new complaint. In such cases, the review sub-committee should consider carefully if it is more appropriate to pass this to the assessment sub-committee to be handled as a new

complaint. In this instance, the review sub-committee will still need to make a formal decision that the review request will not be granted.

For example, a review may be more appropriate if a complainant wishes to challenge that:

- not enough emphasis has been given to a particular aspect of the complaint
- there has been a failure to follow any published criteria
- there has been an error in procedures

However, if more information or new information of any significance is available, and this information is not merely a repeat complaint, then a new complaint rather than a request for review may be more suitable.

## Notification requirements – reviews of local assessment decisions

If the standards committee receives a review request from the complainant, it must notify the subject member that it has received the request. We recommend that all relevant parties are notified when a review request is received.

When the review sub-committee reviews the assessment sub-committee's decision it has the same decisions available to it that the assessment sub-committee had. It could be decided that no action should be taken on the complaint. In this case, the review sub-committee must, as soon as

# review

possible after making the decision, give the complainant and the subject member notice in writing of both the decision and the reasons for the decision. If the subject member is a parish or town councillor, the review sub-committee must also give written notice to the parish or town council.

If it is decided that the complaint should be referred to the monitoring officer or to the Standards Board for England, the standards committee should write to the relevant parties telling them this and letting them have a summary of the complaint. The decision notice must explain why that particular referral decision has been made.

We recommend that the review sub-committee sends out its decision notice within five working days of the decision being made.



# other issues to consider

## Access to meetings and decision making

Initial assessment decisions, and any subsequent review of decisions to take no further action on a complaint, must be conducted in closed meetings. These are not subject to the notice and publicity requirements under Part 5 of the Local Government Act 1972.

Such meetings may have to consider unfounded and potentially damaging complaints about members, which it would not be appropriate to make public. As such, a standards committee undertaking its role in the assessment or review of a complaint is not subject to the following rules:

- rules regarding notices of meetings
- rules on the circulation of agendas and documents
- rules over public access to meetings
- rules on the validity of proceedings

Instead, Regulation 8 of the regulations sets out what must be done after the assessment or review sub-committee has considered a complaint. The new rules require a written summary to be produced which must include:

- the main points considered
- the conclusions on the complaint
- the reasons for the conclusion

The summary must be written having regard to this guidance and may give the name of the subject member unless doing so is not in the public interest or would prejudice any subsequent investigation.

The written summary must be made available for the public to inspect at the authority's offices for six years and given to any parish or town council concerned. The summary does not have to be available for inspection or sent to the parish or town council until the subject member has been sent the summary.

In limited situations, a standards committee can decide not to give the written summary to the subject member when a referral decision has been made and, if this is the case, authorities should put in place arrangements which deal with when public inspection and parish or town council notifications will occur. This will usually be when the written summary is eventually given to the subject member during the investigation process. Please see the section on **Notification requirements** on page 18 for further information.

Review of a decision to take no further action on a complaint is not subject to access to information rules in respect of local government committees.

In addition, authorities must have regard to their requirements under Freedom of Information and Data Protection legislation.

## Withdrawing complaints

There may be occasions when the complainant asks to withdraw their complaint prior to the assessment sub-committee having made a decision on it.

# other issues to consider

In these circumstances, the assessment sub-committee will need to decide whether to grant the request. It would be helpful if the assessment sub-committee had a framework by which to consider such requests. The following considerations may apply:

- Does the public interest in taking some action on the complaint outweigh the complainant's desire to withdraw it?
- Is the complaint such that action can be taken on it, for example an investigation, without the complainant's participation?
- Is there an identifiable underlying reason for the request to withdraw the complaint? For example, is there information to suggest that the complainant may have been pressured by the subject member, or an associate of theirs, to withdraw the complaint?

## **Multiple and vexatious complaints**

An authority may receive a number of complaints from different complainants about the same matter. Authorities should have procedures in place to ensure that they are dealt with in a manner that is a practical use of time and resources.

A number of complaints about the same matter may be considered by the assessment sub-committee at the same meeting. If so, an officer should be asked to present one report and recommendation that draws together all the relevant

information and highlights any substantively different or contradictory information. However, the assessment sub-committee must still reach a decision on each individual complaint and follow the notification procedure for each complaint.

Unfortunately, a small number of people abuse the complaints process. Authorities may want to consider developing a policy to deal with this. For example, they could bring it within the scope of any existing authority policies on vexatious or persistent complainants, or take action to limit an individual's contact with the authority.

However, standards committees must consider every new complaint that they receive in relation to the Code of Conduct. If the standards committee has already dealt with the same complaint by the same person and the monitoring officer does not believe that there is any new evidence, then a complaint does not need to be considered.

A person may make frequent allegations about members, most of which may not have any substance. Despite this, new allegations must still be considered as they may contain a complaint that requires some action to be taken.

Even where restrictions are placed on an individual's contact with the authority, they cannot be prevented from submitting a complaint.

Vexatious or persistent complaints or complainants can usually be identified through the following patterns of

# other issues to consider

behaviour, which may become apparent in the complaints process:

- repeated complaints making the same, or broadly similar, complaints against the same member or members about the same alleged incident
- use of aggressive or repetitive language of an obsessive nature
- repeated complaints that disclose no potential breach of the Code
- where it seems clear that there is an ulterior motive for a complaint or complaints
- where a complainant refuses to let the matter rest once the complaints process (including the review stage) has been exhausted

There are ways that authorities can reduce the resources expended. For example, they can allow a vexatious complainant to deal with only one named officer or refuse email communication. Authorities can also include a statement in their referrals criteria that malicious or tit-for-tat complaints are unlikely to be investigated unless they also raise serious matters. This will allow authorities to decide not to investigate or take other action on such complaints if appropriate.

## Case history

Authorities should consider developing a complaints management system. Records of all complaints and their outcomes

should be retained in line with the authority's records management policy. This policy may need to be amended to reflect the authority's new responsibilities in the local assessment of complaints.

Documents that relate to complaints that the assessment sub-committee decided not to investigate should be kept for a minimum of 12 months after the outcome of any review that has been concluded. This is in case of legal challenges, and also in order to meet the Standards Board for England's monitoring requirements.

Authorities should set a time limit for records retention after the outcome of any hearing or result of further action in respect of a complaint is known. This should be set in accordance with the authority's own file retention policy and in accordance with the principles of data protection.

Authorities should keep details of cases in a format that is easy to search by complainant name, by member name, and by authority where an authority is responsible for parish and town councils. Authorities may also want to search by paragraph of the authority's Code of Conduct.

Old cases may be relevant to future complaints if they show a pattern of behaviour. Authorities will also be able to identify complaints about the same matter that have already been considered by the standards committee.

# other issues to consider

Authorities will need to consider records management alongside the law on keeping records of committees.

## Confidentiality

As a matter of fairness and natural justice, a member should usually be told who has complained about them. However, there may be instances where the complainant asks for their identity to be withheld. Such requests should only be granted in exceptional circumstances and at the discretion of the assessment sub-committee. The assessment sub-committee should consider the request for confidentiality alongside the substance of the complaint itself.

Authorities should develop criteria by which the assessment sub-committee will consider requests for confidentiality. These may include the following:

- The complainant has reasonable grounds for believing that they will be at risk of physical harm if their identity is disclosed.
- The complainant is an officer who works closely with the subject member and they are afraid of the consequences to their employment or of losing their job if their identity is disclosed (this should be covered by the authority's whistle-blowing policy).
- The complainant suffers from a serious health condition and there are medical risks associated with their identity being disclosed. In such

circumstances, standards committees may wish to request medical evidence of the complainant's condition.

In certain cases, such as allegations of bullying, revealing the identity of the complainant may be necessary for investigation of the complaint. In such cases the complainant may also be given the option of requesting a withdrawal of their complaint.

When considering requests for confidentiality, the assessment sub-committee should also consider whether it is possible to investigate the complaint without making the complainant's identity known.

If the assessment sub-committee decides to refuse a request by a complainant for confidentiality, it may wish to offer the complainant the option to withdraw, rather than proceed with their identity being disclosed. In certain circumstances, the public interest in proceeding with an investigation may outweigh the complainant's wish to have their identity withheld from the subject member. The assessment sub-committee will need to decide where the balance lies in the particular circumstances of each complaint.

## Anonymous complaints

Authorities should publish a statement setting out how complaints received anonymously will be dealt with. The assessment sub-committee may decide that an anonymous complaint should only be referred for investigation or some other action if it includes documentary or

# other issues to consider

photographic evidence indicating an exceptionally serious or significant matter. If so, this needs to be included in the standards committee's assessment criteria.

## Members with conflicts of interest

**Note:** this section does not deal with any interests which may arise under the Code of Conduct, which members must also keep in mind and deal with as appropriate.

A member of the standards committee who was involved in any of the following decisions **can** be a member of the committee that hears and determines the complaint at the conclusion of an investigation:

- the initial assessment decision
- a referral back for another assessment decision
- a review of an assessment decision

The assessment decision relates only to whether the complaint discloses something that needs to be investigated or referred for other action. It does not determine whether the conduct took place or whether it was a breach of the Code. The standards committee hearing the case will decide on the evidence before it as to whether the Code has been breached and, if so, if any sanction should apply.

The assessment process must be conducted with impartiality and fairness. There may be cases where it would not be

appropriate for a member to be involved in the process, even if not disqualified from doing so by law. Any member who is a complainant or one of the following should not participate in the assessment process:

- anyone closely associated with someone who is a complainant
- a potential witness or victim relating to a complaint

In certain situations, a standards committee member might initially be involved with the initial assessment of a case that is then referred to the Standards Board for England or to the authority's monitoring officer. The case might then be referred back to the standards committee to consider again. In such circumstances, the member may continue their participation in the assessment process.

However, a standards committee member who is involved at these assessment stages of the process, either initially or following a referral back from the Standards Board or monitoring officer, must not participate in the review of that decision.

Authorities should ensure that their standards committee has sufficient independent members, and parish or town representatives where applicable, for the framework to operate effectively. This should allow for circumstances where members are unable to participate for reasons of conflict of interest.

# other issues to consider

## Officers with conflicts of interest

An officer who has previously advised a subject member or who has advised the complainant about the issues giving rise to a complaint should consider whether they can properly take part in the assessment process. For example, a conflict of interest could mean that the officer will not be able to:

- draft letters
- prepare reports
- contact complainants
- attend the final hearing of that complaint

The officer should also consider whether they should stand aside due to their prior involvement, which has been such that others involved may view them as biased. Officers should take legal advice if they have any doubts.

If the officer has taken part in supporting the assessment or hearing process then they should not be involved in the investigation of that matter. This is so that the officer can minimise the risk of conflicts of interest that may arise and ensure fairness for all parties.

The monitoring officer should act as the main adviser to the standards committee unless the monitoring officer has an interest in a matter that would prevent them from performing the role independently.

If the monitoring officer is unable to take part in the assessment process, their role

should be delegated to another appropriate officer of the authority, such as the deputy monitoring officer. Similarly, the role of any other officer who is unable to take part in the assessment process should be taken by another officer.

Smaller authorities may find it useful to make reciprocal arrangements with neighbouring authorities. This is to ensure that an experienced officer is available to deputise for the monitoring officer if they are unable to take part in the assessment process.

## Personal conflicts

Members and officers should take care to avoid any personal conflicts of interest arising when participating in the consideration of a complaint that a member may have breached the Code of Conduct. The provisions of the authority's Code relating to personal and prejudicial interests apply to standards committee members in meetings and hearings.

Anyone who has a prejudicial interest or who is involved with a complaint in any way should not take part in the assessment or review sub-committee. Decisions made in an assessment or review sub-committee should not be influenced by anything outside the papers and advice put before the members in that committee. The members should not discuss complaints with others who are not members of the committee which deals with the assessment or review. Discussions between members should only take place at official meetings.

# other issues to consider

Authorities should have clear guidelines in place on when a member or officer should not take part in the assessment of a complaint because of personal interests. These may include consideration of the following:

- The complaint is likely to affect the well-being or financial position of that member or officer or the well-being or financial position of a friend, family member or person with whom they have a close association.
- The member or officer is directly or indirectly involved in the case in any way.
- A family member, friend or close associate of the member or officer is involved in the case.
- The member or officer has an interest in any matter relating to the case. For example, it concerns a member's failure to declare an interest in a planning application in which the member or officer has an interest. This is despite the fact that the outcome of any investigation or other action could not affect the decision reached on the application.

## **Complaints about members of more than one authority**

The introduction of the local assessment of complaints may raise an issue relating to what should happen if a complaint is made against an individual who is a member of more than one authority – often known as a dual-hatted member.

In such cases, the member may have failed to comply with more than one authority's Code of Conduct. For example, an individual who is a member of a district council and a police authority may be the subject of complaints that they have breached the Code of both authorities. As such, it would be possible for both the assessment sub-committee of the district council and the assessment sub-committee of the police authority to receive complaints against the member.

Where a complaint is received about a dual-hatted member, the monitoring officer of the authority should check if a similar allegation has been made to the other authority, or authorities, on which the member serves.

Decisions on which standards committee should deal with a particular complaint must then be taken by the standards committees themselves, following discussion with each other. They may take advice as necessary from the Standards Board for England.

This will allow for a cooperative approach, including sharing knowledge and information about local circumstances, and cooperation in carrying out investigations to ensure resources are used effectively.

Authorities should also consider whether they need to establish a data sharing protocol with other relevant authorities. The government and the Information Commissioner's Office have produced guidance on such protocols. Visit [www.ico.gov.uk](http://www.ico.gov.uk) for further details on the work of the Information Commissioner.

