

Agenda Item:6

Report to: Standards Committee

Date: 27 April 2004

Report from: Borough Solicitor

Title of report: **LOCAL INVESTIGATION AND DETERMINATION OF MISCONDUCT ALLEGATIONS – CONSULTATION BY THE OFFICE OF DEPUTY PRIME MINISTER AND THE STANDARDS BOARD FOR ENGLAND**

Purpose of report: To seek Members' views.

Recommendations: Members are requested to consider the Draft Regulations and Draft Guidance and the proposed responses set out in the report.

1.0 Introduction

- 1.1 The Office of the Deputy Prime Minister and the Standards Board for England are both consulting on proposed regulations and Standards Board guidance concerning the power of the Standards Board to refer complaints of misconduct direct to the local authority's Monitoring Officer following investigation and report to the Council's Standards Committee for determination.
- 1.2 I have previously reported to you in detail on the Local Authorities (Code of Conduct) (Local Determination) Regulations 2003 and the procedure for dealing with complaints which have been subject of a report by the Ethical Standards Officer, who in turn refers it to the Council's Standards Committee for determination. The new powers relating to investigation and report by the Monitoring Officer as opposed to the Ethical Standards Officer (ESO) are achieved by amendment to the 2003 Regulations.
- 1.3 I am attaching a copy of the Regulations and Draft Amendment Regulations, of the Draft Guidance from the Standards Board and the requests for response on particular questions as Appendix A to this report.
- 1.4 I have the advantage of having received a draft response to the consultation paper prepared by Peter Keith-Lucas, a former local government solicitor, who is now in private practice and specialises in local government law and practice. He is a trainer in this area in particular. What follows is largely his suggested response to the consultations.

2.0 Key Issues in the Consultation

(a) Criteria for reference for local investigation

(i) The issue

The Standards Board proposes the following as the criteria by which ESOs would decide whether a particular matter should be sent to the Monitoring Officer for local investigation:

- The matter does not appear to need the heavier penalties only available to the Adjudication Panel for England
- The matter is an isolated occurrence and is unlikely to be repeated
- The member has made a prompt, adequate and unreserved apology and whether adequate remedial action has been taken
- There is evidence that a local investigation would be perceived as unfair or biased

- The allegation is of an entirely local nature and does not raise matters of principle
- There are any relevant local political issues that may have a bearing on a local investigation

(ii) Proposed response

Whilst the proposed criteria address the main issues –

- If an apology is adequate, it is irrelevant whether it is unreserved
- The issue of an apology is entirely separate from whether remedial action has been taken
- The presence of such local political issues is encompassed within the probability that the investigation would be perceived as unfair or biased and so can be deleted
- The reference of a matter for local investigation carries with it a decision that the matter should be determined at a local hearing. One of the criteria should therefore be whether there are any reasons for believing that the matter will not be determined fairly and rigorously at a local hearing.

(b) The scope of investigatory powers

(i) The issue

The consultation paper proposes that the Monitoring Officer should arrange for someone (probably not the Monitoring Officer himself as he may wish to continue to act as the chief legal adviser to the Standards Committee, but more likely another senior officer, and officer of a neighbouring authority or an external investigator) to undertake the investigation and prepare a report to the Standards Committee. The Government proposes to give the investigating officer a power to require the authority to afford him access to any documents in its possession, but does not intend to make it a criminal offence to fail to co-operate with the investigation, as would be the case in an investigation by an ESO.

(ii) Proposed response

Whilst a criminal sanction would be inappropriate for a local investigation, there should be a statutory requirement for members and officers to co-operate with a local investigation which, ultimately, could be enforced through the civil courts, and the Guidance should make it clear that failure to co-operate with a local

investigation could itself give rise to a further complaint of conduct likely to bring the member's office or the authority into disrepute.

(c) Reference back to the Standards Board

(i) The issue

The ESO will refer the case down to the Monitoring officer before it has been investigated. So the Government proposes that, if the investigating officer considers that the matter is more serious than first thought and that the Standards Committee's maximum sanction of 3 month's suspension would be inadequate, he/she should be able to request the ESO to take the matter back so that it can go on to a Case Tribunal, with powers to suspend for up to a year or to disqualify for up to 5 years.

(ii) Proposed response

Such a facility for referring a complaint back to the Standards Board is welcome, but should be extended so that the Standards Committee can also refer a matter back if, in the course of a hearing, it concludes that its available sanctions are inadequate for the particular matter.

(d) The procedure for local hearings

(i) The issues

The Government proposes that every case referred for local investigation should have to be resolved by the Standards Committee (or Sub-Committee) even if the Investigating Officer finds that there has been no breach of the Code or no action is required. In such cases, the Government proposes that the Committee should consider the investigating officer's report and, if it agrees with his finding that there has been no breach of the Code or no action is required, determine the matter accordingly. However, if the Committee disagrees with such a finding or the investigating officer has found that there has been a breach of the Code, the matter would then go on to a full hearing.

(ii) Proposed response

It is absolutely correct that all cases should finally be determined by the Standards Committee, and that the investigating officer should not have a power to close a case if he finds that there has been no breach of the Code or no action is required. The proposed two-stage hearing is cumbersome, and authorities should be given discretion to determine a matter involving a breach of the Code at a first meeting where it can do so fairly.

(e) Confidentiality of ESO's reports

(i) The issue

ESOs have developed a custom of marking their reports as "confidential". This has been taken to mean that, when an ESO's report finds that there has been no breach of the Code or no action is required, the Monitoring Officer is precluded from giving copies of such reports to the Standards Committee. No statutory confidentiality is proposed for investigating officers' reports, but the draft Guidance urges investigating officers to seek similar confidentiality.

(ii) Proposed response

It is important that the public see that all complaints of misconduct are dealt with rigorously, and that authorities have the opportunity to learn from ESO's reports and improve their procedures in order to avoid unjustified complaints. ESO's custom of marking reports as confidential is not justified by the Local Government Act and is contrary to the public interest. Accordingly, the opportunity should be taken to make it clear that such confidentiality should be limited to the course of the investigation but does not apply to completed reports.

(f) The 3-month time limit for hearings

(i) The issue

The current regulations require the Standards Committee to hold the hearing within 3 months of the ESO's report being referred to the Monitoring Officer. The Government proposes to extend this requirement, so that hearings following local investigations would have to be held within 3 months of the investigating officer completing his report. The model procedure for local hearings recommended by the Standards Board means that it is virtually impossible to hold a hearing within 2 months of the ESO's referring the matter to the Monitoring Officer, and the failure of the member to co-operate can easily push the hearing beyond the 3-month time limit. The requirement for a two-stage hearing of local investigation cases will make this even more difficult to achieve.

(ii) Proposed response

The 3 month time limit is an admirable objective, but the regulations and guidance should make it clear that it is an objective rather than a strict requirement, and that the Standards Committee will still be able to determine the matter even if the hearing has not been held or completed within the 3 months.

(g) Seeking additional information

(i) The issue

The present regulations and the current proposals make no provision for the case where the Standards Committee does not feel that it has sufficient information at the hearing to come to a safe determination of the matter.

(ii) Proposed response

The current and the proposed regulations should be amended to enable the Standards Committee to commission additional evidence if, during the course of a local hearing, it does not feel that it has sufficient information to come to a safe determination of the matter. In practice it might instruct the investigating officer to report back with such additional evidence.

(h) Evidence of additional breaches

(i) Issue

The proposals would limit the investigating officer to the specific matter referred by the ESO and do not allow the Standards Committee to consider and determine any possible additional breaches of the Code of Conduct which may be identified during the local investigation. Instead, any such additional matters would have to be reported to the Standards Board for investigation.

(ii) Proposed response

If the additional breaches of the Code of Conduct are essentially aspects of the same conduct (such as rudeness to an officer being both disrespect to the officer and conduct likely to bring the member's office into disrespect), there would seem to be merit in allowing the investigating officer to add them into the investigation and for them all to be dealt with by the Standards Committee at the one hearing, provided that the member had due notice. However, where the additional breaches relate to a different matter, it is quite right that the additional matters should be sent to the Standards Board.

(i) Sanctions available to the Standards Committee

(i) The issue

At present the sanctions available to the Standards Committee include, censure, restriction of use of Council premises and resources, and total or partial suspension or training or an apology or conciliation. The Government recognises that this is inflexible,

and proposes that the Standards Committee should be able to set a total or partial suspension until such time as the member submits a written apology or undertakes training or conciliation. This is still inflexible as the Committee may well wish to require an apology, mandatory training and a total or partial suspension, or may wish to reduce the period of the suspension in the event that the member submits a written apology. Alternatively, the Committee may feel that a partial suspension should be accompanied by a restriction on access to Council premises or resources.

(ii) Proposed response

The Standards Committee should be able to impose any combination of the available sanctions, provided that the total period during which the member is subject to any suspension or restriction should not exceed 3 months. Accordingly the sanctions available to the Committee should be as follows:

“Any one, or a combination of, the following sanctions –

- (i) censure of that member;
- (ii) restriction for a maximum period of three months of that member’s access to the premises of the authority and the member’s use of the resources of the authority;
- (iii) partial suspension of that member for a maximum period of three months;
- (iv) suspension of that member for a maximum period of three months;
- (v) requirement to submit a written apology in a form satisfactory to the Standards Committee;
- (vi) requirement to undertake training as specified by the Standards Committee; and
- (vii) requirement to undertake conciliation as specified by the Standards Committee.

provided that the maximum period during which the member shall be subject to a suspension or restriction shall not exceed 3 months”

(j) Notification to the Standards Committee of reference for local investigation

(i) The issue

The draft guidance suggests that, when the ESO refers a matter to the Monitoring officer for local investigation, the ESO will notify the member, the complainant and the parish clerk (if appropriate) that

the matter has been referred for local investigation. It then suggests that, in order to maintain confidentiality, the Monitoring Officer should notify the members of the Standards Committee by confidential letter that he is arranging an investigation, but should not name the complainant or the member, or give any details of the alleged breach of the Code of Conduct.

(ii) Proposed response

It is suggested that notification to the complainant, the member and the parish clerk should be undertaken by the Monitoring Officer rather than by the ESO, as the Monitoring Officer can then advise them who has been appointed to undertake the investigation. The propose notification to the members of the Standards Committee appears to be completely pointless in the form suggested and so this requirement for notification should be dropped.

3.0 Implementation

We do not as yet have a likely date for implementation of the new regulations.

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Background Papers:

See Appendix A.

(Appendix A is not available electronically. If you require a copy please contact Elaine Wood, Principal Committee Administrator, telephone 01424 781717)