

REPORT FOR DECISION



DECISION MAKER:	STANDARDS COMMITTEE
DATE:	4 FEBRUARY 2014
SUBJECT:	"ERRANT COUNCILLORS AND THE NEW STANDARDS REGIME" – A VIEW BY CLIVE SHELDON QC
REPORT FROM:	MONITORING OFFICER
CONTACT OFFICER:	Jayne Hammond, Assistant Director Legal & Democratic Services
TYPE OF DECISION:	COMMITTEE – for information
FREEDOM OF INFORMATION/STATUS:	This paper is within the public domain
SUMMARY:	The Localism Act 2011 introduced a new standards regime. There are concerns that the new regime is not working and the Committee on Standards in Public Life has decided to keep a watching brief over, and if necessary, investigate the system for local government standards. The attached paper from Clive Sheldon, Queen's Council and one of the country's top public lawyers sets out a couple of examples of cases dealt with under the new regime. It also highlights the challenges posed by social media.
OPTIONS & RECOMMENDED OPTION	To note
IMPLICATIONS:	
Corporate Aims/Policy Framework:	Do the proposals accord with the Policy Framework? Yes
Statement by the S151 Officer: Financial Implications and Risk Considerations:	The Standards Committee should be fully aware of the revised ethical framework in order that consistency of approach is taken in respect of setting and advising on local ethical and standard issues.
Statement by Executive Director of Resources:	There are no significant financial issues arising from this report.
Equality/Diversity implications:	No

Considered by Monitoring Officer:	Yes	JH
Wards Affected:		
Scrutiny Interest:		

TRACKING/PROCESS

DIRECTOR:

Chief Executive/ Strategic Leadership Team	Cabinet Member/Chair	Ward Members	Partners
Scrutiny Committee	Cabinet/Committee	Council	

1.0 The report is for information.

List of Background Papers:-

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ERRANT COUNCILLORS AND THE NEW STANDARDS REGIME

Clive Sheldon QC

1. The Localism Act 2011 introduced a new standards regime. It was designed to "replace the bureaucratic and controversial Standards Board regime, which ministers believe had become a system of nuisance complaints and petty, sometimes malicious, allegations of councillor misconduct that sapped public confidence in local democracy."¹
2. There are concerns that the new regime is not working, and the Committee on Standards in Public Life has decided to keep a 'watching brief' over, and if necessary investigate, the system for local government standards (see *Standards Matter*, A review of best practice in promoting good behaviour in public life: January 2013).

3. The Committee has stated that:

The new, slimmed down arrangements have yet to prove themselves sufficient for their purpose. We have considerable doubt that they will succeed in doing so and intend to monitor the situation closely. The arrangements place a particular onus on the Local Government Association to provide leadership for the sector and to ensure that they work in practice.

4. The Committee welcomed "the intention behind the Localism Act 2011 to encourage a greater sense of local responsibility for standards and to address some of the more vexatious and disproportionate aspects of the local government standards regime". However, it noted that "To function effectively, local leadership and responsibility for standards requires certain conditions to be met – including strong leadership and robust, visible action against those who fall short."
5. The Committee expressed other concerns, which it felt would apply under the new arrangements even in those authorities where strong leadership on standards does exist:

The first is that under the previous arrangements local authorities had the power to suspend members for varying periods of time as a sanction against poor behaviour. The only sanctions now available, apart from through the use of party discipline, are censure or criminal prosecution for deliberately withholding or misrepresenting a financial interest. We do not think these are sufficient.

... Bullying of other members or officers is one category of offence which will be difficult to deal with adequately under the new arrangements.

Our second concern is about the new and so far relatively untested arrangements for independent involvement in the disciplinary process. Under the previous arrangements allegations about poor behaviour were determined by standards committees independently chaired by individuals who were not themselves

¹ "New rules to ensure greater town hall transparency"; DCLG press release, 28 June 2012.

members of the local authority. Under the new arrangements every local authority must appoint at least one independent person whose views it will seek, and take into account, before making its decision on an allegation that it has decided to investigate. We doubt that this will be sufficient to provide assurance that justice is being done and, equally important, that it is seen to be done.

6. In this paper, I will give a couple of examples of cases dealt with under the new local government standards regime so that we can see whether or not the Committee's view is justified. I will also explain the basis of the current legal challenge to the regime (that it does not comply with Article 6 of the Convention), and highlight one area of activities that local authorities are finding particularly challenging: the use of social media by members.

Errant Councillors

7. Many of you will be familiar from the media with Councillor Brewer of Cornwall County Council. The Councillor (an Independent member) had made comments about disabled children at the end of 2011. This resulted in him making a written apology to Disability Cornwall. A further complaint was made with respect to an interview that Councillor Brewer had given to a journalist with Disability News on 8 May 2013.
8. The Council's Standards Committee considered the complaint and determined that Councillor Brewer had (i) repeated the earlier comments in the same or similar form; (ii) sought to justify the making of those comments by reference to the Council's available budget; (iii) sought to justify the making of those comments by reference to the supportive comments of, in particular, a former doctor and a farmer; and (iv) likened disabled children to deformed animals.
9. In considering the appropriate sanctions to be applied to Councillor Brewer, it was decided that:
 - He should be formally censured "for the outrageous and grossly insensitive comments he made in his telephone conversation" with the journalist.
 - He would be required to make a formal apology as to the gross offensiveness of his comments and for the significant distress they have caused.
 - Training would be arranged on the Code of Conduct and in dealing with the media. The training will focus on the damage that can be caused when the provisions of the Code are breached and when inappropriate and/or offensive comments are made, whether in the media or otherwise. It is expected that Councillor Brewer **will** attend this training.
 - A recommendation would be made to the Group Leaders of Cornwall Council that whilst Councillor Brewer remains a Member of Cornwall Council he should not be allocated a seat on any of the Council's Committees that deal or might deal with issues relating to disabled children or other vulnerable members of the community.
 - A recommendation would be made to the Council and the Leader that Councillor Brewer should not be nominated as the Council's representative to any outside bodies that are involved in the provision of services or support to disabled children or other vulnerable members of the community, either as their principal purpose or as part of their routine business.

- Councillor Brewer would not have access to those parts of Council premises from where services to disabled children are directly provided, managed or commissioned.
- A meeting would be facilitated between the Interim Chief Executive, Councillor Brewer and such other senior officers as the Interim Chief Executive shall determine so that it may be explained in the clearest possible terms to Councillor Brewer the Council's position on and commitment to the provision of services to disabled children and other vulnerable groups, the critical importance of the Council's role in Safeguarding and to Equality and Diversity.
- A recommendation was made that the Council issue a press release to coincide with publication of the Decision Notice, which would include the following statements:
 - § The Council completely dissociates itself with the offensive views expressed by Councillor Brewer;
 - § The Council is positively committed to the Equality and Diversity agenda;
 - § Clarification of the limited sanctions available to the Council in respect of Councillor misconduct; and
 - § Such other statements as may assist in restoring public confidence in Cornwall Council and the services it provides to disabled children and other vulnerable groups.

10. Concern had been expressed by members of the Standards Committee about item (vi) (denial of access to premises) on the basis that this sanction could be regarded "from one perspective as either tokenistic or, from another, unduly punitive." The Monitoring Officer explained, however, that he was mindful that "the Council is a Corporate Parent to children who are within its care and by making such offensive comments, Councillor Brewer has failed to act in a way compatible with that Member role and therefore access to premises directly providing services to disabled children would neither be required nor appropriate."

11. The Monitoring Officer did not accept the recommendation from the Investigating Officer that the premises restriction should apply to premises from where services to 'other vulnerable groups' was being provided. That was regarded by Councillor Brewer as unduly harsh, and the Monitoring Officer decided that it was unnecessary and unduly restrictive.

12. The Monitoring Officer noted that had the powers of the old regime still been available, he would have either recommended suspension of Councillor Brewer or would have referred the matter to the First Tier Tribunal who would have had wider powers of sanction available to them. The Monitoring Officer explained that such measures were justified in "exceptional cases", and that there was "no doubt that the absence of those powers has been a source of frustration to the Standards Committee and a source of disbelief to many of those who have complained and the wider public."

13. The Monitoring Officer acted creatively in fashioning the sanctions in this case. They were as severe as any that can be imposed under the current regime. There is clearly some doubt as to whether they are sufficient to deal with seriously improper and insulting comments by the member. It is not difficult to see how the lack of more intrusive sanctions could undermine public confidence in the new

standards regime.

14. It is important to note, however, that when the sanctions were imposed, Councillor Brewer resigned from office with immediate effect. It may well be, therefore, that in certain cases, the censure from one's peers, and the publicity associated with it, make it 'politically' or practically impossible for the member to continue. It might be suggested therefore that whilst the sanctions available are superficially limited, they may in reality have more serious consequences for the member concerned and so provide appropriate *deterrence*.
15. A second case study involves Councillor X from a London Borough. He was the Labour Chief Whip, and a member of the Council's planning committee. The Chairman of the Council's planning committee made a complaint that X had been interfering and attempting to influence the Labour members of the planning committee. The only complaint that was upheld related to the allegation that Councillor B had received a text from Councillor X during a planning meeting, saying: "I HOPE YOU ARE GOING TO SUPPORT THIS ONE." The text was understood by Councillor B as an instruction.
16. The Council's Standards Committee found that Councillor X's text to Councillor B during consideration of the planning application for a public house constituted an attempt to influence the outcome of a decision.
17. As a result, the Councillor was found to be in breach of paragraph 3(1)(a) of the Code of Conduct:

To act solely in the public interest and never improperly attempt to or actually confer an advantage or disadvantage on any person or improperly act to gain financial or other material benefits for themselves, their family, friends or close associates.

and paragraph 3(1)(i):

To promote and support high standards of conduct when serving in their office, ... by leadership and by example.

18. In reaching its decision, it was explained that the Standards Committee had regard to the view of the Independent Person, who felt that Councillor X's conduct in sending the text fell short of what should be accepted from a councillor, and amounted to a breach of the Code of Conduct
19. With respect to the appropriate sanction, the Standards Committee took into account mitigation – Councillor X realised that he had made a mistake, had learnt his lesson and would not do the same thing again, he had already suffered a form of sanction through negative publicity in the local press and by being suspended from his role as Chief Whip since the allegation was brought in September 2012.
20. The Standards Committee determined, however, that this was a serious matter as it questioned the credibility and decision-making in the Planning Committee, which had to make difficult and often controversial decisions, and imposed the following sanctions:
 1. A public statement of the Panel's decision approved by the Panel is published on the Council's website including the following additional statements.
 2. That the Panel's finding is referred to the Labour Group to consider

whether further action is required in accordance with the Group's rules but taking into account the fact and length of Councillor X's suspension from his role as Chief Whip.

3. The Monitoring Officer will write to Councillor X setting out the Panel's recommendations and reminding him of his obligations under the Code of Conduct.
21. The formal sanctions here were pretty light. The informal sanctions might be more severe: the Councillor has not regained his position as Chief Whip.

Judicial Review

22. You may believe that the very limited sanctions available under the new regime, and the presence of the independent member, mean that Article 6 of the Convention is not engaged: that there is no requirement for the entire decision-making machinery to be 'independent'. The Government certainly thought so, as a key part of the new standards regime was the abolition of the Standards Board. It may be time to think again. Mr. Justice Collins has granted permission for one councillor to challenge the regime by way of judicial review: R (on the application of Andrew Riley) v. East Staffordshire Borough Council.
23. The councillor was found to have breached the Code of Conduct by disclosing confidential information. No sanction was imposed. The councillor is arguing, however, that the very decision of the local Standards Committee finding that he had disclosed confidential information and contravened the Code breached his Article 6 rights in that the committee was not politically neutral and was not an independent and impartial tribunal.
24. It is contended that the Councillor's reputation remains "sullied" by a finding of a breach of the Code, which could affect his ability to stand for re-election. This, it is suggested, involves a determination of his Article 8 rights – which include a right to reputation.
25. The claim is being resisted. It is contended that Article 6 is not engaged, as no 'civil rights' were 'determined' by the Standards Committee. The Councillor's Article 8 rights to a good reputation were not seriously affected by the findings as the Standards Committee did not impose any sanction and did not publicise its findings. It is also contended that the overall process, which includes the prospect of judicial review of the Standards Committee decision would satisfy Article 6 in any event.
26. If this case proceeds to a substantive hearing, the structure of the new standards regime will come under the judicial microscope for the first time. Success for Councillor Riley on this case could require a shake-up of the new structure; with a requirement to introduce more independence into the system.

If that is done, I wonder whether Parliament will also see fit to reintroduce the more serious sanctions regime as existed under the old system. The law of unintended consequences, perhaps.

Social Media

27. Some members are particularly savvy with social media; others won't have much of a clue. Difficulties can arise when social media is used inappropriately by members, and this presents challenges to local authorities. Many authorities have

introduced protocols for their members, so as to provide them with a framework as to the do's and don'ts.

28. Taking as an example, Essex County Council. They have explained that 'Social Media is becoming an important part of the operation of a democratic society. For ... members it is an efficient and cost effective way of keeping in touch with residents and businesses and discussing issues with their communities.'

29. The Protocol provides the following:

- When using social media members and co-opted members will be bound by their authority's Code of Conduct if they are conducting authority business or representing the authority.
- Members who make private and personal non-political social media contributions, unconnected to Authority business and without describing themselves as members are unlikely to be subject to the Code.
- In considering whether a member was acting as a member, the Standards Committee would have regard to the following factors
 - § The privacy settings on the member's social media site. Members who have a private, personal blog or social media site, which they use as a private individual and not as a member, should ensure that they have appropriate privacy settings so that they control who reads their posts. If they have a political blog open to all readers, residents may assume that the member is acting as such.
 - § The member's profile on their social media site. Where this is intended to be private the member should not describe themselves as a member or refer to authority business or contacts. A member who did so would have difficulty sustaining an argument that he was not within the Code.
 - § A disclaimer in a private blog to the effect that comments are not made as a member will not necessarily avoid the application of the Code.
- There is no support or encouragement for anonymous postings by members;
- An anonymous post by a member conducting Authority business will be subject to the Code;
- Particularly relevant paragraphs of the Code are
 - § Treating others with respect, noting that political comments and comments about ideas are less likely to be seen as disrespectful and result in a breach of the Code. However, personal jibes or remarks aimed at an individual may well be seen as disrespectful and could lead to a breach of the Code.
 - § Upholding the law: Commenting on, or criticising, the law in a responsible manner is not an issue but encouraging others to break the law may well amount to a breach.
 - § Bullying. Members should be cautious when making personal comments about individuals and social media should never be used to review the performance of Council staff.

§ Disclosing confidential information.

- With respect to Forum Posts: if a member identifies themselves as a councillor the Code will be likely to apply. If they put content on the site which could only have been obtained by a member the Code is also likely to apply. Members should also consider that information they post on a forum could be reposted in part or full.

30. Ultimately, the Protocol is a call for 'common sense' to be applied when using social media. One can only wait to see if the call is heeded.

Clive Sheldon QC
September 2013