

**Minutes of the Standards Committee held on Friday, 4 November 2011 at 10.00 am
in Conference Room 1b, County Hall, Ruthin**

Present:

Mr. C.B. Halliday (Chair), Mrs. M.E. Medley and Mrs. P. White together with Councillors
G.A. Green, D.E. Jones and H. Ll. Jones
Observer: Councillor J. Cahill

Also Present:

Monitoring Officer and Head of Legal and Democratic Services (GW), Deputy Monitoring
Officer and Solicitor: Corporate Governance (LJ) and Committee Administrator (KEJ)

1 APOLOGIES

Mr. G.F. Roberts

2 DECLARATION OF INTERESTS

No declarations of personal or prejudicial interest had been raised.

3 URGENT MATTERS AS AGREED BY THE CHAIR

No urgent matters had been raised.

4 MINUTES OF THE LAST MEETING

The minutes of Standards Committee held on 23 September 2011 were submitted.

Accuracy –

The meeting commenced at 10.00 a.m. and not 9.30 a.m. as stated in the minutes.

Page No. 6 – Item No. 7: Self Regulatory Protocol – it was agreed to change the
word “it” to “if” to read “... *suggested that if there was doubt then the complaint...*”

Members briefly discussed the suggestion that, if the Self Regulatory Protocol was
extended to town and community councils, there may be an opportunity for all
Standards Committee members to be involved in the process. The Monitoring
Officer referred to the Ombudsman’s view, expressed at the recent Standards
Conference Wales, that the local protocol should be established at County Council
level prior to considering its extension to town and community councils in the
locality. It was agreed to discuss the issue further later on the agenda.

Page No. 8 – Item No. 10: Code of Conduct, second paragraph – Councillor G.A.
Green queried the accuracy of the minute during which members attendance and
their role at particular meetings had been discussed. He felt there was an inference
that he had not been fully aware of his own role which was not the case. It was

agreed to amend the wording to read "...Councillor D.E. Jones and Councillor G.A. Green sought clarification from the DMO regarding attendance and the role of the Standards Committee at particular meetings".

RESOLVED that, subject to the above, the minutes of the meeting held on 23 September 2011 be received and approved as a correct record.

5 ATTENDANCE AT MEETINGS

Members verbally reported upon their attendance at the following meetings –

Dyserth Community Council – Mrs. P. White informed the committee that she had attended a meeting of Dyserth Community Council in October which had been well conducted by the clerk and members. Good suggestions and decisions had been made for the benefit of the village. At the beginning of the meeting Mrs. White had been invited to introduce herself and at the close of the meeting she had been thanked for her attendance.

Llanarmon yn Ial Community Council – Councillor D.E. Jones informed the committee that he had attended a meeting of Llanarmon yn Ial Community Council last Wednesday which he had found to be well conducted and objective. It was noteworthy that the Chair had made every effort to ensure that all councillors had the opportunity to contribute whenever they wished. In response to a question from the Chair, Councillor Jones agreed that his presence may have had a positive influence on the way the meeting had been conducted. Councillor Jones added that he had declined the opportunity offered to him by the Chair to address the council.

The committee debated the appropriateness of addressing councils when attending meetings and there were some mixed views in that regard. The Monitoring Officer (MO) advised that if members observed matters at meetings which were subsequently reported to the Ombudsman they would be asked to provide evidence of their observation as part of any resulting investigation. If the matter was subsequently referred to the Standards Committee the observing member would be a witness and would not be able to consider the case. Standard Committee members had a role in providing advice and guidance and could use their own discretion when attending meetings to consider whether or not a breach of the code had occurred. Guidance could be provided where there were blatant breaches and reminders of the underlying principles of the code in less severe cases without passing judgment. If members declined an opportunity to comment there may be an inference that the meeting had been well conducted.

Members also discussed the lack of order at some meetings and the important role of training on the Code of Conduct incorporating the use of role play to reflect real life situations. The Chair also highlighted Denbighshire's Code of Conduct Booklet as an example of good practice. It was disappointing to note that such training could not be made mandatory and members felt that in signing up to abide by the Code of Conduct, councillors should also sign to confirm they had read and understood it. The fact that the Code was not straightforward and open to interpretation compounded the problem. The officers responded to members'

comments advising of past and future training provision on the Code. Particular reference was made to the training for County Councillors on 21 November 2011 and the forthcoming joint training event for Rhyl and Prestatyn Town Councils on their particular training needs. The presence of Standards Committee members at those training events was welcomed. The Code of Conduct had also featured in the preparations for the new Council and had been highlighted in the upcoming road shows, in literature produced promoting the elections and had been prioritised in the members development programme following May's elections. Councillor G.A. Green praised the MO's address at full Council when he had reminded members of the definition of personal and prejudicial interests for declaration in accordance with the Code of Conduct. Councillor Green felt it would be useful if a similar statement was prepared for use at town/community council meetings.

In response to a question from Councillor H.L.I. Jones the MO explained the process following a complaint being made to the Ombudsman during which consideration was given as to whether training on the Code of Conduct had been undertaken and what impact that training could have had. Councillor G.A. Green felt it would be useful for officers to publicise the fact that members training records may be examined in such cases.

RESOLVED that –

- (a) *the verbal reports from members attending Community Council meetings be received and noted, and*
- (b) *the fact that members' training record on the Code of Conduct may be examined during investigations by the Ombudsman be highlighted during future training events and upcoming road shows.*

6 STANDARDS CONFERENCE WALES 2011

The Monitoring Officer (MO) provided a verbal report regarding attendance by members at the Standards Conference Wales 2011 held on 5 October 2011 in Llandrindod Wells. A Panel of speakers had addressed the Conference in the morning session and the MO provided an overview of those speeches as follows –

- Peter Davies – Chair of the Adjudication Panel for Wales delivered a speech about the general work of the Panel and detailed the top categories of consistent breaches. He also raised concerns regarding the legalistic nature of proceedings before the Adjudication Panel and his view that proceedings should be inquisitorial rather than adversarial and time was increasingly being taken up over technical points because of the increased use of lawyers.
- Peter Tyndall – Ombudsman's Office Wales provided an overview of the work of his office and the increasing number of complaints received. He accepted that delays in investigations put pressure on members and was hoping to speed up the process to resolution. He raised concerns regarding the number of trivial complaints with no basis which used up valuable resources. Elements of the Code did require review and he intended to issue guidance in respect of those areas and look towards local resolution. He felt that local Self Regulatory Protocols should be confined to County Councils pending

determination of their effectiveness and he felt there would be a danger of overloading if the Protocol was extended to town and community councils. The Ombudsman was keen to agree a consistent approach across Wales and a national process for local resolution. He also raised concerns regarding the expense incurred at the Adjudication Panel and Standards Committees and felt there should be a national approach to members' indemnities and a spending limit on legal representation.

- Reg Kilpatrick – Welsh Government provided a national context and felt that the national statutory framework should continue to exist and that there should be a Code of Conduct and Ethical Framework. The Welsh Government expected the highest conduct and he expressed concern about the use of the framework for political advantage. As there were no plans to change the legislation governing the Code of Conduct he welcomed the use of local protocols with the agreement of the Ombudsman. He also expressed his concern regarding the level of indemnities provided and supported the approach to change that on a mutually agreed basis.
- Clarence Meredith – Powys County Council Monitoring Officer reported upon the positive input of the Standards Committee and provided an example of Powys' Standards Committee becoming actively involved in particular issues. In view of the number of Town and Community Councils in the Powys area he queried the need for a separate code to deal with them and received some mixed views in response.

Following the speeches discussion focused on aspects of the existing Members' Code of Conduct and issues were raised regarding costs and indemnities, vexatious and political complaints and the Standards Framework in England. The afternoon session focused on a Mock Hearing prepared by leading Local Government Lawyer Peter Keith-Lucas from Bevan Brittan and Mrs. P. White had been assigned a role. The role play provided a useful demonstration of how a hearing should be conducted from both sides and copies of the script had been made available for members.

Members thanked the MO for his comprehensive report on the Standards Conference. As vexatious, malicious and frivolous complaints and complaints due to political motivation constituted a clear breach of the Code of Conduct, Councillor G.A. Green queried whether, in obvious cases, action could be taken. The MO responded that the Ombudsman needed to strike a balance to ensure people felt confident in making a complaint in good faith if there was wrongdoing. If the Ombudsman concluded that a complaint had been vexatious or used as a political tool he could investigate further. Councillor Green felt that the issue of identifying such trends should be raised with the Ombudsman to ensure that persistent breaches were investigated. The MO advised that the Ombudsman would hope that in future such issues would be dealt with in house through the development of local protocols. A certain amount of political to and fro was accepted.

The Chair was pleased to report upon positive feedback from other delegates regarding the proactive work undertaken in Denbighshire to improve standards.

RESOLVED that the verbal report on the Standards Conference Wales 2011 be received and noted.

7 SELF REGULATORY PROTOCOL

A report by the Monitoring Officer (MO) was submitted (previously circulated) presenting the latest draft of the Self Regulatory Protocol (Appendix 1 to the report) and updating members on progress to date.

The Deputy Monitoring Officer (DMO) reminded members that the Protocol had been developed to address the committee's concerns regarding complaints between members which were not sufficiently serious to be referred to the Ombudsman, and that the Members Code of Conduct may on occasion be used as a political tool. The Protocol established a procedure for those complaints which may not reach the threshold to become a breach, to be dealt with under a local procedure; and that which justified a formal complaint to be referred to the Ombudsman. The intention was for the Protocol to sit alongside the Code of Conduct. A revised action plan detailing the consultation process prior to adoption of the Protocol had been set out in paragraph 2.4 of the report. Following consultation with the Leader and Group Leaders on the Protocol the following actions had been implemented –

- timescales had been incorporated into the process which reflected those within the corporate complaints procedure
- a role for the Chair of the Council within the process in the event that a Group Leader was subject to complaint
- consultation with all councillors in advance of any debate on the protocol and its procedure by full Council. The consultation process had started with feedback requested by 5 January 2012.

The Chair thanked the DMO for her hard work in developing the Protocol which he felt highlighted Denbighshire as a leading authority in improving standards. During the ensuing discussion members raised a number of issues regarding elements of the process which were discussed with the officers as follows –

- the absence of an appeal process was raised and it was agreed to include a right of appeal with an appropriate timescale to ensure no undue delay
- the important role assigned to Group Leaders was highlighted and it was felt there may be an inconsistent approach taken by Group Leaders with some likely to take the process more seriously than others. It was hoped that the involvement of the MO as a facilitator plus the involvement of a Standards Committee member would add weight to the process and drive resolution of the dispute. Group Leaders would also be provided with training
- a view was expressed that the political element should be removed from the process and that the role of the Group Leader be replaced by the Chairman to ensure an independent decision was reached. Members were reminded of the reasoning behind providing a role for the Group Leaders and allowing them to regulate the conduct of their group members and facilitate a consensual resolution in order to repair and improve relationships between other group members by going through the process. Support from this committee would

also be provided to Group Leaders and if no resolution was forthcoming the matter would be referred to the Standards Committee

- it was suggested that the MO adjudicate on complaints received in the first instance to ensure that complaints which did not merit investigation did not proceed. The MO felt that the first stage was to determine whether the complaint received was so serious that it should be referred to the Ombudsman or if appropriate to the Group Leaders. He did not envisage an initial investigation of the complaint as he felt that trivial or frivolous complaints would be exposed through the process and allow for consensual resolutions and create a situation whereby members took responsibility for their own conduct. Persistent breaches or low level allegations which could not be resolved could be jointly referred by Group Leaders to the Ombudsman
- some conduct issues had been identified at town/community council meetings and members highlighted the benefit of training for councillors chairing those meetings and keeping order during difficult meetings
- as problems had been identified at particular town/community council meetings it was suggested there would be merit in dividing the county into area groups to discuss issues and ensure a Standards Champion at every town/community council. Members were reminded of the Ombudsman's view to pilot the local procedures at county level before extending the protocol to town/community level.

Having aired their concerns regarding elements of the process members reaffirmed their support, in principle, for the Self Regulatory Protocol with the inclusion of an appeals mechanism with timescales within the process.

RESOLVED that –

- (a) *subject to the inclusion of an appeals mechanism with appropriate timescales within the process, the draft Self Regulatory Protocol (as detailed in Appendix 1 to the report) be supported in principle, and*
- (b) *following consultation with all councillors a further progress report on the draft Self Regulatory Protocol be submitted to the Standards Committee on 27 January 2012.*

8 NORTH WALES STANDARDS COMMITTEE MEETING

The Deputy Monitoring Officer (DMO) provided a verbal report upon the recent attendance at the North Wales Standards Committee Forum held in Bodlondeb, Conwy on 1 November 2011. A copy of the agenda had been previously circulated with the papers for the meeting.

In providing an overview of the meeting the DMO advised that –

- despite poor attendance the consensus was that the Forum should continue
- Mr. K.P. Sibbons, Flintshire County Council had been appointed Vice Chair
- Terms of reference had been discussed and would be revisited in the new year with joint training and sharing good practice highlighted as main issues – members' views were welcomed on the terms of reference in order to feedback to the next meeting

- Register of Gifts and Hospitality – discussion took place on the level of value set by local authorities with a view to setting a standard amount across Wales
- Standards Conference Wales – feedback was received on the conference
- Response from Ombudsman regarding the North Wales Standards Committees Forum – the Forum was keen to welcome the Ombudsman at a future meeting in the Spring to discuss their work and protocols
- Any other business – discussion about to what extent Standards Committees were out within the community and good practice was shared.

During consideration of the minutes of the Forum meeting held on 10 June 2011, Councillor G.A. Green noted that Cardiff City Council had apparently altered their Code of Conduct to ensure that it was compulsory for all County Councillors to attend Code of Conduct Training and queried whether training could be enforced in Denbighshire. The DMO referred to the ongoing review of the Council's Constitution and indicated that she would be happy to receive feedback from members in that regard. In response to Councillor Green's question regarding WLGA funding for training sessions the Monitoring Officer advised that it was unlikely that funding would be made available to other authorities for that purpose.

RESOLVED that verbal report from the Deputy Monitoring Officer on the North Wales Standards Committee held on 1 November 2011 be received and noted.

EXCLUSION OF PRESS AND PUBLIC

RESOLVED that under Section 100A of the Local Government Act 1972, the Press and Public be excluded from the meeting for the following item of business on the grounds that it would involve the likely disclosure of exempt information as defined in Paragraphs 12 and 13 of Part 4 of Schedule 12A of the Act.

9 CODE OF CONDUCT - PART 3 LOCAL GOVERNMENT ACT 2000

A confidential report by the Monitoring Officer was submitted (previously circulated) providing an overview of complaints against members lodged with the Public Services Ombudsman for Wales since 1 January 2011.

The Deputy Monitoring Officer (DMO) presented the report to members which detailed the authority subject to complaint; the alleged complaint; the outcome, and the source of complaint for a number of completed and ongoing cases. Reference was also made to the delay in the Ombudsman's office responding to complaints which had a detrimental affect on the complainant and individual subject of the complaint. Councillor H.LI. Jones asked that the date of the complaint be recorded in order for members to be aware of the timescales involved. Following on from the training need identified by the committee at the last meeting, the DMO was pleased to report that a joint training session would be held shortly for the two Town Councils concerned following which road shows would be rolled out to other communities.

RESOLVED that –

- (a) the report be received and noted, and

(b) the date of the complaint be recorded in future reports.

The meeting concluded at 12.00 noon.

Report To: Standards Committee

Date of Meeting: 27th January 2012

Report Author: Monitoring Officer

Title: Section 25 Localism Act 2011 - Predetermination

1 PURPOSE OF REPORT

- 1.1 To inform Members of the provisions of Section 25 of the Localism Act 2011 which seeks to clarify the law relating to predetermination, and to seek Members' comments on a draft briefing note produced by ACSeS Wales Branch for dissemination to Councillors

2 BACKGROUND

- 2.1 The government has sought to clarify the rules on predetermination in order that Councillors can express their opinions on issues of local importance without fear of legal challenge. Section 25 of the Localism Act 2011 came into force on 15th January 2012. The intention of the government in passing this section is to make it clear that it is proper for Councillors to play an active role in local discussions and that they should not be liable to legal challenge as a result.
- 2.2 Section 25 of the Localism Act 2012 provides that a decision maker is not to be taken to have had, or appeared to have had, a closed mind when making a decision just because;
- (a) the decision maker has previously done anything that directly or indirectly indicated the view the decision maker took, or would or might take, in relation to a matter and
 - (b) the matter was relevant to the decision.
- 2.3 Prior to the introduction of the Localism Act 2011 the case law relating to bias and predetermination had moved the common law position on a number of occasions over the last decade with the pendulum swinging from one side to the other. The concept of predetermination derived from ancient common law principles of natural justice. As the case law developed, a distinction was drawn between bias (having a personal interest in the decision) and "predetermination" (having a closed mind). The courts also developed the concept of "apparent" bias and predetermination. A number of judicial decisions indicated that there was an intolerance of any evidence of bias or predetermination on the part of the decision maker.

- 2.4 More recent cases have drawn a distinction between predetermination which is unlawful and predisposition which is not. These cases have recognised that Councillors will legitimately have firm views about issues which they have to decide, and will have expressed those views, and that this should be allowed. Despite these cases there was still a lack of confidence and clarity in what the legal position actually was.
- 2.5 Members of ACSeS Wales Branch have developed a draft briefing note to be sent to Members to explain the effect of Section 25 and the new legal position in respect of predetermination. Members' views are sought on the draft briefing note which is attached to this report marked Appendix 1.

3 RECOMMENDATION

- 3.1 That Members note the introduction of Section 25 of the Localism Act 2012 and consider the merits of the draft briefing note attached as Appendix 1 to this report.

Members Briefing

Section 25 of the Localism Act 2011 came into force January 15 January 2012. The intention of the government in passing this section is to “make it clear that it is proper for Councillors to play an active role in local discussions and that they should not be liable to legal challenge as a result”.

This note is intended to provide a broad over view of the provision and its implications. Specific legal advice will be needed on the implications of Section 25 in particular circumstances.

What Does Section 25 say?

S 25(2) sets out the following:-

A decision maker is not to be taken to have had, or appeared to have had, a closed mind when making a decision just because:-

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

It applies to actions (generally court proceedings, in particular Judicial review) which challenge the validity of a Council’s decision on the basis of bias or pre-determination or otherwise.

Where such a case relies to any extent on proving that the decision maker had a closed mind, the person bringing the case cannot rely on the anything previously done or said which related to the decision as evidence of a closed mind on the part of a decision maker or makers. This will include statements at public meetings, comments in the press or participation in Community Council meetings by County Council members.

Clearly the Section will make a challenge which relies on establishing bias or pre-determination by reference to prior comment or statements very difficult to prove.

Where does this leave Pre-Determination and Bias?

Public Law Requirements

In reaching a decision you will be subject to wider legal requirements than bias and pre-determination. You are required to take into account all relevant factors and disregard that which is irrelevant.

These issues will vary from decision to decision but, for example, a clearly stated intention to come to a particular decision irrespective of key issues might still form the basis for a challenge of the decision on grounds that relevant considerations were ignored eg a statement such as 'I will vote against this irrespective of the comments made in the public consultation' would give rise to a challenge based on improper consultation where the consultees can argue that their views were not taken into account because of a statement by a member that he was not interested in what they said.

You will still need to be aware of these wider legal requirements and especially so where you are a key decision maker such as an Executive member.

Members Code of Conduct

Paragraph 8 of the Members Model Code of Conduct requires Members to reach decisions on the merits of the circumstances involved and in the public interest, having regard to any advice provided by officers. The Guidance from the Ombudsman identifies pre-determination and bias as relevant evidence relating to this provision and compliance. However, Section 25, because it is only relevant to situations where the validity of a decision is challenged, does not affect this requirement and you will still have to ensure that you take decisions in a way which complies with this paragraph.

Quasi Judicial Hearings

These are situations where you sit on a Committee, Sub Committee or Panel to conduct a hearing and have to independently weigh up evidence and arguments and come to a decision. They include; Standards Committee hearings, Licensing Applications, Employment Panels or appeals, Demoted Tenancy Panels etc.

These decisions are subject to wider legal constraints or consequences if they do not comply with an overall fairness requirement. This can be because of the common law right to a fair hearing or where relevant the requirements of the Human Rights Act 1998 (Article 6) which imposes a similar requirement.

It will also arise where in situations such as Disciplinary Panels the fairness of the process may be relevant to an Employment Tribunal's decision on a finding of Unfair Dismissal.

In most cases appeals or challenges to external tribunals will not challenge the validity of the decision in question but rather seek redress or re-determination of the issue. The legal risk to the Council of failing to hold a fair hearing, reflected in awards of compensation, damages or costs also remains.

It is unlikely in these cases that Section 25 would protect the Council where procedural fairness is an issue for a tribunal. Members participating in such decisions will be advised that they must not create an impression of bias or pre-determination for these reasons.

How does this affect Members

The primary concern of Council Legal Officers in advising on bias or pre-determination or similar grounds was the management of the risk of legal challenge to the Council's decisions.

Although there are issues of interpretation around the Section, generally it means that the risk of a successful legal challenge to a decision on this basis has been reduced. However there can be no blanket assurance that whatever members say in advance of a decision will not matter at all and, as ever, much will depend on how the courts view any challenges based on a prior expression of views.