

MAIDSTONE BOROUGH COUNCIL
REPORT OF THE MONITORING OFFICER

STANDARDS COMMITTEE

25 AUGUST 2011

SELF REGULATION FOLLOWING ABOLITION OF THE STANDARDS REGIME

1. Introduction

- 1.1 The Government announced in the Queen's Speech last year that the proposed Decentralisation and Localism Bill would include proposals to 'abolish the Standards Board regime'. The Localism Bill was presented to Parliament on 13 December 2010 and at the time of writing this report is at the Committee stage in the House of Lords. Royal Assent is anticipated in November 2011. In summary the Localism Bill will revoke the General Principles governing conduct in public office, revoke the Model Code of Conduct, abolish the Standards Board for England and repeal the statutory requirement for principal councils to have a Standards Committee that includes independent members (or at all) and (in the case of a district council) also acts as the Standards Committee for the parish councils established in the district. The Bill will also introduce a new criminal offence for failing to register/disclose interests (see paragraph 1.8). It is possible that no new referrals for investigation can be made after about 1 November 2011 and that sanctions will be limited to censure in respect of breaches identified in respect of cases before that date. The present regime is likely to continue for several months, probably into next year. Although there is no immediate need to take any decisions as to an alternative Standards regime, it is important to begin to consider what the different options might be.

A new standards framework – duty to promote and maintain high standards of conduct

- 1.2 The Coalition Government has nevertheless made it clear that the maintenance of high standards of conduct by elected and co-opted members remains a priority. Chapter 5 of the Localism Bill therefore proposes the establishment of a revised Standards Framework, the starting point of which is the imposition of a duty on a 'relevant authority' to promote and maintain high standards of conduct by members and co-opted members of the authority. Both the district council and the parish councils established in Maidstone will be relevant authorities. Moreover Clause 15 (6) of the Bill makes it clear that the member standards functions imposed by Chapter 5 may not be exercised by the executive of

the authority - that is to say that the duty to promote and maintain high standards of conduct will be a function of the council, not the Executive.

Power to adopt a Code of Conduct

- 1.3 Clause 16(1) of the Bill complements the duty to promote and maintain high standards of conduct by providing an express statutory power for relevant authorities to adopt a Code dealing with 'the conduct that is expected of members and co-opted members of the authority'. For that purpose a relevant authority is also given the power to revise or replace an existing Code of Conduct. As this is a power and not a duty, relevant authorities will also be permitted to withdraw a Code of Conduct made under the section without replacing it. Moreover, the power to adopt, revise or withdraw a Code of Conduct will be exercisable by full Council only.

Duty to consider whether to investigate breaches

- 1.4 Clause 16(4) of the Bill provides that if a relevant authority receives a complaint alleging that a member has or may have failed to comply with any Code of Conduct adopted by the authority, the council must consider whether it is appropriate to investigate the allegation in such manner as it thinks fit.

Action on breach

- 1.5 Clause 16(4) of the Bill provides that if the council finds that a member has failed to comply with the Code (whether or not that finding is made following an investigation) it may have regard to that failure in deciding whether to take any action and, if so, what action to take. The Secretary of State will have the power to make Regulations under Clause 17 of the Bill to prescribe the sanctions that may be applied to members for breaching the Code of Conduct - but those powers may not include suspension or disqualification.

Register of Members' interests

- 1.6 The Regulation making powers proposed to be conferred on the Secretary of State will also include the power to make Regulations requiring elected and co-opted members to disclose certain prescribed financial and other interests in a Register that will be available for public inspection.

Declaring interests at meetings

- 1.7 The Secretary of State will also have the power to make Regulations prescribing the circumstances in which elected and co-opted members are required to declare an interest in an item of business under consideration at a meeting of the Council, the Executive or Committee or Sub

Committee of the council or the Cabinet before taking part in that item of business. The Secretary of State will also be able to prescribe the circumstances in which the participation of an elected or co-opted member with a declarable interest may be prevented or restricted from participating in the business of the council. It appears there will be a system for granting dispensations which will need someone to consider an application and decide upon it.

Failure to register an interest etc

- 1.8 Clause 18 of the Bill creates three new criminal offences if, without reasonable excuse, an elected or co-opted member:
- (i) Fails to register a financial or other interest in accordance with regulations made under Clause 17; and/or
 - (ii) Fails to disclose an interest of a kind specified in such regulations before taking part in business of the authority relating to such interests; and/or
 - (iii) Takes part in business of the authority to which an interest disclosed by virtue of such regulations relates, contrary to a prohibition or restriction imposed by such regulations.

The offences are summary only and, if convicted, members face not only a fine of up to £5,000 but may also be disqualified from office for a period not exceeding five years. Proceedings are at the suit of the Attorney General and have to commence within 12 months of the date on which the prosecutor certified that he had knowledge of sufficient evidence to warrant the proceedings - although no prosecution may be brought more than three years after the date of the commission of an offence or, in the case of a continuing contravention (eg failing to register an interest in the Register of Members Interests), three years after the last date on which the offence was committed.

Parish councils

- 1.9 Parish councils will likewise be under a duty to promote and maintain high standards of conduct and will have the power to adopt a Code of Conduct of their own choosing. If a parish council adopts a Code it will also have to consider whether or not to investigate complaints and if it considers that a breach has occurred, what action, if any, to take. The Standards Committee of the borough council will have no statutory role in relation to this, but voluntary arrangements could be put in place if requested by parish Councils and agreed by MBC.

2. Continuing need for a Standards Committee?

- 2.1 The existence of the statutory duty to promote and maintain high standards of conduct will need to be addressed. The creation of a standing standards committee with or without independent members or the appointment of a group of members and independent persons to meet on an ad hoc basis are two ways to do it. We also have an audit committee for example whose role may be subject to review, but which could take on

that role as being complementary to its existing one. However, informal consultation with the former chairman of audit committee has suggested little appetite for that committee to take on any ethical standard functions. Similarly, informal consultation with the chairmen of overview and scrutiny committees earlier this year did not demonstrate any desire to be involved in this role.

- 2.3 I am not entirely convinced that a code of conduct is absolutely necessary to enable high standards of conduct to be promoted or to measure how far the standard is achieved. The government clearly regards timely and complete declarations of interest as important and as a matter for penalty, so the absence of a code will not prevent measurement of numbers of declarations and failure to do so. Scrutiny of interests declared and by whom can also be measured as to who declares and who does not declare.
- 2.4 Although there is no absolute need for a code of conduct as such, certain internal regulatory documents will still be desirable. For example, protocols dealing with Member/Officer relations, use of council resources by Members, and gifts and hospitality will still be required both for the purposes of guidance to Members, and if other processes fail and they are disregarded, for the council to take such action as is necessary and possible to protect its interests – see Common Law Powers later. Therefore, it may be desirable to adopt a voluntary code to give assurance to the public that the Council takes these issues very seriously.
- 2.5 How would complaints be dealt with? That brings me to the heart of the problem with a voluntary code. If complaints are made in the future outside whatever very limited statutory regime remains, then unless they are to be ignored altogether, it will either be a matter for each political group or party to use their own investigatory and disciplinary procedures or members will have to subscribe to a voluntary regime backed by their political groups by which any sanctions recommended by the standards committee will be supported. In other words, there will not only have to be political support for the concept of a voluntary code and its enforcement but continuing and sustained wholehearted political support for it even when it may not be politically expedient to do so.
- 2.6 Given the changes which the government propose are intended to make members answerable either to the courts or to the ballot box, the group disciplinary system may be one answer. Personalities within political groups become known, and it has always been incumbent upon the groups by whatever machinery they have to consider which Members may or may not be appropriate to sit on certain committees or carry out certain roles. That is not necessarily for example because standards of conduct of any individual are poor, but simply anticipating conflicts of interest that might arise which make it inappropriate for them to be given a particular role.
- 2.7 I believe that more clarity is needed on the new regime before any decisions are finally made. I think that it would be useful to begin to consider what, if any, system Members of both borough and parish

councils might wish to see in the future. It would not be appropriate for me to hold out any hope to any parish councils who would like the present system to continue that the borough council would be prepared to do so on a voluntary basis. Nevertheless for this committee to frame its recommendations it needs to know what parishes would like to see happen. The Maidstone Area Committee of KALC has been consulted and its response is set out at Appendix A. A somewhat different view has been expressed by the National Association (Appendix B).

2.8 I believe members should address the following issues:

- Should a local code be adopted and introduced at Maidstone Borough Council?
- If yes, how would this have the necessary teeth to enforce high standards?
- What would the scope of such a code be if it was introduced?
- If no, how does the council deal with issues such as bullying, disrepute and disrespect?
- What training and development will be required for Members?
- In relation to all or any of the above, will Maidstone Borough Council or a committee of the council or the monitoring officer have any responsibility towards parish councils?
- How to retain public confidence in members' behaviour?
- Should the Council appoint a Standards Committee, and, if so, on what basis?

3. Common law powers

3.1 In the absence of the existing statutory provisions, what other powers exist? The power of a local authority to take action in order to regulate itself and enable it to carry out its functions was confirmed by the Court of Appeal in *R v Broadland District Council ex p Lashley* (2001). In that case the court decided that it was *intra vires* for a council, acting by a duly authorised Standards Committee, to investigate the propriety of a councillor's conduct and to report that her conduct had fallen below the expected standards. There was found to be no procedural unfairness in the investigation leading to the report.

3.2 Kennedy LJ stated: '...if a local government officer complains to his senior officer about the way in which he has been treated by a Councillor, the complaint has to be investigated. Ordinary principles of good management so require, and such an investigation is plainly a function which a local authority is entitled to carry out pursuant to its statutory powers as set out in the 1972 Act. In reality, it makes sense for the investigating officer to report to a Committee, such as the Standards Committee which can then consider what action to take. 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 Auditors. In less extreme cases it may recommend to the Council removal of the Councillor from a Committee, or simply state its findings and perhaps offer advice. On the other side of the equation, the Committee can dismiss the

complaint or, for example, suggest changes to working practices to prevent such problems arising in the future’.

The extent and the power of self regulation

- 3.3 The power of self regulation is not a power to punish a member for misconduct as such, but rather a power to take such administrative action as may be required to protect the interests of the council and of the people it serves. Such action cannot override the democratic election of a member and cannot prevent him/her from exercising his/her basic rights as a councillor. The following are examples of the actions which the Council might take. In the absence of empowering regulations, whether the new style Standards Committee could take such actions on its own, or whether it could only recommend to Council is a matter for further examination. Co-opted (i.e. Independent) Members may have a vote on committees which are purely advisory.

Censure

- 3.4 Where a member has committed misconduct the council can make a public statement dissociating the council from those actions and censuring the member concerned.

Withdrawal of resources

- 3.5 If, for example, a member has misused e-mail or internet facilities or other resources provided by the council, this council could withdraw such facilities for an appropriate period of time or until the member gives a written undertaking that he/she will not misuse the resources of the authority.

Exclusion from council offices

- 3.6 If the breach involved for example bullying of an officer, or other inappropriate conduct in the council offices, it would be possible for the council to bar a Member from the council offices other than the Council Chamber and civic rooms when meetings are being held.

Limited access to officers

- 3.7 The council could require a Member to direct his/her requests for information and advice to a named officer, who would deal with them.

Removal from outside bodies

- 3.8 It may be that misconduct by a Member makes it unsuitable for them to remain on an outside body as the Council’s representative. Although removal would not be a power available to a Standards Committee, it could make a recommendation to Council that a Member be removed from an outside body.

Removal from positions of responsibility within the authority

- 3.9 A committee could recommend to Council that a Member be removed from a position of special responsibility that attracts a special responsibility allowance, or could recommend to a group leader that the member be removed from a Committee (perhaps until an apology was given or training undertaken). However this could lead to difficulties if the Group Leader did not follow the recommendation.

Enforcement of self regulation

- 3.10 A new form of Standards Committee could be created, but unless fresh regulations are made I do not believe that independent Members co-opted onto it would have a vote if it was a decision making body. Nor would its recommendations have legal backing but would be based on the existence of a culture of compliance. Nevertheless, if Members elected to have a Code of Conduct, then a Standards Committee to enforce it would be appropriate. Independent Members on such a committee would add significantly to its credibility. Members of the Committee may wish to express views on the implications of those matters. If requested by parish councils a similar regime could be established by the Borough Council for them.

Code of Conduct

- 3.11 At present there does not seem to be any appetite for a national model code to be produced, nor a county wide version, although this might be helpful, not least for our twin hatted members. I attach at Appendix C paragraphs of the existing code which set out expectations as to conduct (less those dealing with interests as there will be dealt with by criminal sanction) so that members may consider which paragraphs they believe could usefully be incorporated into a voluntary code, should the council decide to have one.

Voluntary Standards Committee

- 3.12 Informal consultation has suggested that there is little demand for a voluntary standards committee to be established as a standing committee, but there is some interest in the possibility of establishing a group of members (either exclusively or partially comprising independent members) who could consider whether complaints should be investigated and if so to consider what sanctions to recommend should a breach be found. The existing functions of the standards committee (Appendix D) could be allocated elsewhere if it was decided not to have a standards committee.

Conclusions

4. Whilst there have been relatively few complaints within the borough council and in the parishes there is no doubt that elsewhere some serious misbehaviour has been checked and punished. Cases elsewhere

concerning bullying of staff for example have been pursued and have succeeded in curbing such behaviour. Parish clerks in particular whose position can be isolated have found the present code particularly welcome in some places. At the same time it would perhaps not be helpful to create a voluntary system which could not be effective. Any voluntary system needs substantial political support even in difficult times. I suggest that the Committee consider the implications of this report and make recommendations to the Council meeting on 21 September, as to the future standards regime. I could then report back to the standards committee on 30 November with detailed suggestions (possibly by then the Localism Bill will be enacted and its provisions known) and standards committee could consider these and report to the full Council meeting on 14 December for a final decision.

Recommendation

5. It is recommended that Members consider this report and make recommendations to the council as to how the ethical standards regime could be addressed following the abolition of the Standards Board for England, the National Model Code of Conduct, and Statutory Standards Committees. In particular members should decide whether:-
 - a) There should continue to be a Code of Conduct adopted by the Council to guide Members as to the standard of behaviour expected of them.
 - b) There should be a Standards Committee (and if so should it be a standing committee or be called on an ad hoc basis as and when complaints are received or guidance sought on ethical issues).
 - c) If the answer to b) above is "yes", should it include/be chaired by Independent persons?
 - d) Parish Councils should be offered a service (and if so, should they pay for it?).
 - e) The Chairman and Monitoring Officer report back to Standards Committee on the 30th November.