

Council Meeting	
Meeting Date	17 June 2015
Report Title	MODIFICATION OF PRESCRIBED STANDING ORDERS RELATING TO THE DISMISSAL OF STATUTORY OFFICERS
Cabinet Member	Cllr Bowles, Leader
SMT Lead	Mark Radford – Director of Corporate Services and Monitoring Officer
Head of Service	
Lead Officer	
Key Decision	No
Classification	Open
Forward Plan	Reference number:
Recommendations	1. That the modifications to the Councils Prescribed Standing Orders, Standing Orders Relating to Staff, be modified as set out in Appendix 2 to this report and be incorporated into the Council's Constitution.

1 Purpose of Report and Executive Summary

1.1 To modify Standing Orders relating to the dismissal of statutory officers as required by the Local Authorities (Standing Orders) (England) (Amendment) Regulations 2015 and to incorporate them within the Council's Constitution.

1.2 The government has made legislative changes which require the Council to amend its Standing Orders insofar as they relate to disciplinary action against and the dismissal of the Council's Head of Paid Service, Monitoring Officer and Chief Finance Officer. The report identifies the necessary changes and recommends that the Council makes them.

2 Background

2.1 Since the Council commenced operating executive arrangements it has been a requirement of the Local Authorities (Standing Orders) (England) Regulations 2001 ('the 2001 Regulations') that the Council makes or modifies standing orders so that they include certain provisions relating to staff and other matters. The Council's Constitution currently incorporates standing orders which comply with the requirements of the regulations.

2.2 The provisions required to be in the Standing Orders in relation to staff operated so as to require the council to appoint a "designated independent person" before it could discipline or dismiss its Head of Paid Service, Monitoring Officer or Chief Finance Officer.

2.3 On 25 March, following a long standing commitment to do so, the Secretary of State for Communities and Local Government made the Local Authorities (Standing Orders) (England) (Amendment) Regulations 2015 which will come into force on 11th May 2015 ('the 2015 Regulations'). The 2015 Regulations repeal the provisions of the 2001 regulations insofar as they relate to the appointment of the "designated independent person" and make new provision

about the procedure to be followed to dismiss a Head of Paid Service, a Monitoring Officer or, a Chief Finance Officer. These provisions must be incorporated into the Council's standing orders "no later than the first ordinary meeting of the authority falling after 11th May 2015".

2.3 The 2015 Regulations require that before dismissing one of the officers identified above, the Council must appoint a "panel" for the purpose of advising on matters relating to the dismissal of the relevant officer. The Council must invite independent persons who have been appointed under section 28(7) of the Localism Act 2011 to be considered for appointment to the panel, with a view to appointing at least two such persons to the panel. These independent persons are those appointed by the Council in connection with the procedures for dealing with alleged breaches of the Code of Conduct for members.

2.4 The Department for Communities and Local Government have issued an explanatory memorandum to the 2015 Regulations which can be viewed at:

http://www.legislation.gov.uk/ukxi/2015/881/pdfs/ukxiem_20150881_en.pdf.

2.5 The section of the document headed "Policy Background" cites issues of complexity and expense as the reasons for the legislative changes although it is fair to say that many commentators do not accept this nor, that the new procedures actually address the perceived problems. The view of ALACE, the organisation representing senior managers in local government, is set out in the implications section below.

2.6 The governance consultancy firm Hoey Ainscough Associates Limited working with Wilkin Chapman Goolden solicitors have also produced a useful briefing note which expands on some of the implications of the 2015 regulations. A copy of this is attached as Appendix 1

3 Proposals

3.1 The requirements of the 2015 Regulations are mandatory insofar as they relate to the adoption of the prescribed standing orders and therefore it is not possible to put options before the Council for consideration in this connection.

3.2 As will be noted from paragraph 28 of the attached briefing note the Council does have a choice as to whether it appoints a standing panel in pursuance of the standing orders or, whether it only appoints one if and when the need arises. The latter is considered the most appropriate for the reasons set out in paragraph 4.2.

4 Alternative Options

4.1 The circumstances giving rise to the need to appoint the panel are likely to occur very infrequently, if at all. It is therefore not proposed that the Council should appoint a standing panel. In the event that one was to be needed, this would be the subject of a report to Council at the time.

4.2 There is also a fundamental legal difficulty in attempting to appoint a standing panel and this lies in the need to ensure that the panel is comprised of members who are impartial. The nature of the positions to which the 2015 applies is such that there is a high probability that one or more members will themselves be involved in any disciplinary action whether as instigators of it or, as witnesses. Clearly, any member involved in this capacity could not sit on the panel. Therefore, until a particular issue arises and the circumstances are known, it would not be possible to identify which members could and (more importantly) could not, sit on the panel.

5 Consultation Undertaken or Proposed

5.1 Consultation has been undertaken through the Kent Secretaries Group to seek to find a consistent response to the regulations and this report reflects that approach.

6 Implications

Issue	Implications
Corporate Plan	The purpose of these regulations is to change prescribed standing orders and to streamline processes for the dismissal of statutory officers.
Financial, Resource and Property	The purpose of these regulations is to change prescribed standing orders and to streamline processes for the dismissal of statutory officers. Any financial implications would be identified in the event of the revised procedure being invoked.
Legal and Statutory	<p>The legal implications in adopting the prescribed standing orders are already contained within the report</p> <p>It should also be noted that there is ongoing discussion about the status of the regulations in the context of employment law.</p> <p>ALACE the group representing senior officers in local government have written to DCLG stating:</p> <p>“ALACE are concerned that, once again, the Department has failed to take account in any way of the practical experience of those with experience of these procedures. The Explanatory Memorandum to the Regulations reflects the absence of this sort of understanding. For instance:</p> <ul style="list-style-type: none"> • The ACAS Code of Practice on discipline states: ‘It is important to carry out necessary investigations of potential disciplinary matters without unreasonable delay to establish the facts of the case’ (para 5); and ‘where practicable, different people should carry out the investigation and disciplinary hearing’ (para 6). • ‘It [the DIP process] has placed councils as the employer at a great disadvantage in comparison to the position of the employee, particularly given that the recommendation of the DIP must be followed.’ (7.1) The only disadvantage is that the council is prevented from dismissing someone whom an independent investigator believes does not warrant dismissal – but the process primarily exists to prevent arbitrary dismissal of statutory officers, so presumably the disadvantage is that councils are prevented from dismissing senior staff arbitrarily. • ‘...performance management process for top staff...The

Government believes that such a process is not appropriate as it defeats the purpose of having the DIP process in place.’ (7.3) A DIP is engaged to investigate disciplinary allegations, not to undertake performance management. As the Committee made clear, appraisal/performance management is a key element of proper oversight of senior officers. (In truth, it is inconceivable that the Government believes performance management is not appropriate – it’s good practice in every area of work.)

- ‘In place of the DIP process, the decision will be taken transparently by full council’ (7.4). With the DIP process, the decision is taken transparently by full Council. These are not alternatives: one is an investigation; the other is a decision. Both are features of every disciplinary process (as the reference to the ACAS Code of Practice above makes clear).

So ALACE is concerned at both the lack of rigour in the thinking around the process, and the inappropriateness of some of the specific requirements; in summary:

- The addition of a further stage in a process already regarded as capable of being made more efficient
- A complete absence of the recognition that the disciplinary process needs to include an investigation of the facts
- A so-called independent component, but with the right to appoint the independent persons being in the hands of the Employer only, and the officer subject to the process having no rights to insist on a genuinely independent appointment
- The involvement of individuals appointed for a completely different purpose and with no requirement whatsoever that they have the necessary experience or expertise for the task involved in this process
- Ambiguity as to the make-up of the Panel on which the independent persons serve – is it a committee of the Authority, in which case the independent persons can be outvoted by councillors and the independent advice might never come to the attention of the Council, or is the Panel composed only of the independent persons?

In more than two years, the Department has been trying to amend these procedures, and exhibited in that time no clarity of purpose and, indeed, no understanding of the nature of disciplinary processes and the legal

	<p>context in which they take place. It has been clear throughout that the Employers and Employees both attach a great deal of importance to the efficacy of these arrangements, and share views on many aspects of how this can be done better than under the present arrangements. But at no point has the Department sought a solution which enjoys the confidence and support of those who have to operate the procedures. It is incomprehensible that we now have Regulations in place that simply make life more difficult for authorities and officers alike, and frustrate and undermine the purposes of these processes.</p> <p>In all this time, one wonders why the Department has not invited the two sides to work with it to at least seek to produce a workable, economical and efficacious process which meets the objectives of the Department, Employers and Employees alike. We suggest the Department now does so, and assure you that we will enter into such discussions positively to produce such an outcome.</p> <p>In the meantime, we support the request of the LGA that these Regulations should be repealed pending such discussions.</p>
Crime and Disorder	Not applicable
Sustainability	Not applicable
Health and Wellbeing	Not applicable
Risk Management and Health and Safety	Not applicable
Equality and Diversity	Not applicable

7 Appendices

7.1 The following documents are to be published with this report and form part of the report:

- Appendix I: Briefing Note; Hoey Ainscough Associates Limited/Wilkin Chapman and Golden Solicitors
- Appendix II Modification of prescribed standing orders, (relevant extract only)

8 Background Papers

The Local Authorities (Standing Orders) (England) (Amendment) Regulations 2015

NOTE ON THE NEW REGULATIONS RELATING TO DISMISSAL OF SENIOR OFFICERS

Background

1. The Government issued new regulations on 25 March 2015 to come into force on 11 May. The Regulations introduce new arrangements for dealing with disciplinary cases involving a council's three statutory officers - the Head of Paid Service, Monitoring Officer and Chief Finance Officer. The new Regulations contain requirements for councils to amend their Standing Orders.
2. Because these three roles are statutory positions with specific roles and personal responsibility to ensure a council acts lawfully and has effective governance in place, they have had specific protection from dismissal under legislation in order to avoid them being scapegoated or victimised by local politicians were they to blow the whistle on impropriety within the authority. This is because the proper discharge of these personal responsibilities can bring the statutory officer into conflict with members of their authority, as their report may conflict with the political objectives of the authority, or indicate misconduct by a particular member.
3. Traditionally, before one of these officers could be dismissed, the council had to appoint a designated independent person (DIP) to carry out an investigation into the circumstances. The DIP was appointed on agreement between the council and the officer concerned, although if no agreement could be reached on the individual the Secretary of State had reserve powers to impose a DIP. The council could then only take disciplinary action in accordance with the DIP's report and recommendation.
4. The Secretary of State regarded this as a cumbersome and expensive process and wished to make it easier and cheaper for such officers to be dismissed where the council believed there had been significant misconduct or poor performance. He had therefore been consulting on draft regulations to streamline the arrangements and in particular remove the need for the DIP.
5. Concerns had been expressed by local government, however, that it was important to continue to provide some form of protection so that chief officers could not be dismissed purely because of political differences or for speaking uncomfortable truth unto power.
6. The new Regulations therefore seek to introduce a new streamlined procedure while attempting to retain some sort of independent check within the system. This is broadly done by giving the 'independent person' (IP) appointed to support the members' conduct framework a role in the disciplinary process for chief officers.
7. However, the regulations do raise a number of issues, both about the role of the IP and the way the process would work more generally, which remain to be clarified. This paper

therefore summarises our initial understanding of the new process and some of the issues councils will need to consider. These Regulations do not stand alone but need to be considered in conjunction with wider provisions relating to local authority governance and any local process will have to have regard to general principles of employment law as well as any contractual employment agreements, so we should stress that these views below are only preliminary views and may be amended after further analysis.

The new process – in brief

8. The Regulations introduce new mandatory standing orders which all councils will have to put into their constitution to replace arrangements relating to the previous framework.
9. In brief, from now on, only the full council can dismiss one of the three statutory officers. Previously the decision could have been delegated to a committee or to the Head of Paid Service.
10. Before considering such action, the council must set up a panel whose role will be to give views, advise and make recommendations to the full council. The council must invite independent persons to sit on this panel. The panel must be appointed at least 20 working days before the relevant meeting of full council.

Issues – the independent person on the panel

11. There is no statutory minimum or maximum number of IPs that the council must appoint with regard to member misconduct issues. Some councils only have one, others have more than one.
12. Under the officer disciplinary process, the panel must invite at least two IPs to be on the panel, but can invite more. It is worth noting that the Regulations say the IP must be invited, but there is no obligation on any IP to take up the invitation, nor is there anything which would prevent the panel sitting if the IPs did not attend.
13. IPs are to be invited in a particular order. First priority is to be given to an IP appointed by the council who is also an elector in that council's area. If that proves insufficient numbers or the invite is refused, the council should invite any other IP it has appointed. And finally, it can then approach IPs from other authorities.

Issues – composition of the panel

14. The covering letter from DCLG accompanying the Regulations describes the panel as an 'independent panel'. In fact the Regulations state that it is to be a panel drawn from the council in accordance with the Local Government Act 1972 which means that it has to comply with certain legal requirements.
15. As by law it is an advisory panel under s102(4) of that Act, this can indeed be a panel consisting solely of independent (non-elected) members appointed for that purpose, which would meet the Government's stated aim of an 'independent panel'. However, there is nothing to say this has to be the case. It could also include elected members – and indeed if no IP takes up the invitation it would have to be made up of elected members.

16. If the Panel includes elected members then the political proportionality rules will apply to any elected members on the Panel, unless the Council votes to waive the proportionality requirements. In considering the composition of any Panel the principles of natural justice and employment law considerations would need to be borne in mind.
17. By virtue of s13 (3) and (4) of the Local Government and Housing Act 1989 IPs who are appointed to an advisory panel have the right, alongside any elected members to vote on matters at that panel. This differs from the IP's role in relation to member conduct issues, where they are there simply to give views rather than to make decisions and have no voting rights.
18. Incidentally, that would mean that any IP appointed to such an advisory panel would be considered a co-opted member with voting rights, and hence would become subject to the code of conduct under the Localism Act, including the requirements to register and declare DPIs.
19. There is no upper limit placed on the membership of the panel, although by convention a panel should always consist of a minimum of three members. Although there is no obligation to invite more than two IPs, if the panel consists of wholly independent appointees, three IPs would have to attend. Otherwise, there must be at least one elected member alongside two IPs.

Issues – how would the panel carry out its considerations?

20. Inevitably the business of the panel relates to employment law and contractual matters. So, while there is no requirement for HR expertise on the panel, they would clearly need to have access to proper legal and HR advice to help their deliberations.
21. There is also no requirement specified as to what they are to consider. However, it is likely if they are to consider whether a dismissal can be justified, they would have to consider the outcome of an investigation or at the very least hold a hearing on the matter in hand. This is not least because employment law and existing contractual terms and conditions would still apply to the operation of the panel.
22. Regardless of the contractual provisions for a DIP in the JNC Chief Officer conditions of service, employment lawyers will be very familiar with the tests of employer reasonableness set out in sections 98(4) of the Employment Rights Act 1996. Whether the council's dismissal of a statutory officer will be regarded as fair or unfair by the Employment Tribunal will be determined by the circumstances (including the size and administrative resources of the council) and whether it acted reasonably. Iceland Frozen Foods v Jones [1982] IRLR 439 remains the leading case on the test to be applied. It is likely to be unfair to dismiss unless a reasonable and sufficient investigation into the alleged misconduct has been carried out, including the provision of an opportunity to explain.
23. Previously, the investigation was done by the DIP. The Government implies the guarantee of independence provided by the DIP has been replaced by the independence of the IP. Yet it seems unlikely that the expectation is that the IP would carry out any investigation, as that is not their role, so there will still need to be some sort of investigator appointed to

provide evidence for the panel to consider.

24. It must be remembered that the panel is not the ultimate decision-making body – it is merely there in turn to advise the full council – so its procedures will need to reflect this.
25. That said, unless and until JNC terms and conditions are amended any procedure would need to comply with these contractual obligations. In particular, the JNC terms refer to the need for there to be an investigation committee to consider the findings of an independent investigation, and for there also to be an appeals committee. We would consider the advisory panel to meet the requirements for an investigating committee even though it is merely making recommendations rather than a final decision, but councils will need to consider how the need for any appeals committee would be met.
26. When the matter is referred to full council, it must have regard to any views, advice or recommendations made by the panel as well as the findings of any investigation and any representations made by the officer concerned.

What the council needs to do

27. These changes to standing orders come into force on 11 May. Councils must therefore adopt these changes at their first ordinary council meeting after that date. At the risk of sounding trite an ordinary meeting would be any meeting which is not ‘extraordinary’ under schedule 12 para 3 of the 1972 Act. Hence the annual meeting would be classed as an ordinary meeting. **(Note advice from the Local Government Association has confirmed a different view on what constitutes an ordinary meeting, hence why the matter is being reported to this meeting)**
28. Councils will need to decide whether they wish to create a standing panel or not. In any case, they should agree what the composition of any panel they might need to set up in future should be and agree procedural rules for the panel in case it needed to be convened in the future, to avoid future arguments about arrangements at a time when sensitivities would be likely to be high.
29. The Regulations also allow an allowance to be paid to any IPs appointed to the panel. Councils should consider now what those allowances might be and how they are incorporated into any existing allowances IPs might currently be getting. The Regulations say this allowance cannot be more than the allowance paid to the IP for their ‘member conduct’ role. While this is not entirely clear, the implication does seem to be they can receive two separate allowances – one for this role and one for the member conduct role, provided the allowance for this role does not exceed that paid for the member conduct role.

Implications and considerations for IPs

30. IPs will need to be aware of the implications of these Regulations for their role. Chief officer dismissals can arise in a number of circumstances – where serious misconduct has been found, where there has been serious performance issues or occasionally where there has been a breakdown in relations between the officer and politicians. This last scenario will always prove the most contentious as officers can only be dismissed where there are clear

grounds to do so under employment law.

31. In particular therefore IPs will need to think how they would carry out their role where the issue arises from a breakdown in relationships. They will need clear guidance on relevant and irrelevant factors they will need to consider.
32. While the Regulations say that IPs have to be invited to participate, it does not appear that they have to accept the invitation. If IPs decline the invitation, it seems clear that the council will have discharged its duty by inviting them so can proceed in their absence. IPs will therefore need to consider the grounds on which they would/would not accept the invitation.
33. As with their role in dealing with member conduct issues, the IP role here appears to be above all that of a guarantor of independence and due process. Even though they are part of the panel, unlike with member conduct issues where they merely give views to the relevant panel, it is not the panel which is the final decision-making body. IPs will therefore need to consider how they would fulfil their role on the panel and, in particular, how they would make representations if they disagree with conclusions reached by the councillors on the panel, particularly where they think the conclusions have been influenced by political rather than employment considerations, or if they do not believe that full council has properly taken the panel's views into consideration.
34. As their role is similar to their role in terms of member conduct, albeit they would have voting rights, we see no need to consider recruiting IPs with different mind sets or skill sets. They will not need to be employment law experts but merely able to reach an independent view based on evidence presented.
35. An IP would become bound by the code of conduct and related statutory obligations were they to become members of the panel and will therefore need to be reminded of their obligations when they do so.

A final reminder

35. Such cases are of course, thankfully, very rare. The most important role for an IP will remain in relation to member misconduct and that should be the main emphasis when recruiting and training IPs. This will simply be an additional duty which they will need to be aware of, but may never be called upon to exercise.

Note prepared by

PAUL HOEY AND NATALIE AINSCOUGH, HOEY AINSCOUGH ASSOCIATES LTD and JONATHAN GOOLDEN, WILKIN CHAPMAN LLP

2 APRIL 2015

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Relevant extract from:

STATUTORY INSTRUMENTS 2015 No. 881

LOCAL GOVERNMENT, ENGLAND

The Local Authorities (Standing Orders) (England) (Amendment) Regulations 2015

Made - - - - 25th March 2015

Laid before Parliament 25th March 2015

Coming into force - - 11th May 2015

“SCHEDULE 3 Regulation 6

Provisions to be incorporated in standing orders in respect of disciplinary action

1. In the following paragraphs—

(a) “the 2011 Act” means the Localism Act 2011**(b)**;

(b) “chief finance officer”, “disciplinary action”, “head of the authority’s paid service” and “monitoring officer” have the same meaning as in regulation 2 of the Local Authorities (Standing Orders) (England) Regulations 2001**(c)**;

(c) “independent person” means a person appointed under section 28(7) of the 2011 Act;

(d) “local government elector” means a person registered as a local government elector in the register of electors in the authority’s area in accordance with the Representation of the People Acts;

(e) “the Panel” means a committee appointed by the authority under section 102(4) of the Local Government Act 1972**(d)** for the purposes of advising the authority on matters relating to the dismissal of relevant officers of the authority;

(f) “relevant meeting” means a meeting of the authority to consider whether or not to approve a proposal to dismiss a relevant officer; and

(g) “relevant officer” means the chief finance officer, head of the authority’s paid service or monitoring officer, as the case may be.

2. A relevant officer may not be dismissed by an authority unless the procedure set out in the following paragraphs is complied with.

3. The authority must invite relevant independent persons to be considered for appointment to the Panel, with a view to appointing at least two such persons to the Panel.

4. In paragraph 3 “relevant independent person” means any independent person who has been appointed by the authority or, where there are fewer than two such persons, such independent

persons as have been appointed by another authority or authorities as the authority considers appropriate.

5. Subject to paragraph 6, the authority must appoint to the Panel such relevant independent persons who have accepted an invitation issued in accordance with paragraph 3 in accordance with the following priority order—

- (a) a relevant independent person who has been appointed by the authority and who is a local government elector;
- (b) any other relevant independent person who has been appointed by the authority;
- (c) a relevant independent person who has been appointed by another authority or authorities.

6. An authority is not required to appoint more than two relevant independent persons in accordance with paragraph 5 but may do so.

7. The authority must appoint any Panel at least 20 working days before the relevant meeting.

8. Before the taking of a vote at the relevant meeting on whether or not to approve such a dismissal, the authority must take into account, in particular—

- (a) any advice, views or recommendations of the Panel;
- (b) the conclusions of any investigation into the proposed dismissal; and
- (c) any representations from the relevant officer.

9. Any remuneration, allowances or fees paid by the authority to an independent person appointed to the Panel must not exceed the level of remuneration, allowances or fees payable to that independent person in respect of that person's role as independent person under the 2011 Act”

(a) SI 2005/421. Article 16 of Part 1 of Schedule 3 of the Order applies regulation 7 of the 2001 Regulations to the New Forest

National Park Authority, as if it were a local authority as referred to in the 2001 Regulations.

(b) 2011 c. 20.

(c) S.I. 2001/3384.

(d) 1972 c. 70.