

WIRRAL COUNCIL
STANDARDS COMMITTEE
26 JANUARY 2012

SUBJECT:	Implications of the Localism Act on the Standards Regime - UPDATE
WARD/S AFFECTED:	All
REPORT OF:	Director of Law, HR and Asset Management
RESPONSIBLE PORTFOLIO HOLDER:	Leader
KEY DECISION	No

EXECUTIVE SUMMARY

.1 The Localism Bill was published on 13 December 2010 and received Royal Assent on 15 November 2011. As reported to this Committee in January 2011, the Localism Bill, as it was then, sought to devolve greater power and freedoms to councils and neighbourhoods, establish powerful new rights for communities, revolutionise the planning system, and give communities control over housing decisions. The reforms cover four broad areas:

- Strengthening local democracy;
- Community empowerment;
- Reform of the planning system; and
- Social housing reform.

1.2 This report provides an update on the affects of the Localism Act 2011 on the Standards Regime, particularly the implications to the Members' Code of Conduct, Members Interests and the Standards Committee.

2.0 RECOMMENDATION(S)

2.1 That the Standards Committee:

- a. Notes the Explanatory Note and Counsel's Advice set out at Appendix 1 and 4 to this report;
- b. Considers the draft Member Code of Conduct at Appendix 2 to this report;
- c. Establishes a Standards Committee Working Group in accordance with the Terms of Reference set out at appendix 3 to this report.

3.0 REASON/S FOR RECOMMENDATION/S

3.1 This report has been prepared so that Members of the Standards Committee can be briefed on the implications of the Localism Act now that it has received Royal Assent.

4.0 BACKGROUND AND KEY ISSUES

- 4.1 The Coalition Agreement 'Our Programme for Government' included the commitment to "abolish the Standards Board regime". The Government has stated that it considers the Standards regime, consisting of a centrally prescribed model code of conduct, standards committees with the power to suspend a Council Member and regulated by a central quango, is inconsistent with the principles of localism and that the regime can be a vehicle for vexatious or politically motivated complaints.
- 4.2 On the 15 November 2011, the Localism Bill received Royal Assent and became the Localism Act 2011 ("the Localism Act"). The relevant provisions relating to standards matters are set out in Chapter 7 and Schedule 4 of the Localism Act.
- 4.3 Appendix 1 is an Explanatory Note detailing the key implications of the Localism Act on the Standards Regime.
- 4.4 The changes introduced by the Localism Act concerning the standards regime are expected to take effect from 1 July 2012. On the 23 December 2011 the *Local Government Lawyer* reported that, in a letter to the Association of Council Secretaries and Solicitors (ACSeS), the Department for Communities and Local Government (DCLG) wrote that while the Standards Board for England would cease to regulate Member standards from the 31 January 2012, "we envisage that the remaining local elements of the current regime, including statutory standards committees with the power to suspend councillors, will be abolished on 1 July 2012".
- 4.5 In the same letter, the DCLG was responding to concerns expressed by ACSeS that the original proposed implementation date of 1 April 2012 for the new local government standards regime was impracticable, in part due to the timing of local Council elections and meetings in spring. The DCLG advised ACSeS that from the 1 July onward, all local government standards matters (including the consideration and determination of outstanding complaints made during the period the Standards Board regime was operating), will become the responsibility of Councils and will be dealt with under the new arrangements imposed by the Localism Act.
- 4.6 The DCLG's decision to delay the implementation of the new local government standards Regime until the 1 July 2012 means that the Government has more time to prepare the outstanding regulations defining what constitutes a "disclosable pecuniary interest" as required by Section 30(3) of the Localism Act. In its letter to ACSeS, the DCLG advised that it recognised that Councils would need sufficient time to "advertise for and then appoint an "independent person" and put in place arrangements for handling allegations of breaches of their code, and principal authorities will have to put in place, and agree, arrangements with parish councils for both a code and register of interest related activity".
- 4.7 Appendix 2 set out Association of Council Secretaries and Solicitors (ACSeS) draft Code of Conduct for Elected Members ("the Member Code of Conduct") for consideration by the Standards Committee. The draft code has been used by many Merseyside Authorities as the basis for a new Member code of conduct. A further meeting of the North West Branch of ACSeS is scheduled for 20 January, which

will be attended by the Monitoring Officer and/or the Head of Legal & Member Services. Discussions will be held concerning the implications of the Localism Act and in particular in relation to the standards regime and the issues that require consideration. An update of the outcome of this meeting will be provided to Members of the Standards Committee at the next meeting.

- 4.8 Many Merseyside Authorities have indicated (along with Members of the Council's Standards Committee) that there is merit in one single Member code of conduct being developed for Merseyside Authorities. This particular issue will be raised at the aforementioned meeting of the North West ACSeS Branch meeting, which is attended by most officers from many Merseyside Authorities.
- 4.9 A number of Members have expressed concern over certain Member conduct and behaviour. Some Members have expressed the importance that the standard of Member conduct and behaviour must improve and that all Members of the Standards Committee have an obligation to lead by example. Given the new standards regime that has been introduced by the Localism Act, the Committee may consider this to be an opportune time to consider how this issue can be progress and achieved.
- 4.10 The Council's Standards Committee should consider the following issues and determine what action should be action taken to ensure that the Council is in a position to discharge it duties and responsibilities in respect of Member standards as from 1 July 2012 arising under the Localism Act:
1. The terms of reference of the future of the Council's Standards Committee;
 2. A Member Code of Conduct;
 3. The role, description and recruitment process for independent persons;
 4. The Register of Interests;
 5. The arrangements, procedures and protocols necessary to effectively deal with alleged breaches of the Member Code of Conduct;
 6. The arrangements and procedures to deal with dispensations;
 7. Member/Co-opted Member training needs; and
 8. A possible protocol for dealing with and making referrals to the Police in relation to alleged criminal activities/offences.
- 4.11 In order to progress the above issues in a timely manner, the Standards Committee is invited to consider establishing a cross-party working group. Appendix 3 sets out draft terms of reference for a Standards Committee Working Group, which (if agreed by the Committee) will be tasked with considering the 8 issues identified in paragraph 4.8 above (and any other relevant matters and issues that may arise) and developing options in relation to them for consideration by the Standards Committee.

4.12 A number of issues have been raised in relation to the Localism Act and the interpretation of certain provisions and the powers/options available to Councils. ACSeS on behalf of its Members has sought legal advice of Clive Sheldon QC on the following:

- i) The range of options open to Councils to impose sanctions for breaches of the code of conduct under the 2011 Act; and
- ii) Whether past independent Members of standards committees are eligible to assume the role of “independent person” under the Localism Act

4.13 A summary of Counsel's Advice is provided at Appendix 4 and a full copy of Counsel's Advice is set out thereafter.

5.0 RELEVANT RISKS

5.1 Should the Council not adopt a Member code of conduct or alternative mechanism/framework, it will fail in its duty to maintain and promote high standards of conduct amongst its Members and Co-opted Members.

6.0 OTHER OPTIONS CONSIDERED

6.1 There are no other options.

7.0 CONSULTATION

7.1 There is no planned consultation in respect of the proposed changes to the standards regime.

8.0 IMPLICATIONS FOR VOLUNTARY, COMMUNITY AND FAITH GROUPS

8.1 There are no such implications arising.

9.0 RESOURCE IMPLICATIONS: FINANCIAL; IT; STAFFING; AND ASSETS

9.1 None identified at this stage, however such implications will need to be considered depending on the scope and nature of the standards regime to be adopted and implemented.

10.0 LEGAL IMPLICATIONS

10.1 The legal implications are set out throughout the report.

11.0 EQUALITIES IMPLICATIONS

11.1 Any equalities implications will be considered as part of the development of the new standards regime.

12.0 CARBON REDUCTION IMPLICATIONS

12.1 There are no such implications arising.

13.0 PLANNING AND COMMUNITY SAFETY IMPLICATIONS

13.1 There are no such implications arising.

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APPENDICES

Appendix 1:

Explanatory Note: Implications of the Localism Bill on the Standards Regime

Appendix 2:

Draft Member Code of Conduct

Appendix 3:

Draft terms of Reference for the Standards Committee Working Group

Appendix 4:

Summary of Counsel's Advice and a copy of Counsel's Full Advice

REFERENCE MATERIAL

Localism Act 2011

Association of Council Secretaries and Solicitors (ACSeS) publications on the standards regime

SUBJECT HISTORY (last 3 years)

Council Meeting	Date
Standards Committee	26 January 2011

EXPLANATORY NOTE

Localism Act 2011 and the Standards Regime

INTRODUCTION

1. Localism Act 2011

- 1.1 The main elements of the new Council standards regime are contained within Chapter 7 and Schedule 4 of the Localism Act.
- .2 The intention is that the new standards regime will be more cost effective, efficient, less formal, less time consuming and more proportionate.
- .3 One significant change made by the Localism Act will be the abolition of Standards for England, which will cease to exist after 31 March 2012.
- .4 DCLG has stated that Standards for England will cease to regulate Member Standards as from 31 January 2012.
- .5 Both The Relevant Authorities (General Principles) Order 2001, which sets out the principles which currently govern the conduct of Members and Co-opted Members of relevant authorities in England and Police Authorities in Wales; and The Local Authorities (Model Code of Conduct) Order 2007 (S.I 2007/1159), which prescribes the model code of conduct to apply to Members of relevant authorities, will be revoked.
- .6 The changes to the standards regime were planned to take effect from 1 April 2012, however following concerns over timing being raised by the Association of Council Secretaries and Solicitors (ACSeS), the full changes to the standards regime are now expected to come into force on 1 July 2012.

LOCALISM ACT: THE STANDARDS REGIME

2. New Duty and Arrangements

- 2.1 The Council, under Section 27(1) of the Localism Act, “must promote and maintain high standards conduct by Member and Co-opted Members” of the Council.
- 2.2 In discharging the duty mentioned in paragraph 2.1 above, the Council must adopt a code dealing with the conduct that is expected of Members and Co-opted Members of the Council when they are acting in that capacity.¹

¹ Section 27(2) Localism Act 2011

2.3 The Council must also have in place arrangements under which:

- a. allegations can be investigated, and
- b. decisions on allegations can be made.²

2.4 Independent Person: The arrangements referred to above, must include provision for the appointment by the Council of at least one independent person –

- a. whose views are to be sought, and taken into account, by the Council before it makes its decision on an allegation that it has decided to investigate; and
- b. whose view may be sought –
 - i) by the Council in relation to allegations that are not subject to investigation; and
 - ii) by a Member/Co-opted Member of the Council if the person's behaviour is subject to an allegation.

2.5 A person cannot be an Independent Person for the purposes of the Localism Act if at any time during the 5 years ending with the appointment, the person was:

- i) a Member/Co-opted Member or officer of the Council; or
- ii) a relative or close friend of anyone mentioned in i) above.³

2.6 The appointment of a Independent Person(s) must be by public advert, an application process being adopted and the appointment by a majority of the Members of the Council.

2.7 Secretary of State guidance is awaited on the definition of an Independent Person under the Localism Act. On the strict literal interpretation of this provision, all current independent members of the Council's Standards Committee would fall outside the definition of "Independent Person" under the Localism Act.

2.8 ACSeS has, on behalf of its membership, sought legal opinion of Clive Sheldon QC, on the definition and application of "independent person". A Summary of Counsel's Advice (and the full Advice) is attached at Appendix 4. (Please note that advice on sanctions has been also been and is addressed later in this Note).

3. The Code of Conduct

3.1 The Council must ensure that the Member Code of Conduct, when viewed as a whole, deals with the conduct that is expected of Members and Co-opted Members

² Section 28(6) Localism Act 2011

³ Section 28(8) Localism Act 2011

of the Council when they are acting in that capacity” (“the Member Code of Conduct”).

3.2 The Council is permitted to either revise its existing Members’ Code of Conduct or adopt a new code of conduct as a replacement.

3.3 The Localism Act requires the Member Code of Conduct to be consistent with the following principles⁴:

- Selflessness;
- Integrity;
- Objectivity;
- Accountability;
- Openness;
- Honesty; and
- Leadership.

3.4 The Localism Act further requires the new Member Code of Conduct to include the arrangements the Council considers appropriate with regards the registration and disclosure of –

- pecuniary interests; and
- interests other than pecuniary interests.⁵

4. Disclosure and Registration of Members Interests

4.1 Members and Co-opted Members of the Council have a legal obligation⁶ to notify the Council’s Monitoring Officer of any “disclosable pecuniary interest” for the purposes of inclusion within the register of Interests.

4.2 “Disclosable pecuniary interest”: This is defined under Section 30(3) Localism Act and includes:

- a. an interest of the Member/Co-opted Member; or
- b. an interest of:
 - i. the Member’s/Co-opted Member’s spouse or civil partner;
 - ii. a person with whom the Member/Co-opted Member is living as husband and wife; or
 - iii. a person with whom the Member/Co-opted Member is living as if they were civil partners.

and the Member/Co-opted Member is aware that other person has the interest.

⁴ Section 28(1) Localism Act 2011

⁵ Section 28(2) Localism Act 2011

⁶ Section 30(1) Localism Act 2011

- 4.3 Further guidance on the definition of a “disclosable pecuniary interest” is awaited from the Secretary of State.
- 4.4 Notification Period: A new (or re-elected) Member of the Council must notify the Monitoring Officer of any “disclosable pecuniary interest” (or any unregistered “disclosable pecuniary interest” if the case of a re-elected Member) before the end of 28 days beginning with the day on which the persons becomes a Member/Co-opted Member of the Council.
- 4.5 There is provision for Regulations to be made requiring the Monitoring Officer to establish and maintain a Register of Interests of Members and Co-opted Members of the Authority. Regulations can make provision:

5. Register of Interests

- 5.1 The Council’s Monitoring Officer is required to establish and maintain a register of interests of the Members and Co-opted Members of Council.
- 5.2 Where an interest is disclosed by a Member/Co-opted Member, the Monitoring Officer must record that interest (irrespective of whether it is a “disclosable pecuniary interest”) in the register of interests.
- 5.3 The Register of Interests must be available for inspection and must be published on the Council’s website.

6. Disclosing interests at Council meetings

- 6.1 Unless otherwise registered in the register of interests (as referred to above), a Member/Co-opted Member attending a Council meeting (i.e. meeting of the Council, or any committee, sub-committee, joint committee or sub-joint committee of the Council), must disclose that “disclosable pecuniary interest(s)” to the meeting.
- 6.2 A Member/Co-opted Member does not have to disclose the nature of the disclosable pecuniary interest if it is sensitive. A sensitive disclosable pecuniary interest is one which if disclosed could lead to the Member/Co-opted Member or a person connected with him/her, being subjected to violence or intimidation.⁷
- 6.3 Where an unregistered disclosable pecuniary interest is disclosed at a meeting, the relevant Member/Co-opted Member must notify the Monitoring Officer of the disclosable pecuniary interest interest within 28 days of the date of the meeting in question.
- 6.4 Participation at Meetings: Where a Member/Co-opted Member discloses an unregistered disclosable pecuniary interest (whether it be sensitive or not) at a Council meeting (as described at paragraph 6.1 above), then the Member/Co-opted Member must not:
- i. participate or further participate in any discussion of the matter at the Council meeting;

⁷ Section 32 Localism Act

- ii. participate in any vote, or further vote, taken on the matter at the Council meeting.

(Unless otherwise granted a dispensation by the Council).

7. Failure to disclose Interests/Sanctions

- 7.1 A person commits an offence if, without reasonable excuse, he/she fails to register or disclose a “disclosable pecuniary interest” as required or knowingly or recklessly provides information in relation to a “disclosable pecuniary interest” that is false or misleading.⁸
- 7.2 A person who commits an offence, as outlined in paragraph 5.4, shall upon summary conviction be liable to a fine not exceeding £5,000.00 and may be disqualified for a period not exceeding 5 years from being or becoming a Member or Co-opted Member of a Council.
- 7.3 The Localism Act removes the power of the Council to suspend a person being Member/Co-opted Member.
- 7.4 Any criminal proceedings shall be brought by or on behalf of the Director of Public Prosecutions and may be brought within 12 months of the date evidence existed that was both in the knowledge and to the opinion of the prosecutor, sufficient to warranted proceedings. There is however a three year limitation period that applies to all conduct.
- 7.5 Various queries have been raised as to what sanctions could be available to the Council should a Member be in breach of the Member Code of Conduct given the limited options set out in the Localism Act. ACSeS has sought legal advice from Clive Sheldon QC on this issue. Members are referred to the Summary of Counsel’s Advice (and the full Advice) set out Appendix 4.

8. Standards Committee

- 8.1 There is no specific requirement under the Localism Act to retain the Council’s Standards Committee. However, it is widely recognised that a Standards Committee will be required in order to:
 - b. Assist the Council discharge its duty to promote and maintain high standards conduct by Member and Co-opted Members of the Council; and
 - c. Ensure appropriate and effective arrangements are in place to:
 - i. Investigate allegations into conduct;
 - ii. Make decisions in relation to allegations against conduct;
 - iii. Monitor standards issues and matters;
 - iv. Consider and approve training; and

⁸ Section 34 Localism Act 2011

v. Evaluate and assess applications received for the position of Independent Person.

8.2 There is no restriction on the number of Standards Committees or Sub-Committees that the Council can establish; however the Standards Committee (or indeed the Council) will no longer be able to suspend or disqualify Members from Council Membership.

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17 January 2012

DRAFT

CODE OF CONDUCT

Introduction

This code applies to you as a Member of this authority when you act in your role as a Member and it is your responsibility to comply with the provisions of this Code.

You are a representative of this authority and the public will view you as such therefore your actions impact on how the authority as a whole is viewed and your actions can have both positive and negative impacts on the authority.

This Code is based upon the “Nolan Principals-the seven principles of public life” which are set out at Schedule 1.

Interpretation

In this Code:-

“Meeting” means any meeting of:

- (a) the authority;
- (b) the executive of the authority;
- (c) any of the authority’s or its executives committees, sub-committees, joint committees or area committees;

whether or not the press and public are excluded from the meeting in question by virtue of a resolution of Members

“Member” includes a Co-opted Member and an appointed Member.

General Obligations

1. When acting in your role as a Member of the authority:

1.1 **DO** treat others with respect

1.2 **DO NOT** conduct yourself in a manner which is contrary to the Authority’s duty to promote and maintain high standards of conduct of Members

1.3 **DO NOT** disclose information given to you in confidence by anyone, or information acquired by you which you believe, or ought reasonably to be aware, is of a confidential nature, except where-

- (i) you have the consent of a person authorised to give it;
- (ii) you are required by law to do so;

- (iii) the disclosure is made to a third party for the purpose of obtaining professional legal advice provided that the third party agrees not to disclose the information to any other person; or
- (iv) the disclosure is-
 - (a) reasonable and in the public interest; and
 - (b) made in good faith and in compliance with the reasonable requirements of the authority; and
 - (c) you have consulted the Monitoring Officer prior to its release

1.4 **DO NOT** prevent another person from gaining access to information to which that person is entitled by law.

2. When using or authorising the use by others of the resources of the authority-

2.1. **DO** act in accordance with the authority's reasonable requirements including the requirements of the authority's ITC policy and the policies (attached to the Authority's Constitution), copies of which have been provided to you and which you are deemed to have read;

2.2. **DO** make sure that such resources are not used improperly for political purposes (including party political purposes); and

2.3. **DO** have regard to any applicable Local Authority Code of Publicity made under the Local Government Act 1986.

Interests

- 3. As a public figure, your public role may, at times, overlap with your personal and/or professional life and interests however when performing your public role as a Member, **DO** act solely in terms of the public interest and **DO NOT** act in a manner to gain financial or other material benefits for yourself, your family, your friends, your employer or in relation to your business interests.
- 4. You are required to register "pecuniary and other interests" (these will be laid out in Regulations subject to these not being sensitive). Failure to declare or register a pecuniary interest will be a criminal offence if this is done without a reasonable excuse. If you knowingly or recklessly provide false or misleading information about a pecuniary interest this will also be a criminal offence.
- 5. There will be no requirement for you to declare or register any gifts and hospitality; (subject to any future Regulations) however **DO NOT** accept any gifts in excess of £50.00 (fifty pounds).

Disclosure and participation

6. At a meeting where such issues arise, **DO** declare any personal and/or professional interests relating to your public duties and **DO** take steps to resolve any conflicts arising in a way that protects the public interest.
7. Certain types of decisions, including those relating to a permission, licence, consent or registration for yourself, your friends, your family Members, your employer or your business interests, are so closely tied to your personal and/or professional life that your ability to make a decision in an impartial manner in your role as a Member may be called into question and in turn raise issues about the validity of the decision of the authority. **DO NOT** become involved in these decisions any more than a Member of the public in the same personal and/or professional position as yourself is able to be and **DO NOT** vote in relation to such matters. (Further clarification is provided in Schedule 2 of this Code).
8. **DO NOT** improperly use knowledge gained solely as a result of your role as a Member for the advancement of yourself, your friends, your family Members, your employer or your business interests.

Pre-determination or bias

9. Where you have been involved in campaigning in your political role on an issue which does not impact on your personal and/or professional life you should not be prohibited from participating in a decision in your political role as Member, however **DO NOT** place yourself under any financial or other obligation to outside individuals or organisations that might seek to influence you in the performance of your official duties.
10. When making a decision, **DO** consider the matter with an open mind and on the facts before the meeting at which the decision is to be taken.

Interests arising in relation to overview and scrutiny committees (subject to Localism Act provisions)

11. In relation to any business before an overview and scrutiny committee of the authority (or of a sub-committee of such a committee) where-
 - 11.1.1 that business relates to a decision made (whether implemented or not) or action taken by your authority's executive or another of your authority's committees, sub-committees, joint committees or joint sub-committees; and
 - 11.1.2 at the time the decision was made or action was taken, you were a Member of the executive, committee, sub-committee, joint committee or joint sub-committee mentioned in paragraph 11.1 and you were present when that decision was made or action was taken; or
 - 11.1.3 that business relates to a decision made (whether implemented or not) or action taken by you (whether by virtue of the Authority's Constitution or under delegated authority from the Leader):

You may attend a meeting of the overview and scrutiny committees of your authority or of a sub committees of such a committee but only for the purpose of making representations, answering questions or giving evidence relating to the business, provided that the public are also allowed to attend the meeting for the same purposes, whether under a statutory right or otherwise.]

THE SEVEN PRINCIPLES OF PUBLIC LIFE

SELFISHNESS

Holders of the public office should act solely in terms of the public interest. They should not do so in order to gain financial or other material benefits for themselves, their family, or their friends.

INTEGRITY

Holders of the public office should not place themselves under any financial or other obligation to outside individuals or organisations that might seek to influence them in the performance of their official duties.

OBJECTIVITY

In carrying out public business, including making public appointments, awarding contracts, or recommending individuals for rewards and benefits, holders of public office should make choices on merit.

ACCOUNTABILITY

Holders of public office are accountable for their decisions and actions to the public and must submit themselves to whatever scrutiny is appropriate to their office.

OPENNESS

Holders of public office should be as open as possible about all the decisions and actions that they take. They should give reasons for their decisions and restrict information only when the wider public interest clearly demands.

HONESTY

Holders of public office have a duty to declare any private interests relating to their public duties and to take steps to resolve any conflicts arising in a way that protects the public interest.

LEADERSHIP

Holders of public office should promote and support these principles by leadership and example.

Schedule 2

Where the decision referred to in Clause 7 above relates to one of the functions of the authority set out below, and the condition which follows that function does not apply to you when making that decision, you may participate in the decision:

- (i) housing, where you are a tenant of your authority *unless* those functions relate particularly to your tenancy or lease;
- (ii) school meals or school transport and travelling expenses, where you are a parent or guardian of a child in full time education, or a parent governor of a school *unless* it relates particularly to the school which the child attends,
- (iii) statutory sick pay under Part XI of the School Security Contributions and Benefits Act 1992, where you are in receipt of, or are entitled to the receipt of such pay;
- (iv) an allowance, payment or indemnity given to Members;
- (v) any ceremonial honour given to Members; and
- (vi) setting Council tax or a precept under the Local Government Finance Act 1992

DRAFT TERMS OF REFERENCE

Standards Committee

Working Group

Scope and Remit

To explore, examine and develop a draft framework and such options, procedures, arrangements considered necessary to enable the Council discharge its duties and obligations arising under the Localism Act 2011 in relation to the standards regime.

In particular, to:

1. Develop a new framework for the Standards regime;
2. Draft new terms of reference for the Council's Standards Committee (if relevant);
3. Prepare a Draft Member Code of Conduct;
4. Detail the role, description and recruitment process for independent persons;
5. Review the current Register of Interests to consider its effectiveness;
6. Propose new arrangements, procedures and protocols necessary to effectively deal with alleged breaches of the Member Code of Conduct;
7. Propose new arrangements and procedures to deal with dispensations;
8. Consider Member/Co-opted Member training needs;
9. Propose a new protocol for dealing with and making referrals to the Police in relation to alleged criminal activities/offences; and
10. Consider and undertake any other actions, steps or measures considered necessary/important to assist the Council's Standards Committee/Council put in place necessary arrangements required by the Localism Act 2011 or as are appropriate.

The Working Group shall make recommendations to the Council's Standards Committee in relation to the matters and issues mentioned above.

Membership

The Working Group shall consist of:

- An independent member; and
- Two Members of each political group.

Any Member of the Working Group (including the independent member) is entitled to nominate a deputy to attend meetings of the Working Group on his/her behalf providing the nominee is a Member of the Council's Standards Committee.

Meetings

The Working Group shall meet as frequently as considered necessary.

The meeting shall be chaired by the independent member (or his/her nominee).

Meetings shall be quorate providing the Chair and at least one eligible Member from each political party are in attendance.

Meetings of the Working Group shall be held in private and the provisions relating to Access to Information shall not apply.

Decision Making

The Working Group shall only be permitted to make recommendations to the Council's Standards Committee in relation to matters falling within its scope and remit.

Administration

The Working Group shall be administered and supported by officers from the Council's Legal & Member Services Section.

SUMMARY OF
COUNSEL'S ADVICE

1. Clive Sheldon QC was instructed to advise the Association of Council Secretaries and Solicitors (“ACSeS”) in relation to two specific matters arising from the Localism Act 2011 (“the 2011 Act”).
2. Counsel’s full Advice is attached to this Summary.
3. The issues in respect of which Counsel Advice has been sought are:
 - a. What is the range of options open to Councils to impose sanctions for breaches of the code of conduct under the 2011 Act?
 - b. Are past independent Members of standards committees eligible to assume the role of “independent person” under the 2011 Act?

SANCTIONS OPEN TO LOCAL AUTHORITIES

4. The Council must have in place arrangements under which allegations can be investigated, and decisions on allegations made.
5. The 2011 Act does not prescribe the detail of the arrangements for investigating allegations, and does not prescribe the detail of the arrangements under which decisions on allegations can be made, save for the requirement that the arrangements must include the involvement of an “independent person”.
6. Under Section 28(11) of the 2011 Act, if the Council finds that a Member or Co-opted Member of the Council has failed to comply with its code of conduct (whether or not the finding is made following an investigation) it may have regard to the failure in deciding (a) whether to take action in relation to the Member or Co-opted Member, and (b) what action to take.

7. The 2011 Act does **not** prescribe the range of 'actions' that the Council can take; but does envisage that some action **can** be taken against a Member or Co-opted Member who fails to comply with that authority's code of conduct.

(i) Current regime sanctions

8. Under the current standards regime (in force until the new provisions are implemented), the legislation listed a range of sanctions that were available to the Council. Such a range of sanctions do not appear in the 2011 Act.

9. Section 34 of the 2011 Act provides for criminal sanctions - a fine (£5,000) -- where a Council Member fails to notify disclosable pecuniary interests. Furthermore, the Court considering whether an offence has been committed under this section may 'disqualify the person, for a period not exceeding five years, for being or becoming (by election or otherwise) a Member or Co-opted Member of the Council in question or any other relevant authority.

(ii) Common law position

10. As the 2011 Act is silent as to what measures can be taken against a Member who breaches the code of conduct, it is necessary to look at common law principles. In particular, assistance can be gained from the case law that pre-dated the statutory standards regime.

11. Looking at the earlier case law, it seems that the common law did not afford the Council the ability to issue sanctions that interfered with local democracy. The Court of Appeal expressed real concern at the use by a Council of standing orders to damage local democracy.

12. A Council cannot 'disqualify' one of its own Members. Members are democratically elected to serve in that role, and there would be a very strong presumption that only statute can confer a power to interfere with the will of the local electorate by

removing them from their role or interfering generally with the performance of their duties.

13. The common law cannot in Counsel's view, confer any power to disqualify a Member. The same most probably applies to *suspension* from performing the role of Member, as this again interferes with the will of the local electorate, and an express statutory power is most probably required.
14. Similarly, the sanction of exclusion from meetings of the authority. There is a statutory power under section 94(4) of the Local Government Act 1972 to exclude (via standing orders) a Member from meetings.
15. Counsel however does not however believe this extends to conferring a power to exclude from meetings as a disciplinary sanction in other circumstances as this interferes with the democratic process.
16. As for other sanctions, Counsel's general view is that the range of measures available to Councils is limited. This is supported by the case law that predated the legislation for the standards regime, and the 'Third Report of the Committee on Standards in Public Life', which noted that 'There is at present no way in which a Council collectively can act against an individual Councillor for non-compliance with the code of conduct, other than by exclusion from committees with the consent of the Councillor's party group'. In ex parte Lashley, the judge did not agree with this broad statement insofar as it was intended to mean that a Council could not censure an offending Member, but the judge observed that the sanctions available were very limited.
17. In ex parte Lashley, (as preceding the current standards regime) the Council was investigating an allegation of misconduct by a Member. It was contended that the Member had made remarks to an officer resulting in her going on sick leave suffering from stress. The judge observed that a Council could censure a Member for breaching the Council's code of conduct. That is, it could 'name and shame' a Councillor for falling short of standards expected of Councillors.

18. The judge analysed the law relating to access to committees and sub-committees of a Council, and access to information, and in essence stated that a Councillor's Membership of committees and sub-committees and his right of access to meetings of those committees or sub-committees of which he is a Member are protected by law.
19. The statutory power under section 102 of the Local Government 1972 Act ("the 1972 Act") to appoint to committees, by implication, includes power to remove and replace committee members; that power being fundamental to the proper discharge of the functions and cannot be delegated.
20. A Councillor who has been appointed to a committee or sub-committee in accordance with the provisions of sections 15 and 16(1) of the Local Government and Housing 1989 Act (sections described in the act as relating to "Political balance on committees etc") ("the 1989 Act") can be removed from the committee or sub-committee only "in accordance with the wishes of" the political group pursuant to whose wishes he was originally appointed.
21. Although section 94(4) of the 1972 Act empowers a Council to provide for standing orders for the exclusion of a Member of the authority from a meeting of the authority, that power permits such exclusion only while a matter in which he has a pecuniary interest is under consideration.
22. Moreover, whilst one Councillor can move, in full Council, a vote of no confidence in another Councillor, it is equally clear from legal judgments that a Councillor cannot be removed from office by such a vote.
23. It is accepted that a Council could take action such as 'giving advice or making observations, either generally or specifically about a Councillor's misconduct', 'reporting matters to the police', and even making 'a recommendation to the full authority to remove a Councillor from a committee'. However, a Council cannot impose "arrangements" of working practices or "instructions" to staff 'which sought to impose on a particular Councillor or Councillors specific restrictions more

onerous than those imposed on Councillors'. Such arrangements could be ultra vires if imposed for disciplinary reasons.

24. The Court stated that, 'In approaching this question [i.e. what sanctions are permissible] one needs always to have in mind that anything which fetters the otherwise appropriate activities of a democratically elected representative must...be subject to the most searching and rigorous scrutiny and is something which requires the most cogent and compelling justification.'

25. The Court of Appeal observed that the sanctions available to Councils [unless otherwise expressly conferred by statute] were limited. The Court stated that in extreme cases a Council can report matters to the police or to the auditors. In less extreme cases, it may recommend to the Council removal of a Councillor from a committee, or simply state its findings and perhaps offer advice.

(iii) Possible Sanctions

26. Counsel has considered the various sanctions proposals suggested by ACSeS and advised on whether they are available to a Council and whether any of them would engage Article 6 of the European Convention on Human Rights ("the Convention") so as to require an independent appeals process if they were implemented.

(a) Formal Letter

27. There is no objection to a Council (or a committee of a Council) sending a formal letter to a Councillor who has been found to have breached the authority's code. This kind of measure does not, in any way, interfere with the Member's duties or the will of the electorate. Nor does it, in Counsel's view, amount to 'determination of civil rights' for the purposes of Article 6 of the Convention.

(b) Formal Censure (e.g. through a motion)

28. Counsel is of the view that there is no objection to the Council (or a committee of a Council) issuing a formal censure towards a Councillor, eg. through a motion. This kind of measure does not, in any way, interfere with the Member's duties or the will of the electorate; nor does it engage Article 6 of the Convention. A formal censure may interfere marginally with 'political rights', but does not interfere with civil rights.

(c) Removal of Member from Committees

29. As a matter of principle, the sanction of removing a Member from a committee of the Council would be open to the Council. Case law suggests that this power was thought to be available before the introduction of the statutory standards regime, so long as the removal decision was made by the Council itself and not by a committee of that authority. However, where the appointment of a Member to a committee is the decision of one of the political groups, it was envisaged that only the leader of the relevant political group could remove the Member from the committee.

30. Accordingly, it would appear that where the committees are governed by the rules of proportionality, the most that can be done is to make a recommendation to the relevant political group that the Member be removed from a particular committee or committees.

31. As a matter of process, the recommendation to the relevant political group to make its change to a particular committee or committees could come directly from the full Council, or from the committee of the Council that is responsible for dealing with the code of conduct issue. If the former mechanism was adopted, this will be likely to involve discussion and debate at full Council, leading to a greater airing of the underlying conduct issues and greater transparency to the whole process.

32. Counsel does not consider that this kind of measure (whether the recommendation is made by a committee or full Council) engages Article 6 of the Convention.

(d) Press release/publicity

33. It seems to me that there is no overriding legal objection to the Council publicising a decision that a Member had breached the authority's code of conduct. The new statutory scheme does not provide for the decision to be kept confidential and the 'right to know' whether or not Members are complying with an authority's code of conduct provides a 'rational' reason for publicising that decision.

(e) Withdrawal of allowances

34. Counsel doubts that a sanction that seeks to withhold an allowance being paid to a Member in consequence for breaching the code of conduct would be lawful.

35. Members allowances are set annually by the Council pursuant to the Local Authorities (Members' Allowances) (England) Regulations 2003 (SI 2003/1021). The Regulations clearly contemplate that the scheme for allowances reflects the nature of the functions or activities performed by Members.

36. Counsel does not believe the Council can make a scheme which involves the payment of allowances to a Member which does not reflect the nature of their activities and functions: whether as a 'basic allowance', or a 'special responsibility allowance'. Given that there is express provision conferring power on the Council to withhold a payment when a Member is suspended suggests that there is no power to withhold a payment, or part of a payment, in any other circumstances.

37. Although the payment of an allowance is connected with the 'political rights' of a Member (they only receive the payment in return for serving as a Councillor), it amounts to a form of remuneration for the work that they do for the Council which, ordinarily, would be regarded as a 'civil right'.

38. On the other hand, a respectable argument can be made that the payment of the allowance, and its subsequent withdrawal (as prescribed by the Council's scheme for allowances) should be considered as falling properly within the 'public law' realm.

39. The two sets of arguments are, in Counsel's view, quite finely balanced. Council considers, however, that the former argument is (just) more likely to prevail. The allowance will be treated as akin to remuneration.

(f) Withholding of confidential information

40. Council strongly doubts that a sanction of withholding confidential information is available for breach of the code; even where the breach of the code involves the breach of a duty of confidentiality by the Councillor in question.

41. Where the Councillor ordinarily has the right to access confidential information, then depriving him or her of this right is likely to be viewed by the Courts as an undue interference with their rights as a Councillor, and as interfering with the democratic process. Although a Councillor does not have an unrestricted access to the books, papers, records and files of the Council, the Member is entitled to such access as is necessary to enable him or her properly to discharge the duties as a Councillor if he or she has a 'need to know'.

42. Furthermore, Councillors have statutory rights of access to information such rights cannot, in Council's view, be interfered with or qualified without express statutory authority to do so.

INDEPENDENT PERSON and INDEPENDENT MEMBERS

43. Counsel has considered whether past independent Members of a Council's standards committee would be permitted to take on the role of 'independent person' for the same authority under the 2011 Act.

44. Serious concern has been voiced at the loss of experience for Councils if past independent members cannot serve as the 'independent person.'

45. In Counsel's opinion, it is not permissible for a past independent member (that is, an independent member who has served in the past 5 years) to serve as the 'independent person.'

46. The definition of the 'independent person' is set out at section 28(8) of the 2011 Act.

(a) a person is not independent if the person is—

(i) a Member, Co-opted Member or officer of the authority,

(ii) a Member, Co-opted Member or officer of a parish Council of which the authority is the principal authority, or

(iii) a relative, or close friend, of a person within sub-paragraph

(i) or (ii);

(b) a person may **not be appointed** under the provision required by subsection (7) if at any time during the 5 years ending with the appointment the person was—

(i) a Member, Co-opted Member or officer of the authority, or

(ii) a Member, Co-opted Member or officer of a parish Council of which the authority is the principal authority;

It can be seen, therefore, that a person cannot be an 'independent person' if he or she was 'a Member, Co-opted Member or officer of the authority' at any time during the 5 years ending with the date of the intended appointment. There must, therefore, be a five year break.

47. In Counsel's opinion, the previous definition of "Co-opted Member" under section 49(7) of the 2000 Act (which is the same as the 2011 Act definition) was apt to include an independent Member of a Council's standards committee.

48. *On a literal reading of the legislation*, the independent Member of the standards committee was a 'Co-opted Member' of the authority for the purposes of section 49(7) of the 2000 Act, and the same applies to the 2011 Act.

49. ACSes suggested that it had never been argued that independent Members were prevented from being reappointed by virtue of regulation 5 of the 2008 Regulations, and so presumably there is no reason in principle why they should be prevented from being appointed under the 2011 Act. Counsel agrees with the first part of the suggestion, but not the second point where there are textual differences between regulation 5 and section 28 of the 2011 Act.

50. Regulation 5(2) provided that:

‘a person may not be appointed as an independent Member of a standards committee if that person—

(a) has within the period of five years immediately preceding the date of the appointment been a Member or officer of the authority; or

(b) is a relative or close friend of a Member or officer of the authority.

51. That is, a ‘Member’ of the authority in the previous five years could not be appointed as ‘independent member’ of the standards committee. The definition of ‘Member’ for these purposes did not include a ‘Co-opted Member’ (save for Co-opted Members of a parish Council), however:

52. There is a clear textual difference between the 2011 Act and the 2008 Regulations. Under the existing standards regime, there is no prohibition against an independent member of a standards committee being re-appointed to that role. However, the same language does not appear in the 2011 Act: it would have been possible to repeat the language had Parliament intended to do so.

53. Given the unambiguity in the language of section 28(7) of the 2011 Act – that the ‘independent person’ cannot have been a ‘Co-opted Member’ – and the fact that Parliament could quite easily have used the same language as in the 2008 Regulations had it wished to permit independent Members from serving as independent persons but did not do so, the better reading of the legislation is that such persons are not permitted to serve as independent persons within a period of five years from their previous service.

54. Counsel appreciates that good arguments can be made that Parliament cannot have consciously intended to do that, as this would involve a loss of experience from the former independent members. On the other hand, it can be said that the new standards regime is designed to mark a break with the previous regime, and so it is not surprising if there are to be differences in approach.

55. Indeed, whereas previously the 'independent member' sat on the standards committee, and actually chaired the committee, the 'independent person' does not make the decision as to whether there has been a breach or not, but is merely consulted for his or her views. The role of the 'independent person' is therefore different, and there is not necessarily a complete overlap of skill sets and experience between the two roles.

FULL ADVICE NOTE

IN THE MATTER OF:
THE LOCALISM ACT

ADVICE

56. I am instructed to advise the Association of Council Secretaries and Solicitors (“ACSeS”), the professional association representing monitoring officers in England and Wales, with respect to a number of matters arising from the recently enacted Localism Act 2011 (“the 2011 Act”).

57. First, I am asked to advise as to the range of options open to Councils to impose sanctions for breaches of the code of conduct under the 2011 Act.

58. Second, I am asked to advise as to whether past independent Members of standards committees are eligible to assume the role of “independent person” under the 2011 Act.

I. Range of Sanctions

(i) Statutory Position

59. The 2011 Act, which received Royal Assent on 15th November 2011, makes substantial changes to the standards regime for Council Members in England and Wales. Section 27 of the 2011 Act provides that:

(1) A relevant authority must promote and maintain high standards of conduct by Members and Co-opted Members of the authority.

(2) In discharging its duty under subsection (1), a relevant authority must, in particular, adopt a code dealing with the conduct that is expected of Members and Co-opted Members of the authority when they are acting in that capacity.

60. The 2011 Act does not prescribe a model code of conduct. Section 28(1) merely requires Councils to secure that the code which they adopt is ‘when viewed as a whole, consistent with the following principles— (a) selflessness; (b) integrity; (c) objectivity; (d)

accountability; (e) openness; (f) honesty; (g) leadership’ (that is, the *Nolan* principles of standards in public life).

61. Section 28(4) of the 2011 Act provides that: ‘A failure to comply with a relevant authority's code of conduct is not [to] be dealt with otherwise than in accordance with arrangements made under subsection (6)’. Subsection (6) provides that:

‘A relevant authority other than a parish Council must have in place—

(a) arrangements under which allegations can be investigated, and

(b) arrangements under which decisions on allegations can be made.’

62. The 2011 Act does not prescribe the detail of the arrangements for investigating allegations, and does not prescribe the detail of the arrangements under which decisions on allegations can be made, save for the requirement (discussed further below) that the arrangements must include the involvement of an “independent person”.

63. Section 28(11) of the 2011 Act provides that:

‘If a relevant authority finds that a Member or Co-opted Member of the authority has failed to comply with its code of conduct (whether or not the finding is made following an investigation under arrangements put in place under subsection (6)) it may have regard to the failure in deciding—

(a) whether to take action in relation to the Member or Co-opted Member, and

(b) what action to take.’

64. Section 28(11) of the 2011 Act does not prescribe the range of ‘actions’ that the Council can take; but does envisage that some action *can* be taken against a Member or Co-opted Member who fails to comply with that authority’s code of conduct.

65. Under the previous standards regime (still in force until the new provisions are implemented), the legislation listed a range of sanctions that were available to Councils:

(a) censure of that Member;

(b) restriction for a period not exceeding six months of that Member's access to the premises of the authority or that Member's use of the resources of the authority, provided that those restrictions—

(i) are reasonable and proportionate to the nature of the breach; and

(ii) do not unduly restrict the person's ability to perform the functions of a Member;

(c) partial suspension of that Member for a period not exceeding six months;

(d) suspension of that Member for a period not exceeding six months;

(e) that the Member submits a written apology in a form specified by the standards committee;

(f) that the Member undertakes such training as the standards committee specifies;

(g) that the Member participate in such conciliation as the standards committee specifies;

(h) partial suspension of the Member for a period not exceeding six months or until such time as the Member submits a written apology in a form specified by the standards committee;

(i) partial suspension of the Member for a period not exceeding six months or until such time as the Member has undertaken such training or has participated in such conciliation as the standards committee specifies;

(j) suspension of the Member for a period not exceeding six months or until such time as the Member has submitted a written apology in a form specified by the standards committee;

(k) suspension of the Member for a period not exceeding six months or until such time as that Member has undertaken such training or has participated in such conciliation as the standards committee specifies.

See regulation 19(c) of the Standards Committee (England) Regulations 2008 (SI 2008/1085) (“the 2008 Regulations”). These regulations will be repealed by Schedule 4 to the 2011 Act.

66. Section 34 of the 2011 Act provides for criminal sanctions -- a fine not exceeding level 5 on the standard scale -- where a Council Member fails to notify disclosable pecuniary interests. Furthermore, the Court considering whether an offence has been committed under this section may ‘disqualify the person, for a period not exceeding five years, for

being or becoming (by election or otherwise) a Member or Co-opted Member of the relevant authority in question or any other relevant authority' (section 34(4)).

(ii) Common law position

67. As the 2011 Act is silent as to what measures can be taken against a Member who breaches the code of conduct, it is necessary to look at common law principles. In particular, assistance can be gained from the case law that pre-dated the statutory standards regime.

68. Looking at the earlier case law, it seems to me that the common law did not afford Councils the ability to issue sanctions that interfered with local democracy. See e.g. R. v Flintshire CC Ex p. Armstrong-Braun [2001] B.L.G.R. 344, where the Court of Appeal expressed real concern at the use by a Council of standing orders to damage local democracy. See also the discussion in R v. Broadland District Council, ex parte Lashley (2000) 2 L.G.L.R. 933, referred to below.

69. It is clear, therefore, that a Council cannot 'disqualify' one of its own Members. Members are democratically elected to serve in that role, and there would be a very strong presumption that only statute can confer a power to interfere with the will of the local electorate by removing them from their role or interfering generally with the performance of their duties. There are express statutory provisions dealing with disqualification -- see section 80 of the Local Government Act 1972 ("the 1972 Act") (holding of paid office with the authority, bankruptcy etc); as well as the power of the Court under the 2011 Act when considering the criminal offence under section 34 -- and there is, in my view, no room for the common law to confer any power to disqualify a Member.

70. I consider that the same most probably applies to *suspension* from performing the role of Member. Once again, this interferes with the will of the local electorate, and an express statutory power is most probably required.

71. Similarly, the sanction of exclusion from meetings of the authority. There is a statutory power to exclude from meetings, at section 94(4) of the Local Government Act 1972:

A Council may by standing orders provide for the exclusion of a Member of the authority from a meeting of the authority while any contract, proposed contract or other matter in which he has a pecuniary interest, direct or indirect, is under consideration.

There is no room, in my view, to confer a power to exclude from meetings as a disciplinary sanction in other circumstances. This interferes with the democratic process.

72. As for other sanctions, my general view is that the range of measures available to Councils is limited. This is supported by the case law that predated the legislation for the standards regime, and the 'Third Report of the Committee on Standards in Public Life', which led to the legislation. The Report noted that 'There is at present no way in which a Council collectively can act against an individual Councillor for non-compliance with the code of conduct, other than by exclusion from committees with the consent of the Councillor's party group' (see paragraph 170). In *ex parte Lashley*, Munby J. did not agree with this broad statement insofar as it was intended to mean that a Council could not censure an offending Member, but Munby J. observed that the sanctions available were very limited.

73. In *ex parte Lashley*, the Administrative Court was concerned with an application for judicial review of the decision of a Council's standards committee, established before the statutory standards regime was brought into force. The Council was investigating an allegation of misconduct by a Member, relating to his dealings with an officer of the authority. It was contended that the Member had made remarks to an officer which had resulted in her going on sick leave suffering from stress. Munby J observed, in an *obiter* part of the judgment, that a Council could censure a Member for breaching the authority's code of conduct. That is, it could 'name and shame' a Councillor for falling short of standards expected of councillors.

74. Munby J. accepted, however, that there was no power to impose restrictions on a delinquent Councillor of the kind that had initially been imposed in that case. The restrictions were set out in a letter to the Member from the authority's Chief Executive:

"Today, I have issued an instruction to all staff that, for their protection, they are not to have any dealings with you. If you require any information, I request that you contact Mr Bland, Mr Kirby or

myself, in writing, and we will ensure that any response is dealt with by the appropriate person in the organisation. With regard to the inspection of planning files relating to your duty as a Councillor, please make an appointment, in advance, in order that arrangements can be made for you to view the files. You are not permitted to enter this building, or the Training Centre, other than to attend Council meetings and you are requested to report to the main Reception on each occasion.’

Munby J. explained that these restrictions ‘would be an unacceptable – indeed unlawful – restraint of the [Councillor’s] right to perform her functions and duties as a democratically elected representative.’

75. Munby J. went on to analyse the law relating to access to committees and sub-committees of a Council, and access to information. He observed that:

‘The Councillor’s Membership of committees and sub-committees and his right of access to meetings of those committees or sub-committees of which he is a Member are protected by law. Thus, although as Nolan J accepted in *R v. Brent London Borough Council ex p Gladbaum* (1989) 88 LGR 627 the statutory power under section 102 of the 1972 Act to appoint to committees by necessary implication includes power to remove and replace committee Members, that power, being as he put it “not merely incidental, but fundamental to the proper discharge of the functions which the Council were elected to perform”, cannot be delegated and therefore falls outside the statutory power of delegation in section 101. Moreover, a Councillor who has been appointed to a committee or sub-committee in accordance with the provisions of sections 15 and 16(1) of the 1989 Act (sections described in the act as relating to “Political balance on committees etc”) can by virtue of section 16(2) of that Act be removed from the committee or sub-committee only “in accordance with the wishes of” the political group pursuant to whose wishes he was originally appointed. Furthermore, although section 94(4) of the 1972 Act empowers a Council to provide for standing orders for the exclusion of a Member of the authority from a meeting of the authority, that power permits such exclusion only while a matter in which he has a pecuniary interest is under consideration. And finally, although as *R v. Bradford City Metropolitan Council ex p Wilson* [1990] 2 QB 375n shows there is no objection to one Councillor moving in full Council a vote of no confidence in another Councillor, it is equally clear from the judgments in that case that a Councillor cannot be removed from office by such a vote.’

76. Munby J. went on to consider a number of suggested options available to a Council with respect to misconduct. He was inclined to agree with the suggestion that the Council could

take action such as ‘giving advice or making observations, either generally or specifically about a Councillor’s misconduct’, ‘reporting matters to the police’, and even making ‘a recommendation to the full authority to remove a Councillor from a committee’. (This view is consistent with the decision of the Divisional Court in R v. Portsmouth City Council, ex parte Gregory 89 LGR 478, which presupposed that the full Council had power to suspend Members from a committee). However, he was not convinced that a Council could impose “arrangements” of working practices or “instructions” to staff ‘which sought to impose on a particular Councillor or councillors specific restrictions more onerous than those imposed on councillors’. Munby J. observed that these ‘might very well be ultra vires’ if imposed for disciplinary reasons.

77. Munby J. explained that ‘In approaching this question one needs always to have in mind that anything which fetters the otherwise appropriate activities of a democratically elected representative must . . . be subject to the most searching and rigorous scrutiny and is something which requires the most cogent and compelling justification.’ Munby J. was ‘sceptical as to whether any significant restraints of a practical nature imposed on an individual Councillor’s otherwise appropriate activities (that is, restraints more onerous than those imposed on councillors generally) can be justified in the absence of express statutory authority.’

78. The case was appealed to the Court of Appeal: see [2001] LGR 264. The Court did not expressly endorse Munby J’s observations, nor did it disapprove them. The Court’s observations were that the sanctions available to Councils were limited. Kennedy LJ observed at §26 that ‘So far as the Councillor is concerned, the committee’s powers are restricted, but they are not non-existent. In extreme cases it can report matters to the police or to the auditors. In less extreme cases it may recommend to the Council removal of a Councillor from a committee, or simply state its findings and perhaps offer advice.’

(iii) Possible Sanctions

79. Against this background, I will consider the various sanctions proposals suggested in my Instructions: are they available to a Council and whether any of them would engage Article 6 of the European Convention on Human Rights (“the Convention”) so as to require an independent appeals process if they were implemented.

(a) *formal letter*

80. I agree with my Instructing Solicitor that there is no objection to a Council (or a committee of a Council) sending a formal letter to a Councillor who has been found to have breached the authority's code. This kind of measure does not, in any way, interfere with the Member's duties or the will of the electorate. Nor does it, in my view, amount to 'determination of civil rights' for the purposes of Article 6 of the Convention.
81. The Strasbourg jurisprudence suggests that 'political rights' (including the electoral process) are not to be treated as 'civil rights', and that this may apply even where the decision in question has economic consequences: see Pierre-Bloch v France (1998) 26 E.H.R.R. 202 (Member of French Assembly disqualified from retaining his seat as a result of exceeding election expenses); and Porter v. United Kingdom (2003) 37 EHRR CD 8 (surcharge of Council Member). A formal letter may interfere marginally with 'political rights', but does not interfere with 'civil rights'.
82. In Pierre-Bloch, the European Court of Human Rights held at §50 that the 'right to stand for election to the National Assembly and to keep his seat [was] . . . a political one and not a "civil" one within the meaning of Article 6(1) so that disputes relating to the arrangements for the exercise of it—such as ones concerning candidates' obligation to limit their election expenditure—lie outside the scope of that provision.' The fact that there was an 'economic aspect of the proceedings in issue does not, however, make them "civil" ones within the meaning of Article 6(1)': at §51.
83. In Porter, the Court did not make a definitive decision on the matter, but noted that the Councillor's argument that the surcharge proceedings to which she had been subject fell under Article 6 in its civil aspect was not necessarily the case:

'proceedings do not become "civil" merely because they also raise an economic issue or have an impact on the applicant's pecuniary interests (Schouten and Meldrum v Netherlands: (1995) 19 E.H.R.R. 432, para. [50], Pierre-Bloch v France, judgment cited above, para. [51]). The Court notes that the liability to pay the surcharge arose from regulations governing the duties and obligations of public officials and thus could be regarded as pertaining to the sphere of public law.'

The House of Lords in Porter had assumed that Mrs. Porter's 'civil rights' were involved, and that Article 6 was engaged. Porter v. Magill [2002] 2 A.C. 357.

(b) *formal censure e.g. through a motion*

84. I agree with my Instructing Solicitor that there is no objection to a Council (or a committee of a Council) issuing a formal censure towards a Councillor, eg. through a motion. This kind of measure does not, in any way, interfere with the Member's duties or the will of the electorate; nor does it engage Article 6 of the Convention. A formal censure may interfere marginally with 'political rights', but does not interfere with civil rights.

(c) *removal of Member from committees*

85. As a matter of principle, the sanction of removing a Member from a committee of a Council would be open to the authority. The case law referred to above suggests that this power was thought to be available before the introduction of the statutory standards regime, so long as the removal decision was made by the Council itself and not by a committee of that authority. However, where the appointment of a Member to a committee is the decision of one of the political groups, it was envisaged that only the leader of the relevant political group could remove the Member from the committee. The power of removal from a committee (which is the inverse of the power of appointment: see Gladbaum) yields to the political balance requirements.

86. Accordingly, it would appear that where the committees are governed by the rules of proportionality, the most that can be done is to make a recommendation to the relevant political group that the Member be removed from a particular committee or committees. This will, of course, create difficulties in practice where the relevant political group is very small. It does not mean, however, that the recommendation should not be made.

87. As a matter of process, the recommendation to the relevant political group to make its change to a particular committee or committees could come directly from the full Council, or from the committee of the Council that is responsible for dealing with the code of conduct issue. If the former mechanism was adopted, this will be likely to involve

discussion and debate at full Council, leading to a greater airing of the underlying conduct issues and greater transparency to the whole process.

88. I do not consider that this kind of measure (whether the recommendation is made by a committee or full Council) engages Article 6 of the Convention, even if removal from a committee may have financial consequences, in that the Member will lose special responsibility allowances. Primarily, the decision interferes with ‘political rights’, albeit there may be some consequential impact on pecuniary interests.

(d) Press release/publicity

89. It seems to me that there is no overriding legal objection to a Council publicising a decision that a Member had breached the authority’s code of conduct. The new statutory scheme does not provide for the decision to be kept confidential, and the ‘right to know’ whether or not Members are complying with an authority’s code of conduct provides a ‘rational’ reason for publicising that decision.

(e) Withdrawal of allowances

90. One suggestion of a sanction would be to include in a Council’s scheme of Members’ allowances the ability to withhold an allowance for a breach of the code of conduct. I am most doubtful that this sanction would be lawful.

91. Members allowances are set annually by Councils pursuant to the Local Authorities (Members’ Allowances) (England) Regulations 2003 (SI 2003/1021). The Regulations clearly contemplate that the scheme for allowances reflects the nature of the functions or activities performed by Members.

92. Thus, Councils are obliged to ‘make a scheme in accordance with these Regulations which shall provide for the payment of an allowance in respect of each year to each Member of an authority, and the amount of such an allowance shall be the same for each such Member (“basic allowance”): regulation 4(1)(a). Where the term of office of a Member begins or ends part way through the year, ‘his entitlement shall be to payment of such part of the basic allowance as bears to the whole the same proportion as the number of days during

which his term of office as Member subsists bears to the number of days in that year': regulation 4(2)(b). Where a Member is suspended (under the current standards regime), 'the part of basic allowance payable to him in respect of the period for which he is suspended or partially suspended may be withheld by the authority': regulation 4(3).

93. For the special responsibility allowance, although the amount of the allowance does not need to be the same for each Member, regulation 5(2)(c) provides that 'where a Member does not have throughout the whole of a year any such special responsibilities as entitle him to a special responsibility allowance, his entitlement shall be to payment of such part of the special responsibility allowance as bears to the whole the same proportion as the number of days during which he has such special responsibilities bears to the number of days in that year.' In other words, the level of allowance should reflect the functions performed. There is also power to withhold payment where the Member is suspended: regulation 5(3).

94. It seems to me that there is no room for a Council to make a scheme which involves the payment of allowances to a Member which does not reflect the nature of their activities and functions: whether as a 'basic allowance', or a 'special responsibility allowance'. Furthermore, the express provision conferring power on a Council to withhold a payment when the Member is suspended suggests that there is no power to withhold a payment, or part of a payment, in any other circumstances.

95. If Councils do seek to apply this sanction, however, then I consider that there is a reasonable prospect that this would be treated by the Courts as involving a 'determination of civil rights' within the meaning of Article 6.

96. Although the payment of an allowance is connected with the 'political rights' of a Member (they only receive the payment in return for serving as a Councillor), it amounts to a form of remuneration for the work that they do for the authority which, ordinarily, would be regarded as a 'civil right'. Withdrawing the allowance is not merely a consequence of another sanction (as with removal from a committee), but is the sanction itself. The 'determination' that is being made by the authority, once it has decided that a breach of the code has taken place, is to interfere directly with that remuneration.

97. On the other hand, a respectable argument can be made that the payment of the allowance, and its subsequent withdrawal (as prescribed by the Council's scheme for allowances) should be considered as falling properly within the 'public law' realm. It is not dissimilar to the situation in Porter, where the Court declined to find that 'civil rights' were engaged when the Councillor was subject to the statutory discharge procedure.
98. The two sets of arguments are, in my view, quite finely balanced. I consider, however, that the former argument is (just) more likely to prevail. The allowance will be treated as akin to remuneration.
99. If the 'civil rights' aspects of Article 6 had to be complied with, however, then it seems to me that it would not be possible for this to be done within the Council committee structure, as there would not be sufficient independence or impartiality; and the supervisory jurisdiction of the Administrative Court by way of judicial review is unlikely to remedy the lack of impartiality at the first stage: the role of the Administrative Court will be to review, rather than to re-hear the case against the Councillor.
100. It would be necessary, it seems to me, for the Council to establish some form of independent appeal. The Members of that appeal panel could not include Council Members or Co-opted Members, as they would be regarded as 'judges in their own cause' or, at the very least, their presence and involvement would give rise to the appearance of bias, as it is the 'standards' of their authority which will have been called into question.
101. There is a question mark as to whether the panel could include an 'independent' person; albeit not the same 'independent' person who has been involved in the particular decision that led to the sanction. The 'independent' person is not a Member (or Co-opted Member) of the authority in question, and so it can be argued that they have no vested interest in the outcome of the appeal and, as they are 'independent' of the authority in question, could not sensibly be seen to the 'fair minded observer' as being biased.
102. On the other hand, an argument could be made that the 'independent person' participates generally in a 'prosecutorial capacity' with the authority in question; and the Court of Appeal has recently explained that this 'will disqualify' that individual from taking part in decision-making involving that authority or may 'else raise concern in the

mind of the fair-minded observer about the appearance of impartial justice’: see R (Kaur) v. Institute of Legal Executives Appeal Tribunal [2011] ELR 614 at §35. As explained further below, the 2011 Act states that the ‘independent person’ must have his or her views ‘taken into account, by the authority before it makes its decision on an allegation that it has decided to investigate’.

103. The ‘independent person’ will, therefore, have a regular working relationship with the Members of the particular authority involved in decision-making on standards issues. The ‘independent person’ will also have a close interest generally in the outcome of code of conduct matters for that particular authority. The ‘fair minded’ observer might, therefore, have doubts about the ability of the ‘independent person’ to be impartial on any appeal.

104. Given the availability of this argument, which in my view is more than respectable, it would be sensible not to include an ‘independent person’ of an authority on that same authority’s appeal panel.

(f) *Withholding of confidential information*

105. I am most doubtful that a sanction of withholding confidential information is available for breach of the code; even where the breach of the code involves the breach of a duty of confidentiality by the Councillor in question.

106. Where the Councillor ordinarily has the right to access confidential information, then depriving him or her of this right is likely to be viewed by the Courts as an undue interference with their rights as a Councillor, and as interfering with the democratic process. Although a Councillor does not have an unrestricted access to the books, papers, records and files of the authority, the Member is entitled to such access as is necessary to enable him or her properly to discharge the duties as a Councillor if he or she has a ‘need to know’: see discussion of the authorities (e.g. R v. Birmingham City Council, ex parte O [1983] 1 AC 578) by Munby J. in ex parte Lashley.

107. Furthermore, councillors have statutory rights of access to information: see the Local Authorities (Executive Arrangements) (Access to Information) (England) Regulations

2000 (SI 2000/3272). These rights cannot, in my view, be interfered with or qualified without express statutory authority to do so.

II. The Independent Person

108. I am asked to consider whether past independent Members of a Council's standards committee would be permitted to take on the role of 'independent person' for the same authority under the 2011 Act. I am informed that there is serious concern at the loss of experience for Councils if past independent Members cannot serve as the 'independent person.'

109. In my opinion, it is not permissible for a past independent Member (that is, an independent Member who has served in the past 5 years) to serve as the 'independent person.'

110. The role of the 'independent person' is set out at section 28(7) of the 2011 Act.

'Arrangements put in place under subsection (6)(b) by a relevant authority must include provision for the appointment by the authority of at least one independent person—

(a) whose views are to be sought, and taken into account, by the authority before it makes its decision on an allegation that it has decided to investigate, and

(b) whose views may be sought—

(i) by the authority in relation to an allegation in circumstances not within paragraph (a),

(ii) by a Member, or Co-opted Member, of the authority if that person's behaviour is the subject of an allegation, and

(iii) by a Member, or Co-opted Member, of a parish Council if that person's behaviour is the subject of an allegation and the authority is the parish Council's principal authority.

111. The definition of the 'independent person' is set out at section 28(8) of the 2011 Act.

For the purposes of subsection (7)—

(a) a person is not independent if the person is—

- (i) a Member, Co-opted Member or officer of the authority,
 - (ii) a Member, Co-opted Member or officer of a parish Council of which the authority is the principal authority, or
 - (iii) a relative, or close friend, of a person within sub-paragraph (i) or (ii);
- (b) a person may not be appointed under the provision required by subsection (7) if at any time during the 5 years ending with the appointment the person was—
- (i) a Member, Co-opted Member or officer of the authority, or
 - (ii) a Member, Co-opted Member or officer of a parish Council of which the authority is the principal authority;
- (c) a person may not be appointed under the provision required by subsection (7) unless—
- (i) the vacancy for an independent person has been advertised in such manner as the authority considers is likely to bring it to the attention of the public,
 - (ii) the person has submitted an application to fill the vacancy to the authority, and
 - (iii) the person's appointment has been approved by a majority of the Members of the authority;
- (d) a person appointed under the provision required by subsection (7) does not cease to be independent as a result of being paid any amounts by way of allowances or expenses in connection with performing the duties of the appointment.

It can be seen, therefore, that a person cannot be an ‘independent person’ if he or she was ‘a Member, Co-opted Member or officer of the authority’ at any time during the 5 years ending with the date of the intended appointment. There must, therefore, be a five year break.

112. A ‘Co-opted Member’ of the authority is defined by section 27(4) of the 2011 Act as ‘a person who is not a Member of the authority but who—

- (a) is a Member of any committee or sub-committee of the authority,
- or

(b) is a Member of, and represents the authority on, any joint committee or joint sub-committee of the authority,

and who is entitled to vote on any question that falls to be decided at any meeting of that committee or sub-committee.

113. This definition is identical to the definition of “Co-opted Member” for the purposes of Part III of the Local Government Act 2000 (“the 2000 Act”): see section 83(1), referring to section 49(7) of the 2000 Act.

114. In my opinion, the previous definition of “Co-opted Member” (which is the same as the 2011 Act definition) was apt to include an independent Member of a Council’s standards committee.

115. Section 53(4)(b) of the 2000 Act required a Council to include on its standards committee ‘at least one person who is not a Member, or an officer, of that or any other relevant authority’. Section 53(8) of the 2000 Act provided that ‘A Member of a standards committee of a relevant authority . . . who is not a Member of the authority is entitled to vote at meetings of the committee.’ In other words, the independent Member of the standards committee was not a Member of the authority, but was entitled to vote at meetings of the standards committee. The standards committee was a ‘committee’ of the authority: see section 53(1), (3), (4), referring to ‘a standards committee of a relevant authority’.

116. If, as I consider to be the case, a standards committee was a committee of a relevant authority, then *on a literal reading of the legislation* the independent Member of the standards committee was a ‘Co-opted Member’ of the authority for the purposes of section 49(7) of the 2000 Act, and the same applies to the 2011 Act.

117. My Instructing Solicitor has suggested to me that it had never been argued that independent Members were prevented from being reappointed by virtue of regulation 5 of the 2008 Regulations, and so presumably there is no reason in principle why they should be prevented from being appointed under the 2011 Act. I agree with the first part of the suggestion, but the second point does not follow where, as here, there are textual differences between regulation 5 and section 28 of the 2011 Act.

118. Regulation 5(2) provided that:

‘a person may not be appointed as an independent Member of a standards committee if that person—

(a) has within the period of five years immediately preceding the date of the appointment been a Member or officer of the authority; or

(b) is a relative or close friend of a Member or officer of the authority.

119. That is, a ‘Member’ of the authority in the previous five years could not be appointed as ‘independent Member’ of the standards committee. The definition of ‘Member’ for these purposes did not include a ‘Co-opted Member’ (save for Co-opted Members of a parish Council), however:

First, regulation 5 distinguishes between the term ‘Member’ and ‘Co-opted Member’ (see regulation 5(4)).

Second, for the purposes of Part III of the Regulations, regulation 9 provides that “‘Member”, except where the context otherwise requires, includes a Co-opted Member, former Member or former Co-opted Member of an authority’. Part III deals with the investigation of allegations – which could include allegations against ‘Co-opted Members’. Regulation 5, which is concerned with the composition of the standards committee, is contained within Part II of the regulations.

Third, regulation 2, which deals with the regulations as a whole provides that “‘Member”, in relation to parish councils, includes persons appointed under section 16A of the 1972 Act’ (that is, a person ‘appointed’ to a parish Council).

120. There is, therefore, a clear textual difference between the 2011 Act and the 2008 Regulations. Under the existing standards regime, there is no prohibition against an independent Member of a standards committee being re-appointed to that role. However, the same language does not appear in the 2011 Act: it would have been possible to repeat the language had Parliament intended to do so.

121. Given the unambiguity in the language of section 28(7) of the 2011 Act – that the ‘independent person’ cannot have been a ‘Co-opted Member’ – and the fact that Parliament could quite easily have used the same language as in the 2008 Regulations had it wished to permit independent Members from serving as independent persons but did not do so, the better reading of the legislation is that such persons are not permitted to serve as independent persons within a period of five years from their previous service.
122. I appreciate that good arguments can be made that Parliament cannot have consciously intended to do that, as this would involve a loss of experience from the former independent Members. On the other hand, it can be said that the new standards regime is designed to mark a break with the previous regime, and so it is not surprising if there are to be differences in approach.
123. Indeed, whereas previously the ‘independent Member’ sat on the standards committee, and actually chaired the committee, the ‘independent person’ does not make the decision as to whether there has been a breach or not, but is merely consulted for his or her views. The role of the ‘independent person’ is therefore different, and there is not necessarily a complete overlap of skill sets and experience between the two roles.

CLIVE SHELDON QC

11kbw

11th January 2012