

Committee: STANDARDS COMMITTEE
Date: 22 MARCH 2004
Agenda Item No: 4
Title: Local investigations of allegations of misconduct – a Government consultation
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Summary

- 1 S.66 Local Government Act 2000 gives the Government power to make regulations enabling Ethical Standards Officers (ESOs) to refer allegations of breaches of the Code of Conduct to Monitoring Officers (MOs) for investigation and determination by the Standards Committee. Due to a defect in the drafting of the primary legislation the introduction of the regulations was delayed. Members will recall that the Local Authorities (Code of Conduct) (Local Determination) Regulations 2003 permitted ESOs to refer cases to the MO for determination by the Standards Committee but not for local investigation.
- 2 The Government now proposes amending the 2003 regulations to permit ESOs to refer cases for local investigation as well as local determination and is consulting Councils on the proposed amendments. This report is to inform Members of the proposed amendments with a view to a response being sent to the consultation paper.

Background

- 3 Where a matter is referred to an MO for investigation the draft regulations provide for the MO to inform the Member, the complainant and any parish council concerned that the allegation has been referred to him for investigation. He is then required to carry out an investigation in the course of which he must give the Member the opportunity to comment upon the allegations made. During the investigation the MO must also have regard to guidance issued by the Standards Board (SB).
- 4 The MO may call upon such advice and assistance as he may reasonably require to assist him in the investigation and may require any authority concerned to provide reasonable access to documents in its possession which the MO considers necessary for the conduct of the investigation. The draft regulations provide that if the MO does seek advice or assistance the expense of him so doing is to be met by the authority concerned (i.e. the district, town or parish council).
- 5 Under the draft regulations the MO can request the ESO to refer the matter back to himself for investigation at any time before the MO's investigation is completed. The ESO can accede to that request or can direct the MO to continue with the investigation. Page 1

- 6 At the conclusion of the investigation the MO must make a finding either that there has or that there has not been a breach of the Code of Conduct and then prepare a written report concerning his investigation and findings. The report is sent to the Member who is the subject of the allegations. If the MO finds that there has been a breach of the Code he will refer his report to the Standards Committee for a hearing. If the MO finds that there has been no breach of the Code he will refer his report to the Standards Committee for consideration.
- 7 Where a report has been referred for consideration the Standards Committee must determine either that it accepts the MO's finding that there has not been a breach of the Code or that the matter should be considered at a hearing before the Standards Committee. Where the Standards Committee accept the MO's finding that there has not been a breach of the Code the Committee must notify the Member concerned, the ESO, the Standards Committee of the authority (and any other authority) concerned, any parish council concerned and the complainant.
- 8 The Government consultation document poses 5 specific questions to which a response is requested although Members may of course make additional comments if they wish.
- 9 The first question is whether the investigative powers of the MO necessary and sufficient. Without the ability to call for advice and assistance and access to documents contained in the draft regulations it is difficult to see how an investigation could be carried out. Members may well therefore conclude that the powers contained in the draft regulations are necessary. As to whether they are sufficient Members may find it useful to compare the powers of the MO in the draft regulations with the statutory powers of an ESO contained in s.62 of the 2000 Act which include the power to make inquiries of any person, requiring any person to give information or explanations, requiring persons to attend before him in person for the purpose of making inquiries of them or requiring them to give any information or explanation, requiring the production of information concerning communications between the authority concerned and any Government department (or producing such correspondence or other documents forming part of the same). Failure on the part of any party to comply is an offence punishable by way of a fine of up to £1000. In addition the ESO may require the relevant authority to provide all information which the ESO reasonably requires for the purpose of the investigation. Members are asked to consider whether the draft powers of a MO are sufficient to enable an effective investigation to be carried out.
- 10 The second question is whether the powers for Standards Committees to consider reports referred by Monitoring Officers are necessary and sufficient. Although phrased as a separate question this is very much linked in with the next issue.
- 11 Should all cases investigated by the MO be referred to the Standards Committee or in the most minor cases should the MO be able to determine that there is no evidence of a breach of the Code and no further action is therefore required? In such cases a report could be made to the Standards

Committee for information purposes only. Members may wish to bear in mind that for there to be a referral for local investigation the complaint must have been accepted by the Standards Board as being a complaint worthy of investigation.

- 12 Although contained in the draft regulations the Government asks whether MOs should be able to refer cases back to ESOs. It is anticipated that matters will be referred for local investigation where the ESO considers on the basis of information known to him that the more severe sanctions which the Adjudication Panel can impose would not be required. The suggestion is that if new evidence came to light during the investigation which suggested that the matter is more serious than the ESO first thought then the MO would refer it back to ensure that cases are determined appropriately. Members may also wish to consider whether other circumstances may exist which could make it desirable for the MO to refer cases back to the ESO e.g. where parties refuse to co-operate with an investigation.
- 13 The final question is whether the appropriate balance has been struck between the draft regulations and the guidance proposed by the Standards Board. The draft guidance is the subject of a separate report.
- 14 The Government seeks responses to the consultation document by 18 May 2004.

RECOMMENDED that the Committee determine what (if any) response it wishes to make to the Government consultation paper.

Background Papers: Local Investigation of Allegations of Misconduct
Consultation by the ODPM on the proposed Local
Authorities (Code of Conduct) (Local Determination)
(Amendment) Regulations 2004

Committee: STANDARDS COMMITTEE

Date: 22 MARCH 2004

Agenda Item No: 5

Title: Draft Guidance to Monitoring Officers - local investigations of allegations of misconduct – a Standards Board consultation

Author: Michael Perry (01799) 510416

Summary

- 1 s.66 Local Government Act 2000 gives the Government power to make regulations enabling Ethical Standards Officers (ESOs) to refer allegations of breaches of the Code of Conduct to Monitoring Officers (MOs) for investigation and determination by the Standards Committee. Due to a defect

in the drafting of the primary legislation the introduction of the regulations was delayed. Members will recall that the Local Authorities (Code of Conduct) (Local Determination) Regulations 2003 permitted ESOs to refer cases to the MO for determination by the Standards Committee but not for local investigation.

- 2 The Government now proposes amending the 2003 regulations to permit ESOs to refer cases for local investigation as well as local determination. The draft regulations require MOs to have regard to guidance issued by the Standards Board (SB) when conducting investigations. Draft guidance has now been published for consultation. This report is to inform Members of the draft guidance with a view to a response being sent to the consultation paper.

Background

- 3 Complaints will still be referred initially to an ESO for investigation. At any time before he completes his investigation the ESO may refer the matter to the MO for investigation. If he does not do so, having concluded his investigation he may refer the case to the MO for local determination by the Standards Committee or refer it to the Adjudication Panel (AP). Factors which the ESO will take into account in deciding whether to refer a case for local investigation are:-

- Whether the case does not appear to need the heavier penalties available only to the AP
- Where the matter appears to be an isolated incident unlikely to be repeated
- Where the Member has given a prompt, adequate and unreserved apology and whether remedial action has been taken
- Whether there is evidence that a local investigation is likely to be perceived as unfair or biased
- The allegation is of a purely local nature and does not raise matters of principal
- Whether there are any relevant local political issues that may have a bearing on a local investigation

The SB asks whether these circumstances are reasonable and whether there are other factors that an ESO should consider before referring a matter for local investigation.

- 4 The draft regulations provide for a MO to be able to request an ESO to refer a case back to himself. The draft guidance envisages that this would only happen if evidence emerged which indicated that the allegation is more serious than was at first thought to be the case. It should also be noted that it is only the MO who can ask for a referral back. Cases cannot be referred back to an ESO once the MO has presented his report to the Standards Committee. Where during the course of an investigation evidence comes to light of other possible breaches of the Code the MO does not have power to investigate such matters. He may ask the person from whom the evidence was obtained to make a formal complaint to the SB or he may make a complaint to the SB himself.

The SB asks:-

- *Whether there are other circumstances where cases may be referred back.*
- *Whether the draft guidance distinguishes clearly between circumstances which warrant a referral back being made and circumstances which warrant a fresh allegation*
- *Whether the circumstances contained in the draft guidance are reasonable*

On the first issue examples are given in the contemporaneous report before this Committee regarding the draft regulations. Members may also wish to express a view as to whether as Committee they would wish to have the ability to refer a case back if they felt that the sanctions which they could impose were inadequate to meet the circumstances of a particular case.

- 4 ESOs are under a strict duty of confidentiality. An ESO who discloses information obtained in the course of an investigation outside of the statutory framework governing confidentiality commits a criminal offence. No such constraints apply to MOs in the conduct of local investigations. Nevertheless the SB believes that MOs should regard information obtained in the course of an investigation as being confidential. It suggests that information should only be disclosed if:-

- It would assist an ESO perform his statutory functions
- It would assist the MO perform his statutory functions
- The subject of the disclosure has given his consent
- The information has already been lawfully made public
- It is disclosed for the purpose of criminal proceedings in the UK

The draft guidance reminds Members of their obligations regarding confidentiality contained in paragraph 3(a) of the Code of Conduct. It also suggests that consideration needs to be given as to whether the information is confidential or exempt within the meaning of the Access to Information rules. In the interests of confidentiality it is advised that although the Standards Committee be informed of investigations that this be done by confidential memo and not at Committee meetings. Further the names of the complainant and Member should not be disclosed and any summary given should be brief to avoid the perception of prejudice in either the investigation of the subsequent determination.

The SB asks whether it is right to seek to maintain confidentiality and if so whether the draft guidance is clear.

- 6 The draft guidance anticipates that there may be circumstances when the MO may wish to produce a draft report e.g. where there are factual complexities or ambiguities, a genuine dispute as to the material facts or where the expectation has been created by the investigation that a draft report would be supplied. It is suggested that draft reports should be sent to the complainant and the subject of the investigation for comment on the MOs findings of fact but not to witnesses or the parish or diocesan witnesses should however be asked

to confirm that the contents of their statements are correct. The SB asks whether it is appropriate not to have to prepare a draft report in all cases and if so whether the guidance on the factors to be taken into account in considering whether to issue a draft report is sufficiently comprehensive.

- 7 The draft guidance sets out what reports should contain. Draft (but not final) reports should be clearly marked “confidential” as they may change before the final version. All reports should be dated. They should specify the legislation under which the investigation has been carried out. A summary of the allegation(s) should be included along with a reference to the relevant sections of the Code. The evidence obtained during the investigation should be recorded with a statement of the MO’s findings of fact and his findings as to whether or not there has been a breach of the Code. The report should set out the MOs reasons for his findings. Final reports should also contain a schedule containing background documents; a schedule containing notes of telephone conversations, letters and notes of interviews with witnesses and a chronology of events. Draft reports should be clearly labelled “Draft” and should state that they do not necessarily express the MO’s final finding and that a final report will be presented to the Standards Committee. Final reports should be clearly identified as such. If the MO’s finding is that there is no breach of the Code it should state that it will be reported to the Standards Committee for consideration. If the finding is that there has been a breach of the Code then the report should make it clear that there will be a hearing.

The SB asks whether the draft guidance provides sufficient steps to producing a comprehensive report.

Members are asked to consider whether they feel that the guidance should be clarified to require the MO to give reasons for findings of fact (where facts are not agreed) as well as on the issue of a breach of the Code. Members are also asked to consider whether a report following these guidelines would enable them to adequately deal with consideration of the report or hearings.

- 8 MOs generally have to perform their duties personally and may not delegate them save for in their absence. The 2000 Act has been amended however to permit MOs to delegate their investigation functions under that Act recognising that there may well be circumstances where a conflict of interest may arise. The MO has four main functions with regard to the Code of Conduct, advising the Standards Committee, advising complainants and Members who are the subjects of complaints, investigating complaints referred to him by an ESO and advising Members on conduct issues before complaints arise. A clear conflict would arise where the MO has advised on a conduct issue which has later lead to a complaint. Previous guidance from the SB has been to the effect that the MO should not investigate cases and then act as adviser to the Standards Committee on those cases. Consideration needs to be given therefore in each case as to whether the MO should conduct the investigation or act as adviser to the Committee. The draft guidance provides that where the MO is aware of a potential conflict of interest he should notify the Standards Committee, the Member concerned, the complainant and the ESO of the existence and nature of the interest, that for that reason the MO will not be investigating the allegation and identifying the person who will be carrying out the investigation in his place.

The SB asks whether the draft guidance on conflicts of interests is clear and appropriate and whether its previous guidance that the MO's main function is to advise the Standards Committee rather than carry out the investigation correct.

The SB also indicates that it is considering issuing non-statutory guidance on conducting investigations and asks whether MOs may find this useful.

RECOMMENDED that the Committee determine what (if any) response it wishes to make to the Standards Board consultation paper.

Background Papers: Draft Guidance to Monitoring Officers by the Standards Board for England: local investigation of allegations of misconduct under the Local Authorities (Code of Conduct) (Local Determination) (Amendment) Regulations 2004