

LOCAL AUTHORITY GOVERNANCE, CURRENT ISSUES

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INTRODUCTION

1. “Governance” in local authority terms means different things to different people. We have chosen three issues within this broad field which appear to us to have caused significant recent controversy, and which are likely to continue to cause problems in the future. These are –
 - a. Local government standards and predetermination particularly examining the regime under the Localism Act 2011 and asking, two years on from its implementation, what has been the impact of the new regime?
 - b. A look at some recent case-law concerning the conduct of local authority meetings, the provision of information at and prior to meetings, and the effect of breaches of such requirements on the legality of decisions.
 - c. Finally, some brief notes on the 2014 DCLG Transparency Code and the Local Audit and Accountability Act 2014.

[1] STANDARDS

Introduction – the new standards regime

2. *“These new measures, outlined in the Localism Act, will replace the bureaucratic and controversial Standards Board regime, which ministers believe had become a*

¹ We would like to thank Tony Cox, Head of Legal & Democratic Services, Walsall Council, for his kind assistance with ideas and thoughts for this paper.

system of nuisance complaints and petty, sometimes malicious, allegations of councillor misconduct that sapped public confidence in local democracy”

3. Thus proclaimed the government press release heralding the introduction of the new local government standards regime for England under Chapter 7 of the Localism Act 2011 (“the 2011 Act”). The 2011 Act, relevant parts of which came into force on 1 July 2012, abolished the local government standards framework established under the Local Government Act 2000, doing away with the Standards Board for England, the mandatory requirement on local authorities to have standards committees and the powers of the First Tier Tribunal to hear cases relating to local government standards in England (powers formerly held by the Adjudication Panel for England).
4. In place of the old prescriptive regime, the 2011 Act imposed a general duty on local authorities to: “promote and maintain high standards of conduct by member and co-opted members of the authority” (s.27(1)). The legislation in its original form removed entirely the requirement for local councils to maintain a code of conduct, intending to make it a voluntary matter, but amendments were introduced in the House of Lords requiring relevant authorities to adopt a code dealing with the conduct that is expected of members and co-opted members of the authority when acting in that capacity (s.27(2)). The 2011 Act also introduced a new criminal offence of failing to declare or register a pecuniary interest (s.34) and made special provision in relation to allegations of predetermination or bias against local decision-makers (s.25).
5. These legislative changes (save in relation to predetermination) apply only to England (the provisions in relation to predetermination apply also to Wales): local government standards are devolved to Scotland, Wales and Northern Ireland where different regimes apply. In Wales the standards regime under the Local Government Act 2000 has been retained.

What has changed?

6. The new framework for England has been in place now for over two years; what impact has it had? In relation to the government’s stated aim of reducing the number of vexatious claims, 22% of respondents to a survey carried out by the Local Government Lawyer reported a fall in the number of vexatious complaints, but 15% argued that vexatious complaints had increased, and the majority said that the new measures had made no difference.²

Independent Persons

7. A major change, at least on its face, was the abolition of the obligation on local authorities to have standards committees chaired by an independent person. Under the 2011 Act relevant authorities are required to include in their procedures for determining allegations provision for the appointment of at least one “independent person” (s. 28(7)). The authority must seek, and take into account, the views of the independent person before it makes its decision on an allegation that it has decided to investigate, and it may seek his or her views in other circumstances. However, the role of the independent person is otherwise undefined.
8. The vague and general nature of these provisions was a point of concern for many before the 2011 Act came into force. In a Survey of 200 Monitoring Officers conducted in May 2012, 68% agreed or strongly agreed that the roles and responsibilities of the independent person had not been adequately explained.³ Concern was also expressed in relation to provisions that prevent co-opted, and former co-opted (within the last five years), members of an authority being an ‘independent person’ (s.28(8)): the effect of these provisions is to prohibit former independent members of standards committees from undertaking this role.
9. However, the Local Government Lawyer survey (cited above) suggests that - from the perspective of local authority lawyers at least - the role of the independent person has been one of the more successful aspects of the new regime. Of those who

²“Raising the Standards” Local Government Lawyer 17/12/13

³ Macaulay et al, Preparing for the new standards regime in English local government, July 2012

took part in the survey, half (50%) concluded that the role was working either very well or quite well. Just 7% believed it to be working either quite badly or very badly. The remainder (43%) said the role had made no difference.

10. However, issues were raised by respondents to the survey in relation to: finding the right person to undertake the role and under-utilisation of the independent person. The reported under-utilisation is of greatest concern as it suggests that, at least in some authorities, the independent person may not be involved adequately in standards procedures to ensure that there is effective independent input into decision making. The role of the independent person is important in ensuring not only that justice is done, but that it is seen to be done.

Sanctions - a regime without teeth?

11. As to sanctions, under the new provisions there is no power to disqualify or suspend a local councillor for breach of an authority's code of conduct (the new criminal offence of failure to disclose a pecuniary interest may lead to disqualification as discussed below). The 2011 Act makes no provision as to what sanctions may be imposed pursuant to new locally devised procedures. However, absent express statutory authority, a local authority could not lawfully grant itself the power to suspend democratically elected members.
12. In the recent case of *Heesom v The Public Services Ombudsman for Wales* [2014] EWHC 1504 (Admin) at [28], Hickinbottom J noted that:

It was uncontroversial before me that, there being no common law right for an authority to impose sanctions that interfere with local democracy, upon the abolition of these sanctions and outside the categories I have described above, a councillor in England can no longer be disqualified or suspended, sanctions being limited to (for example) a formal finding that he has breached the code, formal censure, press or other appropriate publicity, and removal by the authority from executive and committee roles (and then subject to statutory and constitutional requirements).

13. Concerns as to the absence of powers of sanction were raised when the legislation was passed and, over two years on, there is some evidence that those concerns were

well founded: 85% of the respondents to the Local Government Lawyer survey stated that the sanctions available under the Localism Act were too weak.

14. Moreover, there have been reports in the media raising concerns about authorities powerless to prevent seriously discredited councillors from continuing to serve and claim their allowances. For example, Mid-Devon District Council were quoted recently as blaming the Localism Act for their inability to remove a councillor from office where the councillor had been convicted of benefit fraud.

15. The annual report of the Committee on Standards in Public Life (CSPL) 2013/14 stated that:

“the effectiveness of the sanctions regime for non-adherence to Local Authority codes of conduct, which apart from criminal prosecution, provides only for censure or suspension from a particular committee or committees, remains an issue of concern. We are aware that there have been recent individual cases that illustrate this, in particular the lack of a sanction to suspend councillors who have seriously breached the code of conduct.”

In contrast to the recent public debate on parliamentary standards calling for greater sanctions, tightening of codes of conduct, and a greater independent element, local government is now largely self-regulated with no systematic approach to conduct issues and limited sanctions. There remains in our view a significant risk under these arrangements that inappropriate conduct by Local Authority members will not be dealt with effectively, eroding public confidence and trust in local government.”

Standards in Practice

16. In these circumstances, the CSPL has emphasised the practical steps that authorities can and should take to promote high standards before any allegations arise, highlighting the importance of the Local Government Association (LGA) in supporting strong leadership and the role of the LGA’s peer challenge process in offering sector led improvement in this field.

17. Another important area is training and induction: a majority of councils offer induction for new elected members which covers their code of conduct and/or the

“Nolan principles” of public life.⁴ The CSPL will continue to monitor provision of local authority induction programmes and the profile of standards, conduct and ethical behaviour within those programmes in 2015.

Registration of Interests

18. Where the 2011 Act has more teeth is in relation to the registration of interests. A member or co-opted member of a relevant authority must, within 28 days of taking office, notify the authority’s monitoring officer of any disclosable pecuniary interests (s.30). A member may not, in general, participate in any discussion or vote in which he has a pecuniary interest (s.31) (although dispensation to participate may be granted in certain limited circumstances (s.33)). Disclosable pecuniary interests are listed under schedule 2 of the Relevant Authorities (Disclosable Pecuniary Interests) Regulations 2012.

19. It is a criminal offence if a member or co-opted member, without reasonable excuse, fails to comply with these requirements (s.34). The offences are punishable by a fine of up to level 5 (currently £5,000) and an order disqualifying the person from being, or becoming, a member or co-opted member of a relevant local authority for up to five years.

Predetermination and Bias

20. The 2011 Act also addresses the circumstances in which a decision may be quashed where it is alleged that a councillor was biased. The relevant provision is section 25 which states:

(1) Subsection (2) applies if—

(a) as a result of an allegation of bias or predetermination, or otherwise, there is an issue about the validity of a decision of a relevant authority, and

(b) it is relevant to that issue whether the decision-maker, or any of the decision-makers, had or appeared to have had a closed mind (to any extent) when making the decision.

⁴ Committee for Standards in Public Life, Ethics in Practice: Promoting Ethical Conduct in Public Life, July 2014

(2) A decision-maker is not to be taken to have had, or to have appeared to have had, a closed mind when making the decision just because—

(a) the decision-maker had previously done anything that directly or indirectly indicated what view the decision-maker took, or would or might take, in relation to a matter, and

(b) the matter was relevant to the decision.

21. The intention of this provision, as described in the Explanatory Notes, is to clarify the common law on how the concept of ‘predetermination’ applies to councillors in England and Wales:

“The section makes it clear that if a councillor has given a view on an issue, this does not show that the councillor has a closed mind on that issue, so that that if a councillor has campaigned on an issue or made public statements about their approach to an item of council business, he or she will be able to participate in discussion of that issue in the council and to vote on it if it arises in an item of council business requiring a decision.”

22. This section has been cited by local authority defendants in a number of recent judicial review claims. In *I.M. Properties Development Ltd v Taylor Wimpey Ltd* [2014] EWHC 2440 (Admin), Patterson J confirmed that the provision is not limited to public statements and that it may cover the sending of an e-mail.

23. However, it is doubtful whether, in practice, section 25 adds anything to the existing common law. The courts have repeatedly held that the public expression of a preference by an elected member does not constitute predetermination (see, *R (Island Farm Development Ltd) v Bridgend County BC* [2006] EWHC Admin 2189; *R (Lewis) v Redcar & Cleveland BC* [2008] EWCA Civ 746); and the words “just because” in section 25 leave scope for a court to find that there was predetermination where a local authority decision maker has expressed a view on a matter and other factors are present to demonstrate a closed mind.

[2] THE CONDUCT OF MEETINGS

24. Where councils are the decision-maker, the usual practice is to have the important documents which need to be considered available to the Councillors, for example in a file or on a table in the council chamber or room where the decision is being considered and taken. However to what extent must officers ensure that the councillors have actually read the material which the Council is required to take into account? There have been a number of cases recently on the conduct of local authority meetings, and whether sufficient information was put before the meeting.

Materials available to meeting: *R (Hunt) v North Somerset Council*

25. The first is the Court of Appeal's decision in *R (Hunt) v North Somerset Council* [2014] LGR 1. The case concerned a challenge to an item in a local authority's budget, and the decision-making undertaken to reach that budgetary decision. The principal ground of challenge was the now familiar public sector equality duty challenge, under section 149 of the Equality Act 2010, ie alleging that the local authority has not paid due regard to equality issues when making its decision. The specific issue that arose here was the extent to which it must be proven that decision-makers have personally read information prepared by officers on equalities impacts.

26. The local authority had proposed to reduce its spending on youth services by around £365,000 for the financial year. It published the proposal on its website and in its own monthly magazine; and it held meetings with representatives of local youth clubs

27. The local authority also updated its Equality Impact Assessments (EIAs), one of which applied solely to the impact of budget reduction proposals in relation to services for children and young persons. However only summaries of the EIAs were put before council members in advance of the meeting at which a final decision was made to approve the cuts. Councillors were told how to access the full EIAs in an appendix to the document that they received, but they were not specifically directed to consider them.

28. Section 507B of the Education 1996 Act requires LAs to “take steps to ascertain the views of qualifying young persons in [its] area”. The appellant was a 22 year old with ADHD, learning difficulties and behavioural problems, and as such was a “qualifying young person”.
29. The Court of Appeal held that there was “no sufficient evidence” to conclude that the local authority had taken the required steps.
30. As to the equality duty, the Court of Appeal crucially rejected the argument (accepted at first instance) that it could be inferred that council members had considered the full EIAs. The Court held that “if council members are provided with a particular set of materials for the purpose of a meeting, they can, absent positive evidence to the contrary effect, be taken to have read all such materials and also to have read any additional materials to which they were expressly referred”.
31. However that was not the case here. The report to the Councillors who made the decision did not indicate “any need or requirement to read the EIAs themselves. Whilst they were told how to access the EIAs, they were not told, either expressly or impliedly, that they must or should consider them before the meeting”. The failure of the decision-makers to consider the full EIAs breached the PSED.
32. Despite this the Court of Appeal refused to grant any relief. The decision could not be quashed without also quashing the Council’s decision to approve the entire revenue budget for 2012/2013. It was too late to unwind what had already been done and to grant relief in these circumstances would be “detrimental to good administration”.
33. Comments: This decision affirms that general practice of having important documents which need to be considered available to the Councillors, though highlights the crucial importance of officers drawing attention in sufficiently clear terms to the need actually read that material.

34. It should also be noted this practice only gives rise to a presumption that the necessary materials have in fact been considered. Such a presumption can be rebutted. For example, a dissenting councillor may sign a witness statement claiming that throughout the decision-making meeting the file containing the necessary reading was not opened. Local authorities need to be wary of such problems, and take steps as far as they are able to ensure that Councillors actually read the materials prepared for them. This is particularly the case where such materials relate to a statutory mandatory consideration, such as the PSED.

Breach of publication requirements: *R (Joicey) v Northumberland CC*

35. *R (Joicey) v Northumberland CC* [2014] EWHC 3657 concerned the effect of breaches of requirements to publish information in advance of meetings at which decisions are made, and the effect of such breaches.

36. The case concerned a planning application for a wind turbine. Noise was a key issue in the application, and the local authority had commissioned a noise report.

37. Sections 100A-E of the Local Government Act 1972 provide for rights to access to local authority meetings. Section 100B provides for access to agendas and reports. Section 100D provides for access to background papers. All such documents must be “open to inspection by members of the public at the offices of the council” at least five clear days before the meeting.

38. In this case the noise report, a key background paper within section 100D of the 1972 Act, was not available for inspection for the required five clear days before the meeting. One of the people opposing the planning application became aware of the existence of a noise report. He requested to see a copy of the report before the meeting. He also attended the Council offices to inspect the files, but did not find any noise report there.

39. The day before the meeting the noise report was uploaded to the Council website and was also, separately, provided to the person who had requested it.

40. Mr Joicey attended the Council committee meeting and complained about the fact that it had appeared only the day before. He later brought judicial review proceedings, raising the non-availability of the noise report as one of his grounds.
41. The Court held that there had been a number of breaches of the public's right to information under the Local Government Act 1972. Further, the fact that the report was not available on the Council's website also constituted a breach of its undertakings in its Statement of Community Involvement, prepared pursuant to its obligations under section 18 of the Planning and Compulsory Purchase Act 2004.
42. The local authority urged the Court to decline relief, on the basis that the local authority said it was inevitable that the same result would have been reached regardless of this breach. The Court was unwilling to accept that argument. Relief would only be refused on such a basis if the Court decided that the result would inevitably have been the same, and the Court was unable to find that the decision would inevitably have been the same if the noise report had been made available earlier. The planning permission was quashed.

[3] TRANSPARENCY AND ACCOUNTABILITY

The 2014 Transparency Code

43. In October 2014 the DCLG issued the Local Government Transparency Code 2014 ("the Code"). It deals with the publication by local authorities of information relating to the discharge of their functions.
44. The Code was issued pursuant to section 2 of the Local Government, Planning and Land Act 1980.
45. The stated purposes of the Code are to "place more power into citizens' hands to increase democratic accountability and make it easier for local people to contribute to the local decision making process" (Code para 1).

46. The Code's starting position is stark: "all data held and managed by local authorities should be made available to local people unless there are specific sensitivities" (Code para 3).
47. Part 2 of the Code then lists types of information and publication cycles. All expenditure over £500 and procurement information, are to be published quarterly: Code paras 21-22.
48. Various types of information relating to local authority land holdings, parking, senior salaries and a variety of other organisational information, are to be published annually: see Part 2.2 of the Code. Details of waste contracts need only be published once: para 44.
49. Part 3 of the Code goes into more detail on the minimum data that should be published under each category. These provisions are expressed as "recommendations".

The Local Audit and Accountability Act 2014

50. It is also worth briefly mentioning the Local Audit and Accountability Act 2014. This abolishes the Audit Commission and establishes new arrangements for the audit and accountability of local public bodies, including certain health service bodies that were previously audited by the Audit Commission. The main changes brought about by the Act are -

- Abolition of the Audit Commission as mentioned, and transfer of its continuing functions to other bodies.
- A requirement for relevant authorities to keep accounting records and to prepare an annual statement of accounts, which must be audited.
- A requirement to appoint an external and independent auditor and to publish information about the appointment.
- A requirement that an audit must include a value for money element.

- The creation of a regulatory framework for local audit, by which the Financial Reporting Council and professional accountancy bodies regulate the provision of local audit services.
- The transfer of responsibility for setting the code of audit practice and supporting guidance to the National Audit Office.
- A power for the Secretary of State to commission an inspection of a best value authority
- A new regulation-making power to enable the Secretary of State to make regulations to allow the public to film, blog and tweet at the public meetings of local government bodies.

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