

**STANDARDS COMMITTEE – 22<sup>ND</sup> APRIL 2010**

**STANDARDS BULLETIN NO. 4**

Report of the: Monitoring Officer

Status: For information purposes

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**Executive Summary:** The report sets out recent developments surrounding the local standards regime and the ethical agenda. Topics that are covered include guidance from the Standards for England, predetermination, First-tier Tribunal, recent cases and the revised Code of Conduct.

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**This report supports the Key Aim of** effective management of Council resources.

**Portfolio Holder** Cllr. Elaine Bracken

**Head of Service** Head of Legal and Democratic Services – Christine Nuttall

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**Recommendation:** Members are requested to note this report.

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**Background**

1 The local standards regime continues to develop and this Bulletin updates Members as to how matters are progressing. This Bulletin follows on from the first, second and third Bulletin presented to the Committee on the 23 April 2009, 14 July 2009 and 3<sup>rd</sup> December 2009 and covers current developments taking place in relation to the ethical agenda.

**Guidance from Standards for England**

2 The Standards for England has published on its website guidance on:

- freemasons and the Code of Conduct for local authority members
- independent members of standards committees; charitable trustees and declarations of interest
- the role and appointment of parish and town council representatives to the standards committee and the Standards Committee (England) Regulations 2008
- notifications to parish and town councils concerning complaints about their members and the Standards Committee (England) Regulations 2008

3 It has also published a research report called “Assessing the Impact of Standards Committees”.

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4 The guidance on freemasons says that local authority members who are members of the Freemasons' Grand Charity must register this in their local authority's register of members' interests. If an individual lodge of freemasons has charitable status or could be directed as a body directed towards charitable purposes, membership of that lodge would also need to be registered. Local authority members also need to declare their membership of the Freemasons' Grand Charity and individual lodges as a personal interest in a matter to be discussed if that matter would affect the member to a greater extent than the majority of other people in the area affected by the decision. They would also need to consider whether the interest is prejudicial. The guidance notes that the recent Government decision that freemasons no longer need to declare their membership when applying for positions on the judiciary does not affect the need to register membership as an interest under the Code of Conduct.

5 The guidance on Independent Members says that the attributes and skills expected of an independent member are:

- a keen interest in standards in public life
- a wish to serve the local community and uphold local democracy
- high standards of personal integrity
- the ability to be objective
- independent and impartial
- sound decision making skills
- leadership qualities and the ability to chair meetings

It says that the time that independent members sit on a standards committee should be long enough for them to gain an understanding of the committee, the authority and its workings but not so long that independence is lost. Standards for England recommends that Independent Members should serve no longer than two four year terms but this is at the discretion of each local authority.

6 The guidance on charitable trustees says that a member who is a charitable trustee must always register their interest in the charity, whether they are appointed directly by the charity or nominated by the local authority. This is because they are a member and in a position of management over the charity. It says that a holding trustee or nominee who only holds a charity's land or investment will not have a personal interest and will not need to register an interest because he or she will not be a member of the charity nor in a position of general control or management. The guidance reminds members that even where their role does not give rise to an interest that needs to be registered it may still be a personal interest that they need to declare.

- 7 The guidance on the role and appointment of parish and town council representatives to the standards committee says that although legislation requires councils which have functions relating to parish councils to have at least two members that are parish councillors, Standards for England recommends that they have three and that at least two are from different parish councils. It suggests that this will ensure that cases concerning parishes can be considered and dealt with in a timely manner by ensuring that there are sufficient parish representatives to hear a case at all stages.
- 8 The guidance on notifications to parish and town councils concerning complaints about their members says that where a sub-committee of a standards committee meets to assess an allegation or review a decision, it must send in writing to the relevant town council the main points considered, the conclusions, the reasons for its decision and may name the member unless this is not in the public interest or would prejudice an investigation. A parish or town council should also be notified after a standards committee meets to consider a report of an investigation and whether to accept the finding of an investigation. If a hearing is held, a parish or town council should be notified of the outcome and reasons. Standards for England recommends that notification should be sent out within five working days of the decision being made for most decisions and within two weeks of any hearing being concluded. The guidance suggests that each parish or town council should adopt procedures about how to deal with notifications and should notify the monitoring officer once they have been implemented, so that the monitoring officer knows who to send the notifications to. The guidance also suggests that parish or town councils should consider putting in place protocols that deal with access to information, sharing of information, and how various legal obligations are met, including those under the general law of confidentiality, the Freedom of Information Act 2000 and the Data Protection Act 1998.
- 9 The research report features nine case studies. The findings are said to be examples of notable practice although they are not to be viewed as recommendations for all authorities to try and emulate. The report looks at examples of organisational learning, working with town and parish councils, member development, working with partnerships, recruitment and retention, training and development and joint standards and audit committees, dealing with high pressure investigations and embedding standards.

### **Predetermination and the Code**

- 10 Standards for England have suggested that predetermination is a more accurate term than 'bias' used to describe a state of mind which is capable of breaching both the law and the Code. This is not to be confused with predisposition where a councillor holds a view in favour of or against an issue, for example an application for planning permission, but they have an open mind to the merits of the argument before they make the final decision at the council meeting. This includes having formed a preliminary view about how they will vote before they attend the meeting, and expressing that view publicly.
- 11 There are two types of predetermination – actual and apparent.

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- Actual predetermination is when a person has closed their mind to all considerations other than an already held view.
  - Apparent predetermination is where the fair minded and well-informed observer, looking objectively at all the circumstances, considers that there is a real risk that one or more of the decision makers has refused even to consider a relevant argument or would refuse to consider a new argument.
- 12 Case law has provided some clarity on how to establish whether predetermination might have occurred by using a two stage test:
- Stage one – all the circumstances which have a bearing on the suggestion that the decision was undermined by actual or apparent predetermination must be established.
  - Stage two – the questions to be asked are a) was there actual predetermination or b) were the circumstances such as would lead a fair minded and informed observer to conclude that there was ‘real risk’ that one of the decision makers had predetermined the outcome?
- 13 Apparent predetermination is to be assessed having regard to all the circumstances which are apparent upon investigation. This extends beyond the circumstances available to the hypothetical observer.
- 14 This could include information on any other relevant facts affecting the decision. It does not include evidence from the member concerned as to their state of mind or evidence from the complainant as to why they believed the subject member’s mind was closed.
- 15 The test is objective looking at what view the facts give rise to. The courts have decided that the fair minded and informed observer has access to all the facts, is neither complacent nor unduly sensitive or suspicious when looking at the facts, is able to decide between the relevant and irrelevant and on the weight to be given to the facts and is aware of the practicalities of local government.
- 16 The Courts have accepted that these practicalities mean that the fair minded and informed observer accepts that:
- Manifesto commitments and policy statements which are consistent with a preparedness to consider and weigh relevant factors when reaching the final decision, are examples of legitimate predisposition not predetermination.
  - The fact that the member concerned has received relevant training and has agreed to be bound by a Code of Conduct is a consideration to which some weight can properly be attached when determining an issue of apparent predetermination.
  - Previously expressed views on matters which arise for decision in the ordinary run of events are routine and councillors can be trusted, whatever their previously expressed views, to approach decision making with an open mind.

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- To suspect predetermination because all members of a single political group have voted for it is an unwarranted interference with the democratic process.
  - Councillors are likely to have and are entitled to have, a disposition in favour of particular decisions. An open mind is not an empty mind but it is ajar.
- 17 What has become evident is that the threshold, in the context of administrative decisions, on the test of apparent predetermination is an extremely difficult test to satisfy. Unless there is positive evidence that there was indeed a closed mind, prior observations or apparent favouring of a particular decision is unlikely to be sufficient to establish predetermination.
- 18 Case law has looked at the relationship between the Code and predetermination and gives an indication that where such issues arise there is a potential paragraph 5 Code breach. The outcome is likely to depend on the individual circumstances of a case and any other Code issues and breaches. This is because a councillor who renders the decision of a council unlawful due to predetermination could reasonably be regarded as bringing that authority or his office into disrepute.
- 19 The important issue for members is that by and large predetermination will not amount to a personal or prejudicial interest. Therefore there is no specific requirement to declare an interest and leave the room under paragraph 8 to 10 of the Code. Members may however find themselves the subject of a complaint under paragraph 5 on disrepute. This paragraph of the Code has no provision for declaring interests or leaving meetings.

**First-tier Tribunal (Local Government Standards in England)**

- 20 On the 18<sup>th</sup> January 2010 the functions of the Adjudication Panel for England were transferred to the First-tier Tribunal (Local Government Standards in England) and the Adjudication Panel for England was abolished. The First-tier Tribunal sits in the General Regulatory Chamber with Charity, Gambling, Information, Estate Agents, Claims Management, Consumer Credit and Transport Tribunals.
- 21 Since it was established by the Local Government Act 2000 the Adjudication Panel has operated without any formal Rules. This situation has changed as a result of the transfer of work into the First-tier Tribunal. The Procedure Rules give more explicit powers of direction to the First-tier Tribunal than were available to the Adjudication Panel, such as the power to summon witnesses. Proceedings are now governed by The Tribunal Procedure (First-tier Tribunal) (General Regulatory) Rules 2009. Appeals from decisions of the First-tier Tribunal must be made to the Upper Tribunal. Permission has first to be sought from the Principal Judge of the First-tier Tribunal.
- 22 Decisions notices issued to members following a determination by a Standards Committee, will need to reflect the changes that have taken place. Members will now have 28 days in which to seek to appeal following a Determination Hearing. References to the Adjudication Panel for England will

need to reflect the name change “First-tier Tribunal (Local Government Standards in England).

- 23 To find out more about the First-tier Tribunal you can visit their website at [www.adjudicationpanel.tribunals.gov.uk](http://www.adjudicationpanel.tribunals.gov.uk)

### **The First-tier Tribunal’s Final Decision on the conduct of Cllr. Anne Bishop**

- 24 Following a Standards for England investigation it was determined that Councillor Bishop failed to comply with the Codes of Conduct of Shanklin Town Council and the Isle of Wight Council in dealings she had with members and officers of the Council in connection with applications for planning permission which she made to the Isle of Wight Council.
- 25 The First-tier Tribunal agreed with the Ethical Standards Officer’s view that Councillor Bishop had breached the parts of the Code of Conduct concerned with compromising the impartiality of officers of an authority and seeking to improperly confer an advantage for herself. She was found to have breached the Code in relation to bringing her own office as Councillor, and the Council itself, into disrepute.
- 26 The Tribunal found that Councillor Bishop ‘failed abysmally’ to divorce her private capacity from her position as a Councillor and sought to use that position to gain advantage for herself.
- 27 The sanction imposed on Councillor Bishop was disqualification from being or becoming a councillor for two years from the 18<sup>th</sup> January 2010. The Standards of England have reported that they welcome the Tribunal’s decision, which demonstrates to the public that councillors whose ethical conduct falls so far short of the standard they expect of them, can be brought to account.

### **Recent Cases**

- Blackpool Borough Council and Councillor Bell
- 28 A Councillor at Blackpool Borough Council failed to declare payments made to him in respect of his election in his member’s register of interests. The ethical standards officer found that the member failed to declare a personal interest contrary to paragraph 9(1) of the Code of Conduct but in the circumstances of the case no further action needed to be taken.
- 29 The complainant a councillor, alleged that Councillor Bell failed to declare two political donations made towards his election expenses in his member’s register of interests, and that Councillor Bell had a personal and prejudicial interest in relation to council business concerning the political donor which he had not declared.
- 30 The member’s response was that he did not consider that two political donations were donations made to him. They were donations made for his party’s use in local and general elections campaigns and held in a party account. He did not agree that he needed to register the donations in his

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register of interests. He did not agree that he had had a personal and prejudicial interest in any council business that concerned the political donor.

- 31 However, the ethical standards officer found that the association had ring-fenced the two £5,000 donations for Councillor Bell's use in the parliamentary campaign.
- 32 In June 2009 the chair of the association assured Councillor Bell that both donations were held for his use. The ethical standards officer found that Councillor Bell did expect that the two donations and any future donation from the company would be held in the association account for his use as the prospective parliamentary candidate and not for any other purpose. In August 2009 after an internal party enquiry the association returned the two donations to the company.
- 33 The ethical standards officer found that the two political donations were not payments made in respect of Councillor Bell's election as a councillor in May 2007, or in respect of any councillor expenses Councillor Bell incurred. Therefore Councillor Bell was not obliged to enter the two donations in his councillor register of interests.
- 34 However, the Ethical Standards Officer found that Councillor Bell had an ongoing relationship of donee/donor with the directors of the company. Given the size of the donations and the importance of them to Councillor Bell, she considered that the directors were people with whom Councillor Bell had a close association and this personal interest should have been declared in relation to council business concerning the company. However the personal interest did not amount to a prejudicial interest in relation to the business that was conducted.
- 35 The Ethical Standards Officer noted that it was wholly foreseeable that donations to a serving councillor from a major planning applicant would raise a question in the public's mind. However, there was no evidence that Councillor Bell purposefully concealed his relationship with the company from others. It was taken into account that Councillor Bell had not attempted to lobby officers or fellow councillors regarding the company's planning applications.
- Canterbury City Council and Councillor Matthews
- 36 This was a corruption case brought by the Crown Prosecution Service following an investigation by Kent Police serious economic crime unit.
- 37 It was reported in the newspapers that Councillor Matthews lived rent free in a flat for six years whilst using his position on planning committees to help a developer friend. The amount that was owed in rent was £34,000.
- 38 Between May 2002 and July 2008 he was a member of Canterbury's development control committee and the steering group overseeing the local plan.

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- 39 He actively promoted development schemes on behalf of Hollamby Estates, the development company run by his friend Julian Brealy, who was also his landlord.
- 40 Maidstone crown Court heard Councillor Matthews spoke in favour of development schemes planned by Mr. Brealy and did not declare an interest. The corruption charges were denied.
- 41 Outlining the case against the two men, the prosecutor said that Mr. Brealy told his agents to write off Matthews' rent arrears. The reason the rent was waived was to keep Councillor Matthews onside so he could help out with planning applications favourable to Mr. Brealy. No proceedings were taken against Councillor Matthews for recovery of arrears they were just written off.
- 42 Councillor Matthews spoke in favour of a number of projects including a plan to build a 50 room hotel on land owned by Herne Bay Golf Club of which Mr Brearly was a director and the plan was passed.
- 43 Council officials repeatedly warned Mr. Matthews about his conflict of interest but he would heed their warnings for a couple of weeks and then ignore their instructions.
- 44 The result of the case was that the Court convicted Mr. Brealy of corruption and Councillor Matthews was acquitted of the charge.
- 45 Councillor Matthews denied he showed favour to Brealy in return for being allowed to live rent free for almost six years between May 2002 and July 2008 and failing to pay around £36,000.
- 46 It will be interesting to see whether a complaint is made against Cllr. Matthews to Canterbury City Council's Standards Committee and if so how they will decide matters.

**Code Revision**

- 47 A revised Code of Conduct was due to be released in late autumn 2009. Standards for England did not anticipate many changes to the Code with the main change allowing the Code to cover members in their non-official capacity, where that conduct would be a criminal offence.
- 48 The Standards for England have now indicated that a new Code of Conduct for Members will not be laid during this Parliamentary session. Communities and Local Government have notified the Standards for England that the Government is concentrating on financial instruments and so there will not be Parliamentary time available for the Code.
- 49 In practice this means that a new Code will not now be laid until after the general election.

**Options (and Reasons for the Recommendation)**

- 50 The report is for information and discussion.



## **Key Implications**

### Financial

51 There are no identifiable financial implications.

### Impact on and Outcomes for the Community

52 This report endeavours to set out the recent developments within the ethical framework thus providing Members and the public with news on current developments, changes and events taking place.

### Legal, Human Rights etc.

53 The information provided shows how the ethical framework is evolving and the legal changes taking place based on legislation, guidance and case law.

### Resource (non-financial)

54 No additional non financial resource implications are identified.

### Value For Money and Asset Management

55 There are no identifiable value for money and asset management implications associated with the contents of this report.

### Equality

56 All members of the public have access to the information contained within this report.

### Sustainability Checklist

57 The ever evolving ethical framework should provide the public with confidence that robust systems exist for enabling high ethical standards to be applied across all levels of local government.

## **Conclusions**

58 Some of the recent developments surrounding the local standards regime and the ethical agenda are high-lighted in this report in order that both Members and the public are kept informed and can discuss the implications of the changes and proposed changes.

## **Risk Assessment Statement**

59 No risks have been identified by the contents of this report.

## **Sources of Information:**

Information from Standards for England  
Standards for England documentation and press releases

Kent Online – March 22<sup>nd</sup> 2010

Kent News – Friday 19<sup>th</sup> March 2010

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