

What have the Lords bequeathed us on Standards?

This note sets out the Standards provisions in the Localism Bill following Third Reading in the House of Lords, as they will apply to local authorities in England and Police Authorities in Wales. The Bill now goes back to the House of Commons to debate the amendments made by the House of Lords, but it now appears unlikely that there will be further major amendments.

Essentially, the standards provisions which were in the Local Government Act 2000 have been restricted in their application to local authorities in Wales. So the only standards provisions relating to local authorities in England and police authorities in Wales are the provisions as set out in Clauses 27 to 37, and Schedule 4 of the Localism Bill. These provisions apply to all “relevant authorities”, which are defined in Clause 27(4) to include both principal authorities and parish councils.

1 Duty to promote and maintain high standards of conduct

Each “relevant authority” shall be under a duty to promote and maintain high standards of conduct by elected and co-opted members of the authority. The definition of “co-opted member” is narrowed to apply to members of committees and sub-committees, but only those who have a power to vote on any matter, so not applying to non-voting members. This has a certain irony as the Bill only enables co-opted independent members of the (now non-statutory) Standards Committees exercising delegated power to participate as non-voting members. As set out below, the Bill provides no mechanism by which authorities can enforce such high standards of conduct.

2 Standards Committees

The provisions for the establishment of statutory Standards Committees (s.55 of the LGA2000) are omitted. Accordingly, when an authority can and wishes to delegate any standards functions to a committee or sub-committee, that would be an ordinary committee or sub-committee established under s.102 of the LGA 1972. That means:

- 2.1 The new Independent Persons (See below) would not be able to be voting members unless the committee or sub-committee was merely advisory (i.e. recommending to Council);
- 2.2 Any such Standards Committee is now subject to the normal proportionality rules;
- 2.3 Standards Committees would be subject to the same requirements on confidential and exempt information under ss.100A to K of, and Sch.12A to, the LGA 1972 as any other Committee. This means that the initial assessment process is no longer confidential and there is no provision for a Hearing Panel to withdraw in order to deliberate;
- 2.4 The Standards Committee of a district or unitary council no longer has any jurisdiction over parish councillors. In future parish councils will deal with complaints against their own members.

3 Codes of Conduct

Each authority is required to adopt a Code of Conduct, which can only apply to members and co-opted members when acting in their capacity as a member or co-opted member. The General Principles and the Model Code are revoked, but an authority's Code must comply with seven principles, which are similar to the ten General Principles that we had before, and provide for the registration of non-disclosable pecuniary interests and non-pecuniary interests (see below). Otherwise, authorities are free to determine what they put in or leave out of a Code. Any decision to adopt or not to adopt a local Code must be taken at full Council.

The abolition of the Model Code means that different authorities will have very different Codes. A councillor who is a member of more than one authority is likely to be subject to significantly different Codes, according to whether he/she is currently acting on this or that authority, and different members of the same joint committee are similarly going to be subject to the varied Codes of their parent authorities.

4 Breach of Code

under a duty to deal with complaints of breach of Code. This must comprise consideration of whether the individual complaint merits investigation and, if so, investigation. If the authority finds a breach, there is then a duty to consider whether to take any action in respect of the breach, and to determine what action to take.

The key difference

- The rigidity of Referrals, Review and Hearing Sub-Committees is repealed, so that authorities have discretion to set their own processes and to delegate more of the process. So it would be possible for an authority to provide that the initial assessment and decision whether to investigate to be undertaken by the Monitoring Officer, perhaps after consultation with the Independent Person. There is no requirement for a review stage. Indeed the statutory requirement for a hearing disappears, and the Bill speaks of the possibility of the authority finding that a member has broken the Code without even having held an investigation. However, there would be strong arguments that natural justice would demand that no decision on whether there had been a breach of code or as to any consequent action could be taken without giving the member an opportunity to be heard and to test the evidence. It is unlikely that authorities will be prepared to delegate substantive decisions to Monitoring Officers, and full Council would be inappropriate as a forum for conducting such a hearing, so it is likely that most authorities will need a Standards Committee or Hearing Sub-Committee to undertake these functions at member level.
- The abolition of statutory Standards Committees in England means the removal of the exclusion of Referrals and Review Sub-Committees from public access to information provisions. As normal Section 101 Committees, they are now subject to the normal rules, so that their agenda and reports must be published clear days before the meeting, and the meetings must be conducted in public unless there are over-riding reasons to the contrary
- There is greater scope to enable the Monitoring Officer to seek local resolution of a complaint before a decision is taken as to whether the complaint merits investigation. This may enable the more minor or tit-for-tat complaints to be taken out of the system without the full process previously required.
- The Bill gives authorities no powers to take any action in respect of a breach of the local Code. Amendments which would have given authorities an express power to suspend a member from Committees for up to 6 months were never moved, and the Secretary of State suggested in debate that authorities could do so under existing powers. However, as it stands, such removal would require the consent of the

member's group leader. Authorities have been given no powers to impose alternative sanctions, such as requiring an apology or training, and the new General Power of Competence would not be applicable here, as no private individual would have the power to impose any form of sanction. Accordingly, other than naming and shaming the individual member, it is unclear whether the authority can take any action, beyond administrative actions to secure that it can continue to discharge its functions effectively per *R v Broadland DC ex p Lashley*.

- As set out above, district and unitary councils' Standards Committees will no longer have any jurisdiction over parish councillors. Instead, parish councils will have to deal with complaints against their own members.

In the LGA 2000, the power of sanction came as part of a package with the safeguards to ensure that such power was exercised fairly. Without the procedural requirements (notably Independent members of Standards Committees, and the requirement that such decisions be taken by Standards Committees or Sub-Committees), it would be inappropriate to give authorities a power of sanction which might be abused for party political advantage. However, the fact that authorities must define standards of conduct in their local Code, and must consider and investigate breaches of Code, is likely to give rise to a degree of frustration when a member is found to have been in flagrant breach of the local Code, perhaps for personal advantage and to the detriment of the authority and of the public interest, even causing considerable damage to the authority and to individuals, and yet the authority has no ability to impose sanctions or to prevent the member continuing to act in exactly the same manner.

5 Independent Persons

At the last moment, the government amended the Bill to require every principal authority to appoint one or more Independent Persons.

Independent persons would be appointed by advertisement and application, and there are very strict rules preventing a person from being appointed if they are a friend or relative to any member or officer of the authority, or of any Parish Council within the authority's area.

The functions of the Independent Person are very curious

- They must be consulted before the authority takes a decision to investigate any allegation. So it would appear reasonable to delegate this decision to the Monitoring Officer after consulting the Independent Person;
- They may be consulted by a member of the authority against whom an allegation has been made. But, if they were consulted before the Monitoring Officer consulted them on a decision whether to investigate, it is hard to see how they could remain impartial. If consulted whilst a matter was being investigated, there would be little that they could suggest other than awaiting the outcome of the investigation. And if consulted by the member once the investigation had been completed, that would make it hard for them to play any impartial or moderating role on any decision as to whether the authority should take any action on the breach. As co-opted members, the Independent Person cannot exercise any decision-making functions.
- They may be consulted by a parish councillor against whom an allegation has been made. But in this instance the Independent Person would appear to even less able to make any sensible contribution; and
- They may be consulted by the principal authority in circumstances where the authority is not taking a decision whether to investigate the allegation. Logic would suggest that the Independent Person might be able to make a useful contribution as a moderator sitting alongside any Hearing Panel, but that would not be practicable if

their impartiality had been prejudiced by previously being consulted by the member concerned.

This provision shows all the signs of being a hastily-conceived and ill-considered palliative. It is hard to see what it contributes, except in the original decision whether to investigate.

6 Registers of members' interests

6.1 The Register

The Monitoring Officer is required to establish a register of members' interests for each authority (i.e. also for parish councils within their area) and to define what interests must be registered. The content of any such register must be approved by full Council. It must contain "disclosable pecuniary interests" (which will be defined in regulations) but the drafting also provides that an authority's Code must require registration of non-disclosable pecuniary interests and non-pecuniary interests, for which no definition is provided. The lack of standard definition of such interests, and the degree of local discretion if not confusion creates scope for considerable local variation, so that a councillor may be subject to very different requirements in different capacities.

The Monitoring Officer is responsible for ensuring that each authority's register of interests is kept within the principal authority's area (e.g. at the principal authority's offices). For parish councils the district or unitary authority's Monitoring Officer must ensure that every parish council's register is available for inspection within the principal authority's, rather than the parish council's area and, if the council has a website, the parish council must ensure that the register is accessible on that website. In Cornwall, this would mean that the county council would have to retain up-to-date copies of some 213 parish Council registers of interests available for public inspection.

6.2 Registration

Every elected or co-opted member is required to notify the Monitoring Officer within 28 days of being elected or co-opted onto the authority of all current "disclosable pecuniary interests", and update the register within 28 days of being re-elected or re-appointed. However, there is no continuing duty to update the register due to a change of circumstances. The Secretary of State will prescribe by regulation what constitutes a "disclosable pecuniary interest", but it will cover the interests of the member, his/her spouse, civil partner or person with whom he/she lives as if they were spouses or civil partners, in so far as the member is aware of his/her partner's interests. This provision raises intriguing questions about members' views as to the nature of their relationships with abitees.

Failure to register any such interest, to do so within 28 days of election or co-option, or the provision of misleading information on registration without reasonable excuse will be criminal offences, potentially carrying a Scale 5 fine and/or disqualification from being a councillor for 5 years. However, as prosecution is only at the instance of the Director of Public Prosecutions, it is likely that many prosecutions will result. In practice, Monitoring Officers are likely to take the opportunity to remind members of their obligations and only seek to involve the Police when a member fails to respond even when reminded. Notably the provision under which a member who fails to make such registration automatically ceases to be a member is repealed and, once a member has made the initial registration, there is no requirement to update such registrations for changes of circumstances, such as the acquisition of development land, unless and until a relevant item of business arises at a meeting which the member attends..

7 Disclosures of Interests at Meetings

7.1 Duty to disclose interests

The requirement for disclosure of interests at meetings apply to the same range of “disclosable pecuniary interests” as the initial registration requirement, and only if the member is aware of the interest. The precision of drafting in the current Code is lost, requiring the disclosure of the interest, rather than the existence and nature of the interest, although the provisions on sensitive interests (below) imply that otherwise the member must disclose both existence and nature. However, where the interest is already on the authority’s register of interests, or is in the process of entry onto the register having been notified to the Monitoring Officer, the member is under no obligation to disclose the interest at the meeting. Where it is an unregistered interest, the member is required both to disclose it at the meeting and to register it within 28 days of the meeting at which relevant business is considered.

Interestingly, the duty to disclose arises if the member attends the meeting, as opposed to the present code requirement to disclose before the start of consideration of the matter in which the member has an interest. This would appear to mean that the member cannot avoid the need to disclose merely by withdrawing during that part of the meeting when the particular item of business is considered. If he/she attends any part of the meeting and a relevant item of business is to be considered, he/she must make disclosure.

Failure to disclose is made a criminal offence

7.2 Prohibition on participation

The concept of a personal interest, which requires disclosure but not withdrawal, disappears. Instead, where the member has a disclosable pecuniary interest in any item of business at a meeting, or which he/she would deal with as a single executive member or ward councillor, if he/she has a disclosable pecuniary interest he/she is simply barred from participating in discussion or voting on the matter at the meeting, or (as a single member) taking any steps in respect of the matter. The sole exception to this exclusion arises as a result of a dispensation (below), so that the right of a councillor to speak as a member of the public and then depart for the consideration of the matter under para.12(2) appears to have been lost. However, there is bound to be some interesting debate about what constitutes “discussion of the matter”.

Participation in the discussion of the matter, or taking steps in respect of the matter, in the face of these prohibitions is made a criminal offence.

7.3 Exclusion from the meeting

For no obvious reason, the requirement for the member to withdraw from the meeting room is not set out on the face of the statute, but the statute provides that it may be dealt with in the authority’s standing orders. This means that a member who fails to withdraw as required in standing orders does not commit any criminal offence and the sanction would be the standard provision enabling a meeting to vote to exclude a disruptive member.

7.4 Sensitive Interests

The provision introduced in the 2008 Code revision are re-enacted, enabling a member to ask the Monitoring Officer to exclude from the public register any details which, if disclosed, might lead to a threat of violence or intimidation to the member or any person in the member's household, and allowing the member merely to recite at the meeting that he /she has a disclosable pecuniary interest, rather than giving details of that interest.

7.5 Dispensations

The previous provisions on dispensations, allowing members with a pecuniary interest to get the consent of Standards Committee to participate despite the pecuniary interest, simply did not work. The first ground for a dispensation, that more than 50% of the members of the body were conflicted out, did not work because members rarely knew how many members would be conflicted out in sufficient time to allow for convening Standards Committee. The second ground, that it would affect the outcome of the vote, required that the applicant knew in advance how each member would vote – in other words that the applicant and all the other members were pre-determined – in which case it was clearly inappropriate to grant a dispensation to allow a member who was predetermined to participate in the decision.

Now the grounds on which a dispensation may be granted are extended, and the power to grant a dispensation can be delegated, for example to the Monitoring Officer, enabling dispensations to be granted at relatively short notice.

The first ground (above) remains, but now restricted to a circumstance where the number of members unable to participate would make the meeting inquorate. The second ground remains unchanged, and as inappropriate as ever, but now dispensations may also be granted if:

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

As the grant of a dispensation can easily alter the political balance of a meeting, the open drafting of these new grounds and the potential for delegation to the Monitoring Officer (or any other officer) could put an officer in a very uncomfortable position and opens the possibility of serious abuse of these provisions for party political advantage. Even more strangely, the Bill specifically allows a member to speak and vote on his/her own application for a dispensation.

8 Transitional provisions

The Bill make provision for the Secretary of State to make transitional provisions by statutory instrument, providing that matters under investigation by the Standards Board be transferred to the local authority. It is to be hoped that the completely unrealistic earlier proposals under which authorities would have a period of two months to resolve all outstanding complaints, but with no power of suspension and no appeal, will be re-considered.

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3 November 2011.