

SUMMARY OF NEW LEGAL PROVISIONS

1) Introduction

- 1.1 This report addresses those sections of Part 10 of the Local Government and Public Involvement in Health Act 2007 ('the 2007 Act') dealing with local assessment of allegations of misconduct.
- 1.2 The standards regime brought in by the Local Government Act 2000 ('the 2000 Act') has not had an entirely easy start. The Standards Board, in particular, has come in for sustained criticism. In inquiries conducted by both the Committee on Standards in Public Life ('the Graham Committee') and a then-ODPM Select Committee, the Standards Board was criticised, in particular, for the length of time it took for allegations of misconduct to be investigated.
- 1.3 The Graham Committee published its tenth report in January 2005, and made a number of recommendations. As summarised in the press release issued at the time, the Committee concluded that:

“the Standards Board for England, a relatively new regulator, has struggled to perform a strategic role within the existing legislative framework. It has been preoccupied with trying to handle all complaints made against councillors in England irrespective of the seriousness of the complaint made. This is a role imposed on the Board by legislation but, in the Committee’s view, this is not sustainable and will, if unchecked, erode confidence in the ethical framework itself.

The Standards Board for England needs to radically transform itself into a strategic regulator focussing on those most serious allegations that pose a high risk to the reputation of local democracy. The legislative framework needs to change to a locally-based system where the initial handling of complaints is done by existing independent local Standards Committees. This, and other measures we propose, will address the large number of minor, vexatious and politically motivated complaints that have created a

significant backlog of national investigations, leaving many councillors with allegations hanging over their heads for long periods of time. This should also enable the Standards Board to make significant savings in its current budget of £9 million per year.”

1.4 The Graham Committee acknowledged the potential problems inherent in a move to local assessment, including: (1) a loss of consistency; (2) the risks to the impartiality of Monitoring Officers and Standards Committees; (3) a loss of public confidence in the system; (4) and the strain upon resources. The Committee concluded, however, that:

- a. the role of the Standards Board as ‘strategic regulator’ would ensure the necessary level of consistency;
- b. the risks to impartiality and to diminished public confidence would be minimised if the Welsh system was adopted, whereby at least half of the Members of Standards Committees are independent, and each committee has an independent chairman. This was said to be a ‘critical element’ in its proposals – and is discussed further below;
- c. as regards resources, Sir Alastair Graham’s stated position has been that:
(1) local Standards Committees were in fact underused and in danger of falling into disrepair; (2) if complaints were spread equally, each authority would have to deal with less than 10 complaints per year; (3) arrangements for assistance and joint working between neighbouring authorities would allow the burden to be shared, especially in relation to heavily parished authorities.

1.5 The Government’s proposals for change were contained in a discussion paper: *Standards of Conduct in English Local Government: The Future* (December 2005), and accepted the main thrust of the Graham Committee’s recommendations.

2. Local Assessment : Key Features

General

2.1 The key features of the new regime can be summarised as follows:-

- a. Standards Committees will be responsible for receiving allegations and deciding whether any action needs to be taken;
- 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.

Standards Committees : establishment

2.2 Members of Standards Committees must be appointed as follows:

- a. a person must have applied following an advertisement in at least one newspaper circulating in the local area, and his/her application must have been approved by a majority of the Members of the Council.
- b. the person cannot have been a Member or Officer of the Council within the 5 years immediately preceding the date of the appointment, nor can he be a relative or close friend of a Member or Officer;
- c. in an important change, an independent Member can be appointed for a limited period of time in relation to a particular allegation or set of allegations: Regulation 5(4) of the 2008 Regulations;

- d. authorities are free to choose their own procedures to appoint independent Members and (where relevant Members of Parish Councils, but must have regard to the guidance issued by the Standards Board;
- e. at least 25% of the Standards Committee must be independent Members: Regulation 4(1)(a);
- f. where the authority is operating executive arrangements (as we are) only one Member of the Council at most can be a Member of the standards committee: Regulation 4(1)(b);
- g. where an authority is a district or county council with responsibility for Parish Councils, it must ensure that at least two Members of the Standards Committee are Members of those Parish Councils (and are not also Members of the district or county council): Regulation 4(2). This is a change to the previous position where only one such Member was required.

Appointment of Sub-Committees

- 2.3 Standards Committees must then appoint Sub-Committees: (1) to take initial assessment decisions; (2) and to review any decision not to act upon an allegation ('review decisions'). Key features of the Sub-Committees are as follows:
- a. they must each be chaired by an independent Member: Regulation 6(2);
 - b. to be quorate, at least 3 Members must be present: Regulation 7(1). The regulations are silent as to whether another independent Member must be present along with the chair, but do provide that at least one Member of the Council must be present at any initial assessment or review decision: Regulation 7(3);
 - c. no Member can be present upon the review of an initial assessment decision at which s/he was present: Regulation 7(2). However, a Member who was involved in an initial assessment decision can be a Member of the Committee that hears and determines the complaint. The rationale

suggested in the DCLG consultation paper that pre-dated the 2008 Regulations is that 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 did or did not take place and so no conflict of interest will arise in hearing and determining the complaint;

- d. a Sub-Committee must contain at least one Parish Council Member (who is not also a Member of the responsible authority) whenever it is taking an initial assessment or review decision;
- e. it is perhaps also worth noting that nothing in the 2008 Regulations requires a Sub-Committee to have a fixed Membership or chairmanship.

Local assessment : procedure

2.4 Upon receipt of an allegation (which must be in writing), the Standards Committee must take reasonable steps to give a written summary of that allegation to the person who is the subject of the allegation. However, importantly, this is subject to the following caveats provided in Regulation 11 of the 2008 Regulations:

- a. the duty does not arise where the Sub-Committee determines that this would be contrary to the public interest or would prejudice any investigation. In determining whether this would be the case, the Standards Committee must take into account guidance from the Standards Board, and may take into account advice from the Monitoring Officer or (where relevant) the Standards Board ESO handling of the case;
- b. non-disclosure as set out above cannot be continued if the Monitoring Officer or ESO advises the Sub-Committee that it can no longer be justified. Moreover, the summary has to be provided before the report or recommendation from the Monitoring Officer or ESO is considered by the Sub-Committee (i.e. once the investigation has been concluded);

- c. a Monitoring Officer can always inform the subject of an allegation that an allegation has been made (even if details are not disclosed);
- d. the Sub-Committee can give the subject such details of the allegation as would not compromise the investigation or be contrary to the public interest.

2.5 By s.57A(2) of the 2000 Act, introduced by the 2007 Act, the Standards Committee (through its Sub Committee) must decide in respect of any allegation received whether:

- a. to refer it to the Monitoring Officer;
- b. to refer it to the Standards Board;
- c. to take no action. If this decision is taken, the Sub-Committee must take reasonable steps to inform the complainant in writing of the decision and its reasons (so that a review can be sought under s.57B).

2.6 By s.57B(2), a review can be sought of a decision to take no further action. It must be made in writing within 30 days of notice being given by the Sub Committee: s.57B(3). Any such review decision must be made within 3 months of the receipt of the request: s.57B(4)(b). The 2007 Act and the 2008 Regulations are silent as to the basis upon which any review is to be carried out. The Standards Board suggests that the grounds for overturning a decision on appeal are that:

- a. the original decision was flawed because it was unreasonable in law or because the correct procedure was not followed;
- b. the complainant had produced compelling new information in their review request.

2.7 In a significant new development, a referral to a Monitoring Officer (either by the Sub Committee or, where the matter has been referred to the Standards Board and then has been referred back down again by the ESO) need no longer solely be a referral for purposes of carrying out an investigation. By virtue of Regulation 13 of

the 2008 Regulations the Sub-Committee (after having consulted with the Monitoring Officer) can refer an allegation to an Officer with a direction to take one of the following steps:

- a. arranging for the Member who is the subject of the allegation to attend a training course;
- b. arranging for that Member and the complainant to engage in a process of conciliation;
- c. any other steps, not including an investigation, which appear appropriate to the Sub-Committee or the ESO.

2.8 The Government suggests that the power in Regulation 13(1):

“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.”

2.9 Regulation 13 contains provisions for a report to be made back to concerned parties as to compliance with the steps directed by the Sub-Committee, and also a power (at Regulation 13(6)) for the Sub-Committee to make a further direction if unsatisfied with the actions taken.

2.10 Regulation 14 sets out the steps a Monitoring Officer must take when a matter is referred to him for investigation (whether by the Sub-Committee or by an ESO). The steps mirror those previously set down in Regulation 5 of the Local Authority (Code of Conduct) (Local Determination) Regulations (SI 2003/1483) (‘the 2003 Regulations’). They include a provision that the Monitoring Officer can refer a matter back to an ESO once during the course of an investigation initiated by an ESO.

- 2.11 Where the Sub-Committee has referred an allegation for investigation to the Monitoring Officer, Regulation 16(1) provides that the Officer can refer the matter back to the Sub Committee at any stage if:
- a. as a result of new evidence or information, the Monitoring Officer is of the opinion: (1) that the matter is materially more or less serious than the Sub Committee may have considered on the initial assessment decision; and (2) that the Sub Committee would have made a different decision in light of that information. In coming to a view about the seriousness of the matter, the Monitoring Officer is expressly empowered to consider: (1) a failure of any person to co-operate with the investigation (i.e. not just the person under investigation); (2) any allegation of a further breach of the code of conduct; (3) any allegation of a related breach;
 - b. the person who is the subject matter of the allegation has died, is seriously ill, or has resigned, such that it is no longer appropriate to continue the investigation.
- 2.12 Where a reference back has been made under Regulation 16(1) the Sub Committee must then take a decision upon the matter as if it were taking an initial assessment decision upon an allegation: Regulation 16(2). This would presumably encompass a decision to direct an expansion of an investigation to cover a further (or related) allegation of a breach of the Code of Conduct. It is perhaps to be hoped that this mechanism will allow for the easier resolution of problems that have sometimes been encountered to date during investigations where Monitoring Officers or their delegates have discovered evidence of additional breaches, but where they cannot take steps to expand the remit of their investigation. It is worth noting finally in this regard that, whilst Regulation 16 does not contain the equivalent to the provision in Regulation 5 of the 2003 Regulations preventing multiple referrals to the ESO, Regulation 16(4) does provide that the Sub Committee can direct that the matter not be referred back to it again.
- 2.13 When a Monitoring Officer reports back to a Sub Committee, Regulation 17 mirrors the provisions of Regulation 5(8) of the 2003 Regulations, with one significant change. The Standards Committee now has the power to decide:

- a. that it accepts the Monitoring Officer's finding of no failure;
- b. that the matter should be considered at a hearing of the Sub Committee; or
- c. (new) that the matter should be referred to the Adjudication Panel for determination. That power can only be exercised where (1) it has determined that the action that it could take against the Member would be insufficient were a finding of failure to be made; and (2) the president or deputy president of the Adjudication Panel has agreed to accept that referral: Regulation 17(1)(c) and 17(2).

2.14 Regulation 17 otherwise provides for the giving of written notices of findings of acceptance, and their publication if the Member concerned so wishes.

2.15 Regulation 18 provides for hearings by Sub Committees. Again, it largely mirrors the provisions at Regulation 6 of the 2003 Regulations, with minor modifications (for instance, the consent of the committee to representation of the Member by a person other than a solicitor or counsel can now be given on the spot, rather than having to be given before the hearing). Where a Standards Committee has convened to consider a report from an ESO referred to a Monitoring Officer under ss.64(2) or (4) of the 2000 Act Regulations 18(10)-(12) give it the power to adjourn the hearing and request that the ESO take back the matter for further investigation.

2.16 Regulation 19 sets out the findings that a Sub Committee can make. The permissible findings remain the same as previously, i.e.: (1) that the Member had not failed to comply with the code; (2) that the Member had failed to comply but no action needed to be taken; or (3) that the Member had failed to comply and that a sanction should be imposed. The sanctions also remain the same, with one significant change, namely that the maximum period of suspension (or part suspension) that can be imposed has been raised from 3 to 6 months. The hope of the Government is that this will mean that a very large proportion of cases can be resolved at local level, with only the most serious being referred to the Standards Board.

2.17 Regulation 20 provides for notification of the findings reached following a Regulation 18 hearing. They mirror closely those provisions contained in Regulation 8 of the 2003 Regulations. The provisions in Regulations 21 to 25 for appeals track those in Part 3 of the 2003 Regulations.

3 **Publicity and disclosure**

3.1 I have dealt above with the requirements under Regulation 11 in respect of the provision of a summary of the allegation to the subject of that allegation. The 2007 Act and the 2008 Regulations contain some other important provisions as to publicity and disclosure. Regulation 8 provides that:

- a. whilst the proceedings of Standards Committees and Sub-Committees are generally open to the public under the provisions of Part 5A Local Government Act 1972, Sub-Committees making initial assessment decisions or review decisions are not;
- b. meetings of Sub-Committees taking initial assessment decisions or making review decisions are private meetings, and the public has no right of access either to them or to documents prepared for them. However, the Sub-Committee has to produce a written summary of its decision and its reasons, and may (but not must) name the subject of the allegation, unless that would not be in the public interest or would prejudice any investigation (Regulation 8(5)(c)(iii)). That summary has to be made open to investigation and given to any Parish Council of which the subject of the complaint is a Member, but not until the subject has seen a summary of the allegation against him.

3.2 By s.191 of the 2007 Act, s.63 of the 2000 Act is amended to allow ESOs 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. section 63 of the 2000 Act 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.

3.3 Regulation 12 of the 2008 Regulations applies s.63(1) of the 2000 Act to Monitoring Officers, with the following additional ground for disclosure, namely to allow:

- a. Standards Committee (or Sub-Committee) to perform its functions in connection with the investigation and consideration of an alleged breach of an authority's Code of Conduct;
- b. enabling an Adjudication Panel tribunal to consider an appeal from a finding of a Standards Committee or Sub-Committee.

3.4 Finally, by virtue of s.192 of the 2007 Act, 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.

4 Overview and Scrutiny by the Standards Board

4.1 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.

- 4.2 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 co-operative approach to be adopted, including the sharing of knowledge and information about the local circumstances and co-operation 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.”

- 4.3 One might suspect, however, that this relaxed approach will not survive too many starkly inconsistent decisions.

5. **Conclusion**

- 5.1 By way of conclusion I set down here what seem to me to be a number of potential problem areas:
- a. recruitment, training and retention of suitable numbers of independent Members;
 - b. developing suitable local assessment criteria, and updating them as appropriate. I note, by way of example, that the Standards Board appears to have a policy that it is unlikely to investigate the content of political leaflets unless they enter the realm of extreme and deliberately offensive remarks about other people. It is most unlikely that any Standards Committee would wish to develop a formal policy along these lines, but it will be necessary to ensure that there is – at the very least – an internal consistency of approach to allegations raising similar issues;
 - c. developing suitable ‘sentencing guidelines’ for the imposition of sanctions so as to ensure internal consistency and – wherever possible – consistency with sanctions imposed by other authorities. Public confidence in the local assessment system is not going to be improved if it emerges that radically different sanctions are imposed for similar breaches by authorities in adjoining areas;
 - d. at least initially, it seems to me that it may well be the case that Standards Committees (through their Sub Committees) will err on the side of caution, and refer more, rather than few, matters for investigation, with all the additional burdens upon the Monitoring Officers that that implies.