

**TO:** Standards Committee  
**DATE:** 20<sup>th</sup> November 2008  
**SUBJECT:** Monitoring Officer Annual Report  
**BY:** Corporate Services Director  
**Classification:** Unrestricted

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**Summary:** This is an update of my annual report of activities relating to my role as Monitoring Officer. This is considered to be good practice by the Audit Commission.

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**Implications:** There are potential resource implications arising from the change in the standards regime in April 2008. However, it is difficult to estimate the demands that will be placed on the Council, as it is not possible to anticipate the number of complaints referred. Based on numbers to date in 2008 and previous years trends I would expect to be able to accommodate this workload within existing resources. I will keep the situation under close review. This will depend upon the number of cases that are referred to investigation following the exercise of the local filter. Estimates of costs of single investigations vary between £4000 and £ 8000 dependent upon the complexities of the issues raised

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**Decision Required:** To review aspects of the Monitoring Officer role carried out in 2007 and to consider areas for future attention

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### **Introduction and Background**

1. This is my third report, as Monitoring Officer for Swale Borough Council. The purpose of the report is not only to provide an overview of Monitoring work in the past year, but also to provide an opportunity to review and learn from experience. This report therefore sets out the Monitoring Officer's statutory responsibilities and summaries how several of these duties have been discharged since my last report and seeks to draw Members' attention to some of the more significant issues that may require attention.

### **THE ROLE OF THE MONITORING OFFICER**

2. The role of the Monitoring Officer derives from the Local Government and Housing Act 1989. The Act requires local authorities to appoint a Monitoring Officer. The Monitoring Officer has a broad role in ensuring the lawfulness and fairness of Council decision-making, ensuring compliance with Codes and Protocols, promoting good governance and high ethical standards. A Summary of the Monitoring Officer's functions is as follows:

| <b>Description</b>  | <b>Source</b>                         |
|---|---------------------------------------|
| Report on contraventions or likely contraventions of any enactment or rule of law                 | Local Government and Housing Act 1989 |
| Report on any maladministration or injustice where the Ombudsman has carried out an investigation | Local Government and Housing Act 1989 |

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|--|--|
| Appoint a Deputy.  | Local Government and Housing Act 1989                                      |
| Establish and maintain the Register of Members' interests, and the register of gifts and Hospitality.                                | Local Government Act 2000  |
| Report on sufficiency of resources   | Local Government and Housing Act 1989                                      |
| Maintain the Constitution  | The Constitution   |
| Support the Standards Committee.<br><br>Promote and maintain high standards of conduct.  | Local Government Act 2000  |
| Receive reports from Ethical Standards Officers and Case Tribunals.  | Local Government Act 2000  |
| Consulting with, supporting and advising the Head of Paid Service and Chief Finance Officer on issues of lawfulness and probity.     | The Constitution   |
| Receive referrals from Ethical Standards officers for local Investigations   | Local Authorities (Code of Conduct) (Local Determination) Regulations 2003 |
| Advice on whether executive decisions are within the budget and policy framework   | The Constitution   |
| Provide advice on vices issues, maladministration, financial impropriety, probity Budget and Policy Framework issues to all members. | The Constitution   |
| Legal Advisor to the Standards Committee when carrying out a local Determination Hearing   | Local Authorities (Code of Conduct) (Local Determination) Regulations 2003 |
| Issuing Dispensations to Members regarding prejudicial interests   | The Standards Committee  |

### **Constitutional Review and Revision**

3. The Constitution sets out how the Council operates and how decisions are made. It sets out the procedures which are followed to ensure that these decisions are efficient, transparent and that those who make the decisions are accountable to local people. The Monitoring Officer is the guardian of the Council's Constitution and is responsible for ensuring that the Constitution operates efficiently, is properly maintained and is adhered to.

4. A review of the Constitution has been undertaken during 2008 and will be reported to the Executive in November. Work was initially progressed through an informal member Working Group and has resulted in a comprehensive review of decision-making processes, delegations and financial standing orders. As a result, the Constitution will reflect greater flexibility for individual Executive member decision making and greater concentration on the role of the Executive as the strategic decision making body on key policies and strategies. The

second major area of update was the Scheme of Approved Delegations. It is important for the Council that this is current and up-to-date, as there can be occasions when the Council may be called on to evidence that officers were in fact empowered to act on a range of regulatory and operational matters. The third area was the arrangements for local area based forums and this will also be considered at the November executive with the aim being to bring together the Area Forums operated by Swale Borough Council and the Local Board run by the County Council into neighbourhood forums representing both bodies. It will also include parish council representation.

## **LAWFULNESS AND MALADMINISTRATION**

5 The Monitoring Officer is the Council's lead adviser on issues of lawfulness and the Council's powers and in consultation with the Head of Paid Service and Chief Financial Officer advises on compliance with the Budget and Policy Framework. Part of this role involves monitoring reports, agendas and decisions to ensure compliance with legislation and the Constitution. At the heart of this work is the agenda of and reports to the Executive. Executive reports and decisions are made publicly available for Councillors either electronically or by way of a paper version. Executive decisions can also be viewed by Members of the public through the Council's website: [www.swale.gov.uk/dso](http://www.swale.gov.uk/dso)

6. The Executive has met on twelve occasions since November 2007. In each case the Management Team had reviewed the agenda and associated draft reports. This clearance process is an important part of ensuring corporate working in an effective Council and provides a vital opportunity to discuss aspects of reports or decisions that require 'buy-in' from, or have implications across, services. All Heads of Service receive draft agendas and Finance, HR and Legal officers have the opportunity to contribute to reports under 'Implications'. Management Team undertook a review of this process recently and has introduced revised arrangements. Management Team now formally review the Forward Plan as a standing item on its agenda and seek advice from the Head of Organisational Development, Head of Finance and the Head of Legal as appropriate. This enables Management Team to review early in the process reports to be presented to the Executive. It is anticipated that this will enhance reporting through earlier input and discussion, including value for money considerations and ensure that a clear set of recommendations are presented to the Executive for consideration.

7. The report template asks officers to consider the following implications: -

- Human resources
- Financial
- Legal
- Crime and disorder (section 17)
- Equalities and Diversity
- Sustainability
- Risk

8. Ultimately, if the Monitoring Officer considers that any proposal, decision or omission would give rise to unlawfulness or if any decision or omission has given rise to maladministration a report must be submitted to the Full Council or, where appropriate, the Executive after first consulting with the Head of Paid Service and Chief Financial Officer. Any proposal or decision that is subject to such a report cannot be implemented until the report has been considered.

9. The sound governance arrangements operated by the Council ensure that the power to report potentially unlawful decision-making is rarely, if ever, used. The Monitoring Officer has not had to issue such a report.

## **GOOD GOVERNANCE AND CODE OF CONDUCT**

10. The Monitoring Officer has a pro-active role in ensuring good practice, good procedures and good governance. During the year I have sought to advise a number of Members who have approached me, and a few who have not. Where I have seen evidence which tests the boundary of good governance I have sought to engage both the individual Member and Group Leaders to ensure that there is some discussion and shared ownership of where the correct threshold of acceptable or appropriate conduct or good governance lies. This dialogue will continue and I remain grateful for the support of Group Leaders in discussions on these issues. I am also pleased to record that the occasions where I have sought to this have been very few.

11. There have been a number of issues relating to planning which is not surprising given the quasi-judicial nature of the work. Matters raised tend to relate to declaration of interests. In particular, prejudicial interests and the impact this has on the member's right to speak (they are able to speak in the same way as a member of the public but must leave the meeting room having done so). The Head of Development Services is currently finalising a proposal for external support to consider a review of planning committee procedures and revised, updated training for planning members. I have also given individual advice to members on predisposition, predetermination or bias and the Code. I gave advice on declaring interests where members represent the council on an outside body where they have been appointed by the Council (they have a personal interest which must be registered only if they speak on the matter). In June 2008 I issued updated advice to members on Licensing and the rights of members to speak (they can only do so where asked by an "interested party" to do so).

12. I have provided informal advice to parish councillors on attendance (qualifying periods), recording decisions, potential conflicts of interests, nature and extent of personal interests.

13. Good governance involves providing procedure notes, guidance, developing and implementing protocols and providing briefings and enabling effective support to Councillors in their different roles including Member training. The purpose of these briefing notes is to provide readily accessible reference materials for members. In addition all briefing notes received from the Standards Board are sent to all members.

14. During June 2008 training was provide to all members on the new Code of Conduct and the Constitution covering the following topics:

- Ethics and Probity for Local Government Councillors
- Introduction to the Standards Machinery
- Personal and Prejudicial Interests
- Gifts and Hospitality
- Top Tips

15. An induction session was arranged for new and re-elected members in May 2008. This welcomed members to the Council, introduced Management Team and the different areas covered by the Council, as well as emphasising where to go for advice and the dates of subsequent training sessions.

16. The main tasks for the year have been:

- Embedding the new Code of Conduct. which was introduced last year Swale Borough Council agreed to operate under the Model Code of Conduct without amendment.
- Introducing the local filter, where all complaints are considered by the sub-Committees of the Standards Committee. There were a number of implications arising from this change:
  - Processes needed to be amended to ensure that all allegations are referred through the Monitoring Officer
  - Procedures to review the allegations and to suggest an appropriate course of action had to be put in place
  - A Referrals Sub Committee was established to enable quick decision making on complaints
  - There was also a need for an Appeals Sub Committee to enable a complainant to appeal against any decision of the Referrals Sub Committee not to investigate a particular complaint.
  - A Hearings Sub Committee was required to consider cases passed for investigation.
- Promoting and encouraging the work of the Standards Committee in joined up working and better governance arrangements. Standards and governance need to be at the heart of service delivery.

#### **REPORTS FROM THE LOCAL GOVERNMENT OMBUDSMAN**

17. The annual letter for the year ended 31<sup>st</sup> March 2007 from the Local Government Ombudsman sets out his reflections on the complaints received against this authority and dealt with by his office over the last year. These were as follows:

18. He received 25 complaints in 2006/07, a slight increase on the previous year (17), The analysis is as follows

| <b>Complaint by service area</b> | <b>2007-2008</b> | <b>2006-2007</b> |
|----------------------------------|------------------|------------------|
| Public Finance                   | 7                | 6                |
| Planning and Building Control    | 5                | 7                |
| Benefits                         | 5                | 5                |
| Housing                          | 2                | 1                |
| Other                            | 5                | 2                |
| Transport/ Highways              | 1                | 0                |
| <b>TOTAL</b>                     | <b>25</b>        | <b>17</b>        |

19. The Ombudsman made 22 decisions during the year – with a finding of no maladministration in 5, 1 was closed using discretion without further action from the Council and 3 were outside his jurisdiction. When he completes an investigation he must issue a report. There are a significant proportion of investigations that do not reach this stage. This

is because these are settled during the course of the investigation. These are known as 'local settlements'. No reports were issued against the council last year and five complaints were settled, two of which related to planning applications, one to a housing benefit case and two in respect of council tax. Of the 22 cases 8 were considered to be premature complaints. The Ombudsman does not normally consider a complaint unless the council has had an opportunity to deal with that complaint itself.

20. The Council has an established complaints procedure with three stages. The first stage is based in the service department about which the complaint is made. A complaint at the second stage is made to the Chief executive's office, acting independently of the service complained of. A complaint at the third stage may be made to the "Swale Arbitrator". In the year under consideration the previous Swale Arbitrator retired and his successor is now in post. During the past year the Ombudsman referred eight 'premature complaints' for consideration to allow the council the fullest opportunity to deal with them through our own procedures.

21. Last year the Ombudsman expressed disappointment that the average time for responding to complaints lodged with him had been skewed by the response to two planning complainants which meant the average response time was 48 days. This year he noted that the response time is 23.6 days which is comfortably within the target average of 28 days. We are now doing all we can to reduce the time taken to respond to first enquiries.

## **THE ETHICAL FRAMEWORK AND SUPPORT TO THE STANDARDS COMMITTEE**

22. As lead Officer for the Standards Committee and the Ethical Framework the Monitoring Officer has a key role in facilitating, promoting the Council's Ethical Framework and in promoting and maintaining high standards of conduct within the authority. As well as policy development and implementation this also involves advising Members and Officers including those within the Parish/Town Councils on propriety issues, advising the Standards Committee on applications for dispensations and advising the Standards Committee when they determine an allegation of misconduct on the part of a Member including a Member from a Parish/Town Council. The maintenance of the Registers of Interests for the District, as well as the Parish/Town Councils, is also the responsibility of the Monitoring Officer, as is the Register of Hospitality.

**23. In the period to end October 2007, the Standards Committee met twice to consider the following:-**

- **The future Role of the Standards Committee following the move to more local determination of complaints**
- **To undertake a training exercise on local assessment, which confirmed, to some extent what the work of the pilot authorities had shown, that local assessment of initial assessment tends to set a lower level for referral for investigation. It will be necessary to see that there is consistency of approach nationally but this will prove challenging in a more local regime**
- **The detailed procedures required to establish the new regime including:**
  - Notification to the Member
  - Local Resolution of Complaints
  - Filtering out Irrelevant Complaints
  - Assessment Criteria
  - Pre-Investigation
  - Access to meetings and decision making
  - Public information about complaints received

- Notification following initial assessment
- Review of Initial Assessment
- Decision whether to conduct a local hearing
- Publicity for the new arrangements
- Confidentiality
- Member and officer conflicts of interest

24. It should be noted that the Standards Board for England have previously commented that they do not generally have jurisdiction over the rules of conduct of local authority meetings. They also commented that a robust debate is part and parcel of the 'rough and tumble of politics'. The Standards Board for England will only refer for investigation the most serious cases. Allegations of simple name-calling or mildly rude and inappropriate behaviour is not considered serious enough to meet this threshold.

25. The Council now has in place the necessary procedures and arrangements to receive and investigate allegations of breaches of the Code of Conduct

26. As yet no complaint under the new revised working arrangements has been received. During the period November 2007 to 8<sup>th</sup> May 2008 I was made aware of 4 cases relating to Swale that were referred to the Standards Board for England. Three did not require investigation. It is interesting to note that the points at issue were: improper use of position and failure to declare a personal interest, misuse of position and failure to declare a financial interest and "launching a scathing attack" on another councillor.

27. One case was referred for local determination under the old regime in relation to Lynsted with Kingsdown Parish Council. It was alleged that three Councillors each failed to declare an interest at a meeting of the Parish Council on 23 May 2007. The Agenda Item in question was to consider an offer from a parishioner to make land available to the Council for affordable housing or to seek suggestions from the Council for other possible uses for the land, as the parishioner wished the land to be of benefit to the community. The complainant alleged that the Councillors ought each to have declared an interest because they each have 'property adjacent to the proposed site'.

28. It was concluded that

1. There was a failure to comply with the Code of Conduct in the manner set out in the Investigating Officer's report.
2. It would not be appropriate to impose a sanction against the members concerned

## **MAINTAINING REGISTER OF MEMBER INTERESTS**

29. The Monitoring Officer is responsible for establishing and maintaining a Register of Members interests for the District, Parish/Town Councils. The District Parish/Town Council Register of Members interests are held by the Personal Assistant to the Director of Corporate Services, Governance and Scrutiny. They are updated periodically as Members advise, and through the Parish/Town Clerk, as well as on an annual basis.

## **CODE OF CONDUCT FOR EMPLOYEES**

30. The Constitution now includes a Code for Employees. We had been awaiting the development of a National Code and there is a separate item on the agenda to consider the latest consultation from the Department for Communities and Local Government.

31. It was originally anticipated that there would be a need to review the Code for Employees. We undertook research amongst the high performing authorities to test whether our Code was 'fit for purpose'. I found that the majority had a Code similar to the Council's

and were not considering revising theirs. I have decided to hold this matter in abeyance for the time being depending on the outcome from the consultation (please see separate report on the agenda). **This matter should be kept under review.**

### **OVERSEEING REGISTRATION OF OFFICER INTERESTS**

32. The Monitoring Officer writes to Councillors, Officers of the Management Team or on certain salary grades, or appointed by statute, each year and asks them to complete and sign an annual declaration on related party transactions.

33. This captures transactions between the individual; members of the individual's close family or the individual's household; or partnerships, companies, trusts or any entities (e.g. charities) in which the individual or their close family of same household has a controlling interest.

34. This declaration is asked for in accordance with FRS9 (Related Party Transactions), as contained within the Code of Practice on Local Authority Accounting in Great Britain 1998.

### **WHISTLE BLOWING (Protected Disclosure Policy)**

35. The whistle blowing policy of the Council is publicised throughout the organisation on the internal Intranet.

36. As a first step, concerns should be raised with the employee's immediate manager or their superior. This depends however, on the seriousness and sensitivity of the issues involved and who is suspected of the malpractice. If this is not practical or appropriate then they can be raised with the Monitoring Officer or the Head of Audit.

37. Where appropriate, the matters raised maybe investigated internally, be referred to the external auditor or form the subject of an independent inquiry.

38. The Monitoring Officer has overall responsibility for the maintenance and operation of this policy.

### **CORPORATE COMPLIANCE WITH LEGISLATION**

39. Legal updates, including details of new legislation, are circulated to relevant officers within the organisation. Those officers then circulate legal updates including new legislation to Members when they consider this to be appropriate.

40. All reports have a compulsory heading in which the author has to consider legal implications and if there are likely to be legal implications the author has to seek comments from the Head of Legal. The same procedure follows for any financial implications (the Head of Finance) and human resources (The Head of Organisational Development).

### **PROTOCOL ON COUNCILLOR/OFFICER RELATIONS**

41. The Protocol on Councillor/Officer Relations is contained within the Constitution. This sets out what is expected of Officers and what is expected of Members.

42. When the relationship between Members and Officers breaks down, or becomes strained, attempts should be made to resolve matters informally through conciliation by an appropriate senior manager or Members. Officers will have recourse to the Council's Grievance Procedure or to the Council's Monitoring Officer, as appropriate to the circumstances (as set out in the Constitution).

43. In the last period there have been no complaints of this type to the Monitoring Officer



## SUPPORT TO COUNCIL, EXECUTIVE, SCRUTINY AND COMMITTEE MEETINGS

44. The distribution and publication of committee reports, agendas and decisions is central to good governance. This includes:

- Distributing and publishing all agendas within five clear working days of the meeting taking place and ensuring that all agendas are compliant with the access to information rules and exempt information is marked up accordingly.
- Advertising public meetings at least five clear days before the meeting date.
- Ensuring that papers are available to the public either through the website or from district offices and libraries.
- Publishing minutes as soon as possible after the meeting, in particular Executive Minutes are published within 3 clear days of the meeting.
- Ensuring that petitions are handled in accordance with the Council's constitution,
- Ensuring that meetings are accessible to the public.

45. One of the explicit aims of the Local Government Act 2000 was to streamline the decision making process to allow Council's to focus on service delivery.

46. From 1<sup>st</sup> December 2007 to 31st October 2008 the following meetings were serviced:

| Name of Meeting                                     | No. of times met |               |
|---|------------------|---------------|
|   | Ordinary         | Extraordinary |
| Council   | 5                | 2             |
| Executive   | 10               | 1             |
| Planning  | 13               |               |
| Faversham & Swale East Area Forum                   | 3                |               |
| Sheppey Area Forum                                  | 3                | 1             |
| Sittingbourne & Swale West Area Forum               | 2                |               |
| Rural Forum   | 4                |               |
| Halfway Unparished Area Grant Committee             | 4                |               |
| Sheerness Unparished Area Grant Committee           | 4                |               |
| Sitt., MR & Kemsley Unparished Area Grant Committee | 2                |               |
| Audit   | 4                |               |
| Licensing   | 0                |               |
| Licensing Sub-Committee                             | 6                |               |
| Hackney Carriages & Private Hire Vehicles Committee | 2                |               |
| Performance Scrutiny                                | 4                |               |
| Community Scrutiny                                  | 7                | 1             |
| Regeneration Scrutiny                               | 4                | 1             |
| Environment Scrutiny                                | 4                |               |
| Swale Joint Transportation Board                    | 4                |               |
| LSP meetings  | 5                |               |
| Local Development Framework Panel                   | 5                |               |
| Planning Working Group                              | 13               |               |
| Standards Committee                                 | 2                |               |
| Standards Hearing Sub-Committee                     | 1                |               |

47. This represents 117 meetings in total. The volume of meetings represents a substantial commitment of both Councillors' and officers' time and resources. It is of great

importance that meetings constitute an effective use of time and resources; that they add value to corporate effectiveness and help in meeting the aims and objectives of the Council. Meetings are generally arranged to start at 7pm, as from research this is the preferred time for members. In addition, a timetable of meetings is set each May for the ensuing year, to ensure that members have as much notice as possible.

## **THE FORWARD PLAN**

48. The coordination and maintenance of the Forward Plan is central to meeting the requirements of good governance as it enhances open and transparent decision-making.

49. The Forward Plan sets out the key decisions that the Executive will take, on a rolling four-month programme. It is updated and published each month and its use has been extended to include 'non' key decisions also. During the year procedures were updated to ensure that the Forward Plan became the key agenda planning document helping Management Team to keep a strategic view of the decision making process. In addition, the Scrutiny Panels also use the Forward Plan to identify whether there are any areas that they wish to review, rather than wait to 'call in' a decision.

## **MEMBER TRAINING AND DEVELOPMENT**

50. The Monitoring Officer is responsible to the Standards Committee for the provision of training to Councillors within the District.

51. Democratic Services have been developing the training and development opportunities for members, and the Council has signed up the principles of the South East Employers Member Development Charter.

52. A Member Development Working Group has been established, which includes representatives from the parties on the Council, which has proved invaluable in designing a programme geared to meet members' needs.

53. Planning was undertaken for the new intake of Members who joined the Council from May 2008 and at subsequent by elections. This included the preparation of a prospective candidates guide, which included information about what being a councillor involves, and how to apply to be a councillor.

## **INDEPENDENT MEMBERS ON THE STANDARDS COMMITTEE**

54. There has been no change in the independent membership of the Standards Committee; Independent Member Stephen Rogers was elected Chairman for the municipal year 2008 –2009.

## **ATTENDANCE AT STANDARDS BOARD ASSEMBLY**

55. I attended the Sixth Annual Assembly of Standards Committees arranged by the Standards Board for England on 13-14<sup>th</sup> October at the International Convention Centre, Birmingham. The Conference was titled 'delivering the goods –local standards in action'. The emphasis was on providing a perspective on how Standards Committees have been implementing the devolved framework. Members will recollect that from 1<sup>st</sup> April 2008 complaints against councillors have been sent to the local authority. It is for them to decide whether there is a breach of the Code, if there is a breach whether it should be determined locally or whether the alleged breach is so serious that it should be referred to the Standards Board for England for decision.

56. Sadiq Khan MP, the responsible Minister at Communities and Local Government said that the devolution had been a success. He made it clear that the public should have trust in their elected representatives and talked of the probity, accountability and objectivity

expected of members. He also commented on the success of the revised Code of Conduct, which is clearer, simpler and more proportionate. He said it has bedded in well but that it is now time to make revisions. Consultation has now begun, **please see separate item on the agenda.**

57. On of the recurring themes of the various speakers was the issue of alternative action. This is where, rather than take the matter through a formal referral and investigation, the initial assessment Sub Committee asks that alternative action such as conciliation, mediation or training is undertaken to resolve the issue. Whilst it is an important tool it needs to be used wisely as it precludes any further investigation of the complaint..

**Suggested action: Ongoing monitoring required to assess potential impacts.**

58. Another key message from the Assembly was how important good conduct and high standards of ethical behaviour are to the wider governance agenda. This will be picked up under the revised Use of Resources assessment. **The guidance has only just been published and I would suggest that this be the subject of a separate report to a future meeting of this Committee.**

59. The key issues for consideration are likely to be:

- How well prepared the Council is for dealing with all complaints in the first instance.
- How integrated is the work on governance, probity, etc. within the overall governance framework of the council. In particular, it will be necessary to consider whether the Annual Governance Statement can be improved to reflect this work and whether there are any actions that could help to demonstrate that the Standards Committee is part of rather than a separate aspect of the Council's work. Regulations have yet to be published on how to exercise the powers practically including whether the initial referral is conducted in private
- Reporting to the Standards Board on activity.
- How to communicate the role and function of the Standards Committee.

60. There have been a number of key cases that have informed the approach to the Code and these were highlighted.

a) Whether "meeting" also includes informal meetings.

In the case of APE 0355, the Adjudication Panel for England, in a preliminary issue, had to decide if meetings of the "Development Plans Policy Project Group" were meetings for the purposes of the Code. The Tribunal reasoned that it was perfectly proper for an authority to set up either a working party or a committee or sub-committee to advise the authority on any matter it saw fit. Generally, the authority's subjective intention would determine this issue:

"Where the manifest intention of the local authority was to create a working party that should be decisive unless there was something unlawful behind the intention." - R, v Warwickshire District Council exp Bailey [1991] COD 284

However, paragraph 6(a) of the Code, which prevents members from using their position improperly, applies at all times when members are acting in their official capacity. A member should not use pre-meetings or informal meetings to influence a matter in which they have a prejudicial interest. If they do so, they are very likely to fail to comply with the Code by improperly seeking to influence a decision.

b) Application of the Code when a member is carrying out an activity which is not official business.

A recent case (APE 0389) illustrated the application of the Code when a member is carrying out an activity, which is not in their official capacity. In this case, the Adjudication Panel for England had to consider the test previously set out by Mr Justice Collins in the High Court case concerning the former Mayor of London, Ken Livingstone. The Adjudication Panel decided that the councillor was subject to the Code when he used a council computer to access indecent images of children. This case was considered in the context of paragraphs 4 and 5 of the Code.

In APE 0401, the member appealed against a standards committee finding under the 2001 Code. The standards committee had found that the member had failed to treat others with respect and brought his office or authority into disrepute. This was by using his position to gain entry to a council-funded organisation and then:

- demanding information from staff
- becoming aggressive
- threatening staff's employment
- refusing to leave until senior staff threatened to call the police

The Adjudication Panel for England decided that the standards committee had failed to address whether the member's conduct was undertaken in an official capacity. In the Tribunal's view, the judgment in the Livingstone case established that for a member to be acting in their official capacity:

- 1) they should be engaged in business directly related to the Council or constituents
- 2) the link between office and the conduct should have a degree of formality

The Tribunal found that the member was not on council business and there was no apparent relationship between the purpose of his visit and any relevant function of the council. The mere fact that he declared himself a councillor while undertaking his visit could not justify a conclusion that he was acting in his official capacity. Accordingly, the Tribunal decided that the member did not fail to treat others with respect in his capacity as a councillor.

However, by so clearly identifying himself as a councillor, his conduct had come within paragraph 4 of the Code. This says that "a member must not in his official capacity or any other circumstances, conduct himself in a manner which could reasonably be regarded as bringing his office or authority into disrepute". Even on the restrictive definition of "in any other circumstance" as set out in the Livingstone case, his behaviour was caught by the Code, and therefore the finding of a breach was upheld.

c) Three new case examples that relate to paragraph 3 of the Code of Conduct.

**Example 1**

In APE 0378, a councillor wrote to an officer, the chief executive, in rude terms demanding action where she had no authority to do so. In this instance, the Adjudication Panel for England decided that the member had not shown disrespect to the chief executive of the authority. The Adjudication Panel decided that sufficient weight had to be given to the fact that the officer was the chief executive, and it was significant that there was no direct personal attack on that officer.

Conversely, the Adjudication Panel did find that there was disrespect shown to a senior police officer. This is because the councillor did not address him respectfully in email correspondence and referred to him by his surname outside of the expected norms of such relationships. This was compounded by the circulation of the offending emails to junior and senior officers within both organisations.

### **Example 2**

In the same case above, APE 0378, the tribunal considered whether racist comments can have a political dimension and examined whether they could be afforded the protection of freedom of expression under Article 10. The councillor made a complaint about planning enforcement, stating that “those wishing to buck the system were usually of ethnic origin”.

The Tribunal considered the High Court case of *Sanders v Kingston* on the degree of protection a councillor is entitled to when considering that councillor’s right to freedom of expression. The Adjudication Panel summarised the judge’s reasoning and concluded “that a person is entitled to the extremely high level of protection which the authorities demonstrate must be given to political expression because of its fundamental importance for the maintenance of a democratic society. However, a factual investigation of the nature of the words used is necessary to determine whether they amount to political expression, or whether they are no more than expressions of personal anger and personal abuse”.

The Tribunal decided that where a member based expressions of opinion on prejudice against people it would, in the mind of a reasonable person, bring both the office and authority into disrepute. This is not only due to the authority’s statutory duties under antidiscrimination legislation, but also because such attitudes fall far short of what is expected of those holding public office.

### **Example 3**

The Tribunal in the case of APE 0399 considered the threshold for a failure to treat others with respect. The subject member made comments about the town clerk at a parish meeting saying that an officer found her “difficult to get on with”. The member added that “this is also the view of many town’s people who say that when they try to contact the town clerk, she is downright rude to them”. The Tribunal considered that the threshold for a failure to treat another with respect has to be set at a level that allows for the passion and frustration that often accompanies political debate and the discussion of the efficient running of a council. It should also be set within the context of who was involved in the exchange.

In this case, the comments were opinions of other individuals which the member honestly believed to be true. The member’s conduct was not unfair, unreasonable or demeaning to the town clerk and not made in a malicious or bullying manner. The town clerk was very experienced in her dealings with councillors and given her seniority was entirely able to defend her position. So the Tribunal decided that the threshold was not met.

d) Two new case examples that relate to paragraph 5 of the Code of Conduct.

### **Example 1**

The Adjudication Panel for England considered case APE 0383 under the 2001 Code. In this case, a councillor was given information in a private briefing to councillors. The briefing was about the council’s proposals to buy land and relocate its offices to another town. The information was made public swiftly after this. The

councillor did not agree with the proposals, and secretly bought the land to prevent the council considering it as an option for its future operations. The link to his office was clearly made.

Together with the lack of openness, these actions diminished public confidence in his ability to discharge his office as a councillor. He had therefore conducted himself in a manner which would reasonably be regarded as bringing his office or authority into disrepute. He had also failed to register the exchange of contracts in the land within 28 days. However, the Tribunal decided that he had not improperly sought to secure an advantage or disadvantage. This is discussed further in the cases given under paragraph 6.

### **Example 2**

The Adjudication Panel for England decided that a member had brought his office or authority into disrepute in the case APE 0387, under the 2001 Code. In this case, the member had issued threats to another member immediately before a planning decision was taken. The threats concerned the deselection of the councillor and were coupled with offensive language. These threats were overheard.

The Tribunal did not find these threats improper in the context of political life, and accepted that future careers could be affected by the way a member voted. However, the Tribunal did find that the comments were disreputable. This was especially so when there was a planning protocol which had been adopted by the council, although not incorporated in the council's code of conduct. The threats and actions of the member constituted a failure to follow that guidance and a breach of that protocol, and so were sufficient to be disreputable.

e) Two further case examples which relate to the question "What kinds of attempts to secure advantages or disadvantages would be improper?"

### **Example 1**

The Adjudication Panel for England considered a case under the old Code of Conduct, APE 0383. In this case, the council intended to purchase land to relocate its offices from one town to another. The council provided information privately to councillors but swiftly after this, made all the information public. The subject member privately purchased the land to prevent the council from buying it, because he did not agree with the relocation plans. The councillor also incurred a significant loss in the venture.

The Tribunal decided that because he was acting in the public interest, however misguided, and gained no benefit, he did not use his position improperly to secure an advantage or disadvantage. However, the Tribunal did decide that he had brought his office or authority into disrepute and this is dealt with under paragraph 5 above

### **Example 2**

In a case decided by the Adjudication Panel concerning a mayor, APE 0382, the Tribunal decided that there was no attempt to improperly secure an advantage or disadvantage. This was in a situation where the member held a meeting, whose purpose was unclear, with one of two parties who were in dispute with each other and the council. Officers were not present at the meeting. The mayor had previously been a director of one of the parties and at the meeting personally drew up a document whose purpose was uncertain. The Tribunal concluded that the actions were foolhardy and there was an unexplained pattern of behaviour favouring one

party. However foolish the actions were, they did not amount to a breach of the Code.

f) Whether members who have prejudicial interests can nevertheless remain in the meeting after they have answered questions and given their evidence to the committee.

This is a frequently asked question on paragraph 11 of the Code of Conduct. The Standards Board for England is aware that some authorities actively encourage all their members to attend overview and scrutiny meetings to better inform and improve the quality of the authority's decision-making. The view is that the decision of the Court of Appeal in Richardson would still apply in these circumstances and that normally, after their statutory role is finished, members with prejudicial interests should withdraw from the room.

g) An example relating to paragraph 12 of the Code of Conduct.

### **Example 1**

In APE 0395, an appeal from a standards committee, the member declared a personal and prejudicial interest and withdrew from the meeting. He returned after the conclusion of the item to chair the remainder of the agenda. The standard agenda item enabling members of the public to raise issues they would like to be included on the next meeting's agenda was then considered. At this point, a member of the public expressed dissatisfaction about the minimal progress made in reaching a decision on the item in which the chair had previously declared the interest. A short exchange then followed between some councillors and that member of the public. The tribunal decided that this exchange did not constitute consideration for the purposes of the Code, as there was no intention to have a further discussion on that item.

61. Overall, I am pleased to report that the Assembly proved to be stimulating and a very useful refresh of the key issues to be faced.

## **CONCLUSIONS AND COMMENTS**

62. The Monitoring Officer's role encompasses both proactive and reactive elements. The proactive role centres on raising standards, encouraging ethical behaviour, increasing awareness and utilisation of the elements of good governance and ensuring that robust procedures are in place across the whole of the Council.

63. The reactive role focuses on taking appropriate action to deal with issues and potential problems as they arise. The Monitoring Officer's effectiveness in this role is in turn dependent on effective systems and procedures being in place to identify problems and ensure that Members, Officers and public are aware of appropriate channels to raise concerns.

64. The work programme aims to expand on the work carried out this year and to consolidate on and embed the systems, policies and procedures that are at present in place, as well as making them more explicit.

## **RECOMMENDATIONS**

65. That the Standards Committee notes this report and the following action points:
- To consider the governance arrangements under the revised Use of Resources assessment. including
    - How well prepared the Council is for dealing with all complaints in the first instance.
    - How integrated is the work on governance, probity, etc. within the overall governance framework of the council. In particular, it will be necessary to consider whether the Annual Governance Statement can be improved to reflect this work and whether there are any actions that could help to demonstrate that the Standards Committee is part of rather than a separate aspect of the Council's work.
    - Reporting to the Standards Board on activity.

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Date: 23/10/2008

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