

| Standards Committee | |
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| Meeting Date | 16 January 2020 |
| Report Title | Annual Monitoring Officer Report |
| Cabinet Member | Not applicable for this report |
| SMT Lead | David Clifford, as monitoring officer |
| Head of Service | Not applicable for this report |
| Lead Officer | David Clifford, as monitoring officer |
| Key Decision | No |
| Classification | Open |
| Recommendations | The report is for information only. |

1 Introduction

- 1.1 This report provides an overview of the work of the monitoring officer during the period 1 November 2018 to 31 October 2019. It includes a summary of the main mechanisms in place at Swale to ensure sound governance and lawful decision-making, together with an indication of how well these have operated during the period. It provides a summary of cases dealt with under the code of conduct, and finally offers a brief update to the standards committee on relevant developments in the wider legal and policy context over the course of the year.
- 1.2 This has been a challenging year for the council and its senior officers, with the chief executive being on long-term sick leave since March and an all-out election in May which resulted in an intake of 25 brand-new councillors (53 percent of the total number). The election also resulted in the loss of the Conservative group's longstanding majority and the formation of a five-group coalition administration including the Labour, Swale Independents Alliance, Liberal Democrat, Green and Independent groups. The new administration was able from the outset to agree a joint programme, which is currently being worked up into a new corporate plan, expected to be adopted at annual council in May 2020.
- 1.3 It has also been a busy year in terms of complaints against borough and parish councillors under the code of conduct, with 28 formal complaint cases¹ considered in the year to 31 October, almost twice the number dealt with during

¹ By 'complaint cases' I refer to incidents or alleged incidents each giving rise to one or more complaints.

the previous year. These complaints are reviewed in more detail in Section 5 of this report.

2 The role of the monitoring officer

- 2.1 The Local Government and Housing Act 1989 requires local authorities to appoint a monitoring officer, giving that officer a broad role in ensuring the lawfulness of council decision-making and promoting good governance and high ethical standards. A summary of the monitoring officer’s functions is as follows:

| Description | Source |
|--|---------------------------------------|
| Report on contraventions or likely contraventions of any enactment or rule of law. | Local Government and Housing Act 1989 |
| Report on any maladministration or injustice where the ombudsman has carried out an investigation. | Local Government and Housing Act 1989 |
| Report on sufficiency of resources. | Local Government and Housing Act 1989 |
| Maintain the constitution. | Council constitution |
| Provide advice to members on governance, probity, vires issues, and questions concerning the budget and policy frameworks. | Council constitution |
| Consult with, support and advise the chief executive and chief financial officer on issues of lawfulness and probity. | Council constitution |
| Advise on whether executive decisions fall within the budget and policy framework. | Council constitution |
| Establish, publish and maintain the register of members’ interests. | Localism Act 2011 |
| Issue dispensations to members regarding disclosable pecuniary interests. | Localism Act 2011 |
| Promote and maintain high standards of conduct. | Localism Act 2011 |
| Undertake the assessment of complaints that a member may have breached the code of conduct. | Localism Act 2011 |

| Description | Source |
|--|-------------------|
| Act as legal advisor to the standards committee when carrying out a local determination hearing. | Localism Act 2011 |

3 Maintenance and review of the constitution

3.1 The constitution sets out how the council operates, including most essentially how authority is gained, delegated and exercised, and how decisions are made. It describes the procedures which are followed to ensure that decision-making is lawful, reasonable and fair, and that those who make decisions are accountable to local people. It provides clarity on the respective roles of members and officers, as well as on the split between executive and non-executive matters.

3.2 The monitoring officer is the ‘guardian’ of the council’s constitution, and is responsible for ensuring that the constitution is properly maintained and is adhered to in practice.

3.3 It is important for there to be some external validation of the council’s governance arrangements. In September 2018, the external auditor Grant Thornton provided its audit findings, which were considered in detail by the audit committee. The council again received an unqualified audit and value-for-money opinion, with the auditors commenting that:

On the basis of our work, having regard to the guidance on the specified criterion issued by the Comptroller and Auditor General in November 2017, we are satisfied that the Authority put in place proper arrangements for securing economy, efficiency and effectiveness in its use of resources for the year ended 31 March 2019.

This reflects well on the organisation’s governance procedures and the work of the finance team, supported by all managers.

3.4 One of the policy objectives of the new administration is to improve public engagement with council decision-making and to diffuse power more widely among elected members than is typically the case in a leader-and-cabinet governance model. This is likely to result in significant changes to the constitution over the next few years.

3.5 The focus this year has been on area committees, which have the potential to further both elements of this objective. A working group of the policy

development and review committee (PDRC) has considered the detail of how area committees could be constituted and what functions they could have, and a full report by the PDRC will be considered by cabinet early in the new year, in time for council to agree the constitutional changes necessary for area committees to start work in the new municipal year.

3.6 The incoming administration also wished to make some changes to the way that full council meetings operate, particularly to make the session on member questions more of an oral exchange than had previously been the case, and to create more time for motions to be debated by reducing the amount of time spent on the leader's statement.

3.7 At its June meeting, full council therefore agreed changes to the council procedure rules, moving away from the previous practice of providing written answers to members' questions in advance of the meeting, as well as introducing time limits for the leader's statement and restricting discussion of the statement to a response by the leader(s) of opposition group(s). The same council meeting also approved an amendment to the planning committee procedure rules, enhancing the speaking rights of affected parish councils.

4 Lawful decision-making and good governance

4.1 The monitoring officer is the council's lead adviser on questions of lawfulness and the scope of the council's powers. In consultation with the chief executive and chief financial officer, I advise on compliance with the budget and policy framework. Part of this role involves monitoring reports, agendas and decisions to ensure compliance with legislation and the constitution.

4.2 At the heart of this work is the agenda of, and reports and recommendations to, the cabinet. Cabinet reports and decisions are made publicly available for councillors either electronically or by way of a paper version. Cabinet decisions can also be viewed by members of the public through the council's website.

4.3 The cabinet has met on ten occasions since the beginning of November 2018 (four prior to the May election and six since). In each case the strategic management team (SMT) has reviewed the agenda and associated draft reports. This clearance process is an important part of ensuring corporate working in an effective council, providing a vital opportunity to discuss aspects of reports or decisions that require 'buy-in' from, or have implications across, multiple services.

- 4.4 All heads of service receive draft agendas, and senior finance, HR and legal officers have the opportunity to comment on reports in the 'Implications' section. Items on the cabinet forward plan are added automatically onto the SMT forward plan, enabling SMT to seek advice from the head of legal, chief financial officer or head of human resources as necessary. This ensures a corporate approach is taken to reports being drafted, enabling a robust set of recommendations and alternative options to be presented to cabinet for consideration and decision.
- 4.5 In cases where I consider that any proposal, decision or omission by the council would result in a breach of any enactment or the rule of law, or if any decision or omission has been found by an ombudsman investigation to have given rise to maladministration, as monitoring officer I am under a personal statutory duty to make a report on the matter to members. Any proposal that is subject to such a report cannot be implemented until the report has been considered. The sound governance processes operated by the council ensure that the obligation to report potentially unlawful decision-making rarely, if ever, arises at Swale. I issued no such reports during the year to 31 October 2019.
- 4.6 A question which arose during the year concerned the possibility of members of the planning committee being predetermined on the basis of having signed an electronic petition against an application to be decided by the committee. Predetermination is a state of mind, and as such the decision as to whether or not to participate in an agenda item is for the member alone to make, based on her view of the extent to which she remains open to new facts and arguments.
- 4.7 If a decision-maker is shown to have been predetermined in the courts, the decision is likely to be overturned and costs awarded against the council, so there is unquestionably a need for caution.
- 4.8 In order to demonstrate predetermination in law, the relevant decision-maker must be shown either to have had a mind so closed that she would refuse even to consider a relevant argument contrary to her own pre-existing view, or to be capable of being judged by a hypothetical fair-minded and informed observer to be at a real risk of having had such a state of mind. It should be noted that this is a high threshold to meet by anyone contesting a council decision.
- 4.9 Legislators have recognised that councillors will have views on proposals affecting their areas and their residents, and that guaranteeing elected representatives the freedom to express those views is a fundamental element of a healthy democracy. The Localism Act 2011 sought to clarify this, s25 of which states that 'A decision-maker is not to be taken to have had...a closed mind when

making the decision just because [she] had previously done anything that directly or indirectly indicated what view [she] took, or would or might take, in relation to a matter [relevant to the decision]’.

- 4.10 Following discussion with Mid-Kent Legal colleagues, my advice was that in view of the above considerations, signing a petition against an application was evidence that a member had a predisposition in respect of the application but not that she had so predetermined her position that she should not participate in the decision-making.
- 4.11 It was argued by some members that there had been inconsistency in the predetermination advice given by monitoring officers over recent years, and it is certainly possible that my own advice approaches the issue from a less risk-averse perspective than has previously been the case. While I will continue to advise that members need to be extremely cautious in always clarifying in their public statements that they remain open to arguments (“I would need a lot of persuading” rather than “I could never vote for anything like this”), I also believe that parliament’s intention of enabling elected councillors to hold and express views without falling foul of predetermination rules is clear in the 2011 Act.

5 Ethical standards and the members’ code of conduct

- 5.1 While robust and well-understood constitutional processes and procedures are an essential component of good governance, the importance of high standards of ethical conduct on the part of the individuals involved in decision-making on behalf of their communities cannot be overstated.

National developments

- 5.2 In 2011, when the Localism Act abolished the rather cumbersome and bureaucratic centralised standards regime and replaced it with local responsibility for maintaining members’ ethical standards, government agreed to carry out a review of how the new system was working within five years of its launch. However, in spite of sporadic reminders from the committee on standards in public life (CSPL, also known as the Nolan committee), this review was never forthcoming, so in 2018 the committee commenced work on a review of its own.
- 5.3 The report and findings from this review were published in January 2019, supported by a great deal of evidence provided in part by councils, their standards committees and their monitoring officers. The review found that the

new system was working well for the most part, but still made a total of 26 recommendations for improvement. With one or two exceptions, these recommendations require legislation or other government action to implement, and in view of the current situation in Westminster it is unclear when this action is likely to happen. A summary of the recommendations is provided for information at Appendix I.

- 5.4 In August 2019 a letter signed by Cllr Truelove as council leader, Cllr Saunders as chair of the standards committee, and myself as monitoring officer was sent to Robert Jenrick MP, secretary of state for housing and local government, urging him to prioritise the legislative and other action necessary to implement the CSPL report's recommendations. The text of the letter was circulated to standards committee members and gained their approval prior to being sent.
- 5.5 The letter particularly highlighted the recommendations which its authors believed would have the most beneficial effect in Swale, including recommendations 3 and 4 on the presumption that elected councillors are acting in that capacity in their public conduct, recommendations 10, 16 and 17 on available sanctions, and recommendations 5 and 6 on gifts, hospitality and councillors' pecuniary interests.
- 5.6 Previous versions of this annual report have generally included a summary of key legal cases, not just from the year in review but since the introduction of the localised standards regime. This is a useful opportunity to remind members of what case-law on local government ethical standards has said, but given that the number of such cases is now fairly high, these are this year to be found in Appendix II.

Local developments

- 5.7 The council adopted its current code of conduct in 2012, along with revised arrangements for the standards committee and the registration and disclosure of interests and dispensations. These continue to work well, and overall it is fair to say that the council's processes for complying with the standards provisions of the Localism Act continue to demonstrate their effectiveness notwithstanding widely-shared concerns over the lack of effective sanctions.
- 5.8 The legally mandated registers of interests are available on the council's website, and both borough councillors and parish clerks are now familiar with how these work. As highlighted by guidance issued by the Department for Communities and Local Government (as was) in 2013, the key requirement is that councillors should not act or take decisions in order to gain financial or other material

benefits for themselves, their families or their friends, and the declaration and resolution of personal interests should be guided by this principle.

Code of conduct cases 1 November 2018 to 31 October 2019

- 5.9 During the period covered by this report a total of 46 contacts were recorded as complaints (“complaints”), resulting from 28 separate incidents or alleged incidents (“complaint cases”). This is a significant (87 percent) rise on the 15 complaint cases recorded last year. Of these 28 complaint cases, 13 related to a borough councillor, 14 to one or more parish councillors, and one to a KCC member.
- 5.10 Of these complaint cases, ten were considered by the monitoring officer and immediately rejected as either failing at least one of the tests set out in the assessment criteria which are included in the constitution² or as not being in the public interest to pursue³. In a further three cases the matter was resolved informally by discussion between the complainant, the subject member and the monitoring officer. Three complaint cases were dismissed as not properly falling under the code of conduct, two of which were about parish council governance and were referred to the parish clerk.
- 5.11 Two complaint cases related to Swale members who lost their borough seats in May but continued as KCC members. In one of these cases the complainant was advised to contact the KCC monitoring officer, while in the other, given my view that there was sufficient merit in the complaint that it would have needed to be investigated had the member not lost her/his seat, I wrote to the KCC monitoring officer myself to apprise him of the situation.
- 5.12 In two complaint cases, the facts were informally investigated by the monitoring officer and there was found to be no case to answer. One complaint case was dismissed because the complainant appeared unwilling to provide the necessary information, one was dismissed as relating to historic matters which there was no public interest in investigating now, and one complaint case resulted in a formal investigation being opened which is ongoing. This was the only complaint case open on 31 October 2019. The table below provides a summary of these outcomes.

² The tests in the assessment criteria are that the complaint is about a named member of a relevant council who was in office at the time of the alleged conduct and that the complaint if proven would constitute a breach of the code of conduct which was in force at that time.

³ The constitutional assessment criteria also set out guidelines on categories of complaint which will not be pursued, including anonymous, trivial, malicious, politically-motivated and tit-for-tat complaints.

| Final outcome of complaint case | No. |
|--|------------|
| Failed initial tests or no public interest in pursuing | 11 |
| Councillor not acting in that capacity at time of alleged conduct | 4 |
| Complaint resolved informally | 3 |
| Complaint does not relate to code of conduct (e.g. governance query) | 3 |
| Complaint or complainant referred/directed elsewhere (e.g. KCC MO) | 2 |
| Monitoring officer investigated and found no case to answer | 2 |
| Complainant failed to provide requested information | 1 |
| Formal investigation commenced (and ongoing) | 1 |
| Historic allegations, events too long ago to be investigated now | 1 |

- 5.13 The outcome of four complaint cases is listed in the table above as ‘Councillor not acting in that capacity at time of alleged conduct’. In establishing the localised standards regime, s27 of the Localism Act 2011 is unambiguous that an authority’s code of conduct should apply to members of the authority ‘when they are acting in that capacity’. Two of the recommendations in the CSPL report (see §§5.2ff above and Appendix I) involved the introduction of a presumption that elected councillors are to some extent always acting in that capacity in their public conduct, but these have yet to be implemented by government.
- 5.14 Three complaint cases this year, including two of the most high-profile cases, were related to social media; these three cases between them generated a total of 19 individual complaints (41 percent of the total complaints received).
- 5.15 In one case a prominent member had retweeted a post appearing to support the far-right activist known as Tommy Robinson and had then characterised this action as a defence of free expression and debate. The action led to the member’s suspension from his political party, which as the condition for readmission required him to delete the offending post, to make a public apology, and to undergo equality and diversity training. Given that these were harsher sanctions than would have been available to a council standards hearing, I determined that there was no public interest in pursuing the matter any further once they had been complied with.
- 5.16 A further case involved a member having posted some extreme content on her Facebook account, including Islamophobic ranting and what appeared to be a call for the death penalty to be applied to remainder ‘traitors’. This case generated a

total of 11 complaints. The nature of the postings was so extreme that I referred the matter to the police, as it seemed possible to me that an offence had been committed under the Public Order Act 1986 as amended in 2006 and 2008. However, the police decided to take no action, and as I could see no reasonable argument that the member had been acting in her capacity as a councillor at the time the content was posted, that was necessarily the end of the matter.

- 5.17 The other high-profile case dealt with during the year, which is not related to social media, remains under investigation, and it would not be appropriate for me to comment on it any further in this report.
- 5.18 The two independent persons appointed in 2017 under s28 of the Localism Act to give their views on complaint cases, Patricia Richards and Christopher Webb, have remained in their roles and are expected to do so until September 2021 when their contracts expire. I had reason to consult one of these independent persons in 12 (43 percent) of the 28 complaint cases dealt with during the year. This has enabled me to be both challenged and supported in my thinking about cases, and is a facility which I have found to be extremely valuable.

Historic cases of interest

- 5.19 There are a number of cases dealt with by the Swale monitoring officer before November 2018 which remain of interest because they included more serious allegations than is typical and/or because they reached a further stage of investigation. These are summarised for information in Appendix III.

6 Officers' code of conduct

- 6.1 The constitution includes a code for employees, which contains a requirement to register interests. Officers are proactively reminded of this requirement on an annual basis. There appears to be a fair degree of compliance with this, but an issue which has been raised recently is the extent to which the information on the register is available to officers (e.g. line managers) to whom it could be useful. I am expecting that there will be some work to improve the functioning of the officers' register of interests over the coming year.

7 Protocol on councillor/officer relations

- 7.1 The constitution includes a protocol on councillor/officer relations, setting out what is expected of officers and what of members. In the event of relationships

between members and officers breaking down or becoming strained, the protocol first attempts to resolve matters informally by conciliation through the appropriate senior manager(s) and/or member(s).

- 7.2 Officers in these situations will have recourse to the council's grievance procedure or to the monitoring officer, as appropriate to the circumstances (this is set out in the constitution, but see also the summary of R (Harvey) v Ledbury Town Council (2018) in Appendix II). I am pleased to report that there have been no complaints of this type to the monitoring officer over the past year.

8 Related party transactions

- 8.1 In accordance with the code of practice on local authority accounting in Great Britain 1998, councillors and senior officers (those above a certain salary grade and those appointed by statute) are requested on an annual basis to complete and sign a declaration on related party transactions.
- 8.2 The declaration captures transactions between the council on the one hand and the individual, members of the individual's close family or household, or entities in which the individual or their close family or household has a controlling interest on the other. All declarations were satisfactorily completed and recorded during March 2019.

9 Protected disclosures – the whistleblowing policy

- 9.1 The purpose of the council's whistleblowing policy is to enable employees to feel confident in making disclosures about potential wrongdoing by individual(s) in a position of authority within the organisation. It provides a mechanism for raising concerns without fear of victimisation, discrimination, disadvantage or dismissal.
- 9.2 Following a review of the policy by the internal audit team, SMT adopted an updated version in September 2019. The new version is more closely aligned with the policies of our Mid-Kent partners, including in the user-friendly guidance it provides to officers who have a concern. Work has now commenced to publicise the new policy and ensure that all staff would be confident to raise an issue in the event that they became aware of one.

10 Support to council, cabinet, scrutiny and committee meetings

10.1 Ensuring that meetings are run efficiently, transparently and lawfully is central to good governance. In practice, this includes:

- Advertising public meetings at least five clear days before the meeting date, and ensuring that agendas are published and distributed in a timely manner;
- Ensuring that agendas are compliant with regulations on access to information, and that exempt information is properly marked up;
- Ensuring that papers are available to the public either through the website or from district offices and libraries;
- Ensuring that meetings are accessible to the public;
- Publishing minutes as soon as possible after the meeting, in particular ensuring that cabinet minutes are published within three working days of the meeting; and
- Ensuring that petitions are handled in accordance with the council's constitution.

10.2 From 1 November 2018 to 30 October 2019 the following meetings were serviced by the democratic services team:

| Name of meeting | Number |
|----------------------------------|--------|
| Annual council | 2 |
| Audit committee | 4 |
| Cabinet | 9 |
| Cabinet delegated decisions | 2 |
| Council | 8 |
| General licensing committee | 2 |
| General purposes committee | 2 |
| Licensing subcommittee | 13 |
| Licensing Act 2003 committee | 0 |
| Local plan panel | 6 |
| Member development working group | 6 |
| Planning committee | 20* |
| Planning working group | 6** |

| Name of meeting | Number |
|---|---------------|
| Policy development and review committee | 8 |
| Scrutiny committee | 8 |
| South Thames Gateway building control joint committee | 4 |
| Standards committee | 1 |
| Standards hearings subcommittee | 0 |
| Swale joint transportation board | 4 |
| Total | 105 |

*Includes five extraordinary and two re-convened planning committee meetings.

**The six working group meetings cover a total of 11 site visits.

- 11.4 These figures do not reflect the additional meetings administered by the democratic services team, including two external charities as well as pre-meetings and agenda-planning meetings. The overall volume of meetings represents a substantial commitment of both members' and officers' time and resources, and it remains of great importance that meetings constitute an effective and productive use of these.

12 Member training and development

- 12.1 It is essential to good governance that members are supported in their roles to make robust, transparent and well-informed decisions for the good of the borough and its communities. The council has established a cross-party member development working group (MDWG) with support from democratic services to oversee and develop the provision of appropriate training for members. Further information is provided in the annual report on member training and development which will be considered by the standards committee in tandem with this report.

13 Use of covert surveillance

- 13.1 Since April 2010, in accordance with the relevant codes of practice, the monitoring officer has been obliged to report the number of occasions on which the authority has used covert surveillance. No applications for such surveillance were made during the year to 31 October 2019.

14 Comments and conclusions

- 14.1 As stated at the beginning of this report, this has been a busy and eventful year in the life of the council, and one which has witnessed a sharp rise in the number of complaints against elected members dealt with under the code of conduct.
- 14.2 Whether the former circumstance accounts entirely for the latter is debatable, but it is probably to be expected that the level both of questionable conduct on the part of local politicians and of the complaints to which such conduct gives rise will increase in the build-up to an election. Certainly there are no other discernible patterns in the nature of the complaints which would explain the rise in their numbers, save perhaps for the social media issues described in section 5 above – although these account for only three (11 percent) of the 28 cases dealt with.
- 14.3 This report also highlights – not for the first time – some of the serious deficiencies in the standards regime within which monitoring officers and standards committees have to work, including the lack of clarity about when councillors are and are not acting in that capacity and the lack of effective sanctions for councillors against whom misconduct cases have been proven.
- 14.4 What is new this year is the CSPL report and its very welcome recommendations, which would go a long way towards addressing these and other longstanding weaknesses. It is very much to be hoped that the new government elected in December will make a point of finding the legislative time necessary to implement these recommendations.
- 14.5 Among the few CSPL recommendations not requiring government action, the LGA has been requested to oversee work on a new single model code of conduct for local authorities, and has recently commissioned the highly-respected standards law firm Hoey's to undertake this work. It is likely that this will eventually result in a model code of conduct to which a large majority of councils will sign up, and Swale will therefore be following the development of this code with interest.

15 List of appendices

15.1 The following appendices are to be published with this report and form part of the report:

Appendix I: CSPL recommendations

Appendix II: Compendium of recent legal cases of interest

Appendix III: Historical cases of interest dealt with by the Swale monitoring officer

**Appendix I:
CSPL report on local government ethical standards: summary recommendations**

| <i>Recommendation</i> | <i>Responsibility</i> |
|--|------------------------------|
| 1 The Local Government Association should create an updated model code of conduct, in consultation with representative bodies of councillors and officers of all tiers of local government. | LGA |
| 2 The government should ensure that candidates standing for or accepting public offices are not required publicly to disclose their home address. The Relevant Authorities (Disclosable Pecuniary Interests) Regulations 2012 should be amended to clarify that a councillor does not need to register their home address on an authority's register of interests. | Government |
| 3 Councillors should be presumed to be acting in an official capacity in their public conduct, including statements on publicly-accessible social media. Section 27(2) of the Localism Act 2011 should be amended to permit local authorities to presume so when deciding upon code of conduct breaches. | Government |
| 4 Section 27(2) of the Localism Act 2011 should be amended to state that a local authority's code of conduct applies to a member when they claim to act, or give the impression they are acting, in their capacity as a member or as a representative of the local authority. | Government |
| 5 The Relevant Authorities (Disclosable Pecuniary Interests) Regulations 2012 should be amended to include: unpaid directorships; trusteeships; management roles in a charity or a body of a public nature; and membership of any organisations that seek to influence opinion or public policy. | Government |
| 6 Local authorities should be required to establish a register of gifts and hospitality, with councillors required to record any gifts and hospitality received over a value of £50, or totalling £100 over a year from a single source. This requirement should be included in an updated model code of conduct. | Government |

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| 7 | Section 31 of the Localism Act 2011 should be repealed, and replaced with a requirement that councils include in their code of conduct that a councillor must not participate in a discussion or vote in a matter to be considered at a meeting if they have any interest, whether registered or not, “if a member of the public, with knowledge of the relevant facts, would reasonably regard the interest as so significant that it is likely to prejudice your consideration or decision-making in relation to that matter”. | Government |
| 8 | The Localism Act 2011 should be amended to require that Independent Persons are appointed for a fixed term of two years, renewable once. | Government |
| 9 | The Local Government Transparency Code should be updated to provide that the view of the Independent Person in relation to a decision on which they are consulted should be formally recorded in any decision notice or minutes. | Government |
| 10 | A local authority should only be able to suspend a councillor where the authority’s Independent Person agrees both with the finding of a breach and that suspending the councillor would be a proportionate sanction. | Government |
| 11 | Local authorities should provide legal indemnity to Independent Persons if their views or advice are disclosed. The government should require this through secondary legislation if needed. | Government / all local authorities |
| 12 | Local authorities should be given the discretionary power to establish a decision-making standards committee with voting independent members and voting members from dependent parishes, to decide on allegations and impose sanctions. | Government |
| 13 | Councillors should be given the right to appeal to the Local Government Ombudsman if their local authority imposes a period of suspension for breaching the code of conduct. | Government |
| 14 | The Local Government Ombudsman should be given the power to investigate and decide upon an allegation of a code of conduct breach by a councillor, and the appropriate sanction, on appeal by a councillor who has had a suspension imposed. The Ombudsman’s decision should be binding on the local authority. | Government |

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| 15 | The Local Government Transparency Code should be updated to require councils to publish annually: the number of code of conduct complaints they receive; what the complaints broadly relate to (e.g. bullying; conflict of interest); the outcome of those complaints, including if they are rejected as trivial or vexatious; and any sanctions applied. | Government |
| 16 | Local authorities should be given the power to suspend councillors, without allowances, for up to six months. | Government |
| 17 | The government should clarify if councils may lawfully bar councillors from council premises or withdraw facilities as sanctions. These powers should be put beyond doubt in legislation if necessary. | Government |
| 18 | The criminal offences in the Localism Act 2011 relating to Disclosable Pecuniary Interests should be abolished. | Government |
| 19 | Parish council clerks should hold an appropriate qualification, such as those provided by the Society of Local Council Clerks. | Parish councils |
| 20 | Section 27(3) of the Localism Act 2011 should be amended to state that parish councils must adopt the code of conduct of their principal authority, with the necessary amendments, or the new model code. | Government |
| 21 | Section 28(11) of the Localism Act 2011 should be amended to state that any sanction imposed on a parish councillor following the finding of a breach is to be determined by the relevant principal authority. | Government |
| 22 | The Local Authorities (Standing Orders) (England) (Amendment) Regulations 2015 should be amended to provide that disciplinary protections for statutory officers extend to all disciplinary action, not just dismissal. | Government |
| 23 | The Local Government Transparency Code should be updated to provide that local authorities must ensure that their whistleblowing policy specifies a named contact for the external auditor alongside their contact details, which should be available on the authority's website. | Government |

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| 24 | Councillors should be listed as 'prescribed persons' for the purposes of the Public Interest Disclosure Act 1998. | Government |
| 25 | Councillors should be required to attend formal induction training by their political groups. National parties should add such a requirement to their model group rules. | Political groups; national political parties |
| 26 | Local Government Association corporate peer reviews should also include consideration of a local authority's processes for maintaining ethical standards. | LGA |

Appendix II:
Compendium of recent legal cases of interest

R (Harvey) v Ledbury Town Council (2018)

Interaction between standards regime and grievance procedures

Facts: Following complaints that Cllr H had bullied, intimidated and harassed staff, the town council's grievance panel met to discuss the allegations. Cllr H did not attend, stating that she did not recognise the authority of the panel, and she requested that the matter be properly investigated under the standards procedure. The panel upheld the accusations, and the town council then resolved to impose a number of prohibitions on Cllr H, including that she should not sit on any committees, sub-committees, panels or working groups nor represent the council on any outside body, and that all communications between her and its clerk and deputy clerk should go through the mayor. Cllr H applied for judicial review of the town council's decision to impose sanctions under its grievance procedures.

Findings: The High Court considered local authority staff grievance procedures and their relationship with the code of conduct regime under the Localism Act 2011. The court held that a council cannot run a grievance procedure alongside, or as an alternative to, a standards regime procedure, and that complaints regarding a councillor's conduct have to be dealt with under the authority's standards arrangements.

Decision: The court granted the application, and ruled that the town council's decision to continue and enlarge the prohibitions must be quashed and that Cllr H was entitled to declaratory relief. Mrs Justice Cockerill found that there was no general power to run a grievance procedure process in tandem with or as an alternative to the code-of-conduct process envisaged by the Localism Act, as that would be contrary to the intention of Parliament.

Comment: This case provides a useful analysis of the standards regime under the Localism Act 2011, making clear that it overrides the previous statutory procedures, as well as local authorities' inherent powers under the 1972 Act. It also highlights that councils cannot try to obviate the 2011 Act's lack of effective sanctions by dealing with complaints under their staff grievance procedures. The judgment provides a reminder that any process must be fair and in accordance with the principles of natural justice; however, notwithstanding this judgment, local authorities must continue to be mindful of their responsibilities to protect their employees from bullying, intimidation and harassment, since the authority may be liable for the actions of its councillors. The proper course for the investigation of alleged behaviour of this type by councillors is now under the code of conduct adopted under the

Localism Act, and following investigation it is for the monitoring officer to discuss the outcome with the independent person(s), ensuring that any hearing or informal action is proportionate in all the circumstances of the case.

Hussain v Sandwell Metropolitan Borough Council (2017)

Councils' and MOs' powers to investigate alleged misconduct

Facts: The claimant was alleged to have procured the sale of council assets to family friends at a substantial undervalue. He was also alleged to have used his power and influence as a senior politician within the council to have parking tickets issued to his family expunged. The council's audit committee conducted a 'pre-formal investigation' under the Local Government Act 1972 to determine whether the allegations had substance and if so to decide on next steps. Counsel was appointed and they advised that there was a serious case to be met and that the Localism Act processes for breach of the code of conduct should be initiated. The claimant challenged the power of the council to conduct both formal and informal investigations of alleged wrongdoing by councillors, arguing that the investigation was ultra vires since there was no power to investigate alleged misconduct before the Localism Act took effect and that the investigating officer had predetermined the outcome and usurped the adjudicatory functions of the standards committee. The Court of Appeal granted leave for judicial review to stay the investigation.

Findings: The court's view was that there is ample power under both the Local Government Act 1972 and the Localism Act 2011 to carry out pre-formal investigations, and that a council is entitled both to investigate in order to establish whether a prima facie case exists and to receive advice as to the appropriate next steps. In addition, it was found that the current standards framework could be used to investigate historic allegations and that the report of the independent person could not predetermine findings as the author of the report was not a decision-maker.

Decision: The court concluded that there was a powerful public interest in the allegations being fully and fairly investigated, and the stay in proceedings was therefore lifted.

Dedman v Information Commissioner's Office (2016)

Limits of personal data exemptions in Freedom of Information Act

Facts: C, then chair of Hickling Parish Council, was quoted in a local newspaper as saying a local charity had shown no desire to negotiate a new constitution and “*they don't want to make changes to the constitution to protect the village asset and it's very sad.*” A resident then complained to North Norfolk's monitoring officer that C had made factually inaccurate comments and deliberately misled readers, amounting to a breach or breaches of the councillors' code of conduct. North Norfolk's monitoring officer appointed an external solicitor to investigate the complaint. She submitted a draft final report for North Norfolk's standards committee after C had ceased to be a councillor, having lost her seat in the election of May 2015. The monitoring officer decided that there was 'no public benefit' in taking the matter further because C was no longer a serving councillor. When another resident requested a copy of the draft report, North Norfolk refused, relying on s40(2) of the Freedom of Information Act, on the grounds that the draft contained personal data about C who no longer held a public position. The dispute then reached the Information Commissioner's Office, which accepted C would have had a legitimate expectation that the details of the investigation would remain confidential. North Norfolk's policy was that draft standards investigation reports were not shared with persons who were not parties to the complaint, and the prejudice to C's interests outweighed any legitimate public interest in disclosure. The complainant then appealed to the Information Rights Tribunal.

Findings: The Tribunal agreed that there was no doubt that the report contained the personal data of C and that there was no practical possibility of editing it so as to avoid the disclosure of such data. However, the tribunal added:

“There is plainly a strong public interest in the disclosure of findings as to the conduct of the chair of a parish council when performing her public duties. That is especially the case where a complaint has been made that she misled a newspaper and its readers, including her local parishioners, as to important matters relating to a controversial local issue. There is a danger that the withholding of a report may encourage the suspicion that its findings are adverse to the subject, whether or not that is, in fact, the case.”

The tribunal stated that such transparency is essential to the maintenance of proper standards in public life, whether or not the subject of the complaint remains in office and if this were this not so “*a delinquent public officer, faced with a draft report containing serious criticism of his/her conduct, could simply prevent disclosure by timely resignation*”. In addition, there was a realistic possibility that C would again seek election to the parish council or another public authority in the future.

Decision: The tribunal concluded that disclosure of the draft report was not unfair and North Norfolk was not entitled to rely on the s40(2) exemption.

Taylor v Honiton Town Council and East Devon District Council (2016)

Inability of parish councils to impose their own sanctions

Facts: Cllr Taylor published comments concerning a loan extension from the Public Loan Works Board and accusing the town clerk of illegality in connection with the loan and investment in a conspiracy to use the money for an improper purpose. East Devon District Council, as the principal authority, determined that Cllr Taylor had failed to treat the town clerk with respect and imposed sanctions, namely censuring Cllr Taylor, publishing its findings, and requiring Cllr Taylor to undergo training on the code of conduct. Honiton Town Council imposed the sanctions recommended by East Devon, however, they also applied additional measures until the training requirement had been fulfilled. Cllr Taylor challenged Honiton's decision for illegality and procedural unfairness.

Findings: It was held that the Localism Act gives decision making power to the principal authority and requires it to have arrangements for the exercise of that power in place to investigate and determine any breach of parish council codes of conduct. It would therefore be a nonsense of that scheme if the parish council were able to take its own decisions without having those in place. The whole point of the scheme is to remove decision-making powers and duties from very small authorities which do not have the resources to manage them effectively and who may be so small that any real independence is unattainable.

Decision: East Devon's decision both as to breach and sanction was lawful, however the parish council cannot impose sanctions over and above those recommended by the principal authority.

R v Flower (2015)

Criminal implications of non-disclosure of a disclosable pecuniary interest

Facts: Cllr Flower listed as a pecuniary interest a non-executive directorship of a housing charity, for which he received remuneration payments. He was present at a meeting about the proposed East Dorset core strategy and voted at the meeting. The housing charity had responded to a consultation about the core strategy and owned land which was being considered for development through the strategy. Cllr Flower had previously attended a meeting of the charity at which the long-term future of the land had been considered. He was charged with an offence under the Localism Act

2011 for participating in a discussion and vote without reasonable excuse despite having a disclosable pecuniary interest (DPI) in a matter being considered.

Findings: Cllr Flower was guilty of the offence. His defence that the matters discussed at the meeting were of a broad nature and did not concern detailed issues of planning and ownership did not amount to 'reasonable excuse'. It was not right that the core strategy had no relevance to pecuniary matters, and it was not a defence that he did not obtain any direct benefit from the vote. The judge held that it would have been reasonable for him to have consulted the monitoring officer and could have gained a dispensation. He was under a duty not to participate and vote. The judge noted that Cllr Flower was of good character and the court received a number of character references speaking highly of his abilities, his conscientiousness and his years of public service.

Decision: Conditional discharge for six months and an order to pay £930 in costs.

Commentary: The lack of any real sanction or appetite for prosecution in the Localism Act 2011 is evidenced by the fact that since its implementation this is thought to have been the only prosecution in relation to an elected member participating in a discussion and vote without reasonable excuse despite having a DPI.

R (Benjamin Dennehy) v London Borough of Ealing (2013)

Social media, freedom of expression and the code of conduct

Facts: Cllr Dennehy posted on a blog which he maintained comments about residents of Southall in which he stated:

"It is a largely Indian community who say they deplore this behaviour but yet it is that very same community that harbours and exploits their own people in squalid third world living conditions... the exploding population of illegal immigrants is a constant on the public purse. Illegal immigrants don't pay tax. The legitimate immigrants exploiting them in the squalid bed sheds don't pay tax on their rental income. If these are the sorts of people who exploit the desperate what other scams are they perpetrating I ask? Criminality is endemic in Southall."

He declined to issue an apology when a number of Southall residents complained because they were offended by the statements.

Findings: Cllr Dennehy failed to treat others with respect and brought the council into disrepute because the tone and much of the content was inappropriately and unnecessarily provocative, and the comments about Southall residents were in a different part of the blog from that which raised legitimate topics of political debate. The comments were not the expression of a political view, but a personal and generic attack on a section of the public. The subjects of the speech were not politicians but ordinary members of the public, so the comments did not attract the higher level of protection applicable to political expressions. Accordingly, sanctioning Cllr Dennehy was justified and proportionate under article 10 (2) of the convention.

Decision: The standards committee's decision that Cllr Dennehy breached the code and should issue an appropriate apology was upheld.

Commentary: The use of social media has continued to raise issues throughout the country, and there is continuing debate on the extent to which these issues fall within the code of conduct. Guidance on this has been made available to councilors as part of the induction handbook following the May election. This case does provide an illustration of the need to consider very carefully what is said in electronic communications and how an appropriate level of caution needs to be balanced against the importance of freedom of political expression.

Cllr John Copeland v West Lindsey DC Standards Committee (2012)

Freedom of expression and the code of conduct

Facts: Cllr Copeland was a parish councillor. He was found by the standards committee to have breached the parish council's code of conduct by referring, in a number of emails, to a member of the public as a grumbler and a geriatric, which had failed to show respect to that person and had brought his office or authority into disrepute. Cllr Copeland's appeal was successful.

Findings: it was not 'necessary' within the meaning of article 10(2) of the European convention on human rights to interfere with Cllr Copeland's freedom of expression by sanctioning him for his comments. The unidentified individual had a remedy in defamation, if there was damage to his reputation, which was doubted. Proceedings before the standards committee were a 'wholly disproportionate response'.

Decision: The standards committee's decision to censure was set aside.

**Appendix III:
Historical cases of interest dealt with by the Swale monitoring officer**

Conduct of parish councilor in dealing with parish clerk (two complaints).

Action: Monitoring officer discussed with independent person and the complaint was referred for investigation.

Outcome: Two separate hearings were held. No breach of paragraph 8 of the relevant code of conduct, but breach of paragraphs 5, 7, 9, 10 and 11. Recommendations made to parish council that the subject member attend training on the role of the parish clerk and refresher training on role of chairman, and that the entire parish council undertake training on the role of the clerk and other matters including closed sessions and employment issues, policies and procedures. It was further recommended that any new parish clerk should attend appropriate training as part of their induction, and that a review of standing orders should be carried out to ensure that they incorporate the outcomes of any training. Following receipt of the report, the parish council wrote to say that whilst they would comply with the recommendations where possible they did not accept the report.

Parish councillor alleged not to have dealt with representations fairly, appropriately and impartially and not to have treated people with respect, including allegedly making racist remarks.

Action: Monitoring officer discussed with independent person and the complaint was referred for investigation.

Outcome: Hearing held. Breach of paragraphs 2, 8, 10 and 11. Recommendations made to the parish council that the subject member should attend equalities training and be removed from all outside appointments until such training is undertaken, and that the entire parish council should attend equalities training and review its policies and procedures governing equalities and the conduct of meetings. Note that the subject member resigned from the parish council prior to the hearing and did not attend.

Parish councillor alleged not to have dealt with representations fairly, appropriately and impartially, and not to have treated people with respect.

Action: Monitoring officer discussed with independent person and the complaint was referred for investigation.

Outcome: Hearing held. Breach of paragraphs 2, 10 and 11. The findings were reported to the parish council with a recommendation that the entire council undertake training on the code of conduct and adopt a more formal approach to meetings.

Borough councillor, having borrowed an officer's unnumbered copy of a confidential paper, returned a numbered copy at the end of the meeting but failed to return the unnumbered copy, contrary to advice provided.

Action: Monitoring officer discussed with independent person and the complaint was referred for investigation.

Outcome: Hearing held. No breach of paragraph 5, but breach of paragraph 8 and the principle of leadership. Reported to full council with a recommendation to remove the subject member from scrutiny committee, as either a member or a substitute member, for a period of three months. This was agreed and implemented by council.