

Mr. Nick Marcar's Presentation to the Standards Committee (18.07.07)

THE CODE OF CONDUCT - IS THERE A BETTER WAY?

I'd like to start off with some questions and get some thoughts from you. Let me take you back a few years now to when the Local Government Act 2000 and the Code of Conduct were first introduced. At that time did you think regulation was needed? Did you think it should be undertaken locally or nationally? Who did you think should fund it? [So first of all, regulation at all? What about local v national regulation. And perhaps the most controversial issue local government v central government financing.]

I took you back in time because we are still in a period of change some 6 or 7 years later. The Code introduced a completely new regulatory system. As we all know this caused a great deal of controversy. No part of the system has really escaped criticism. When I first joined the Standards Board the application papers for staff all stated that applicants must be prepared for, and I quote, "a period of turbulence". I'm not sure this phrase was ever taken out in the nearly five years I was at the Board. And clearly turbulence will continue. But is the scheme now to be introduced the best way, in isolation, of achieving good behaviour and practice in local government, which is of course what we all want. Or should we consider a different approach.

Well first of all let's have a look at some of the problems which have occurred in the past.

The Standards Board has been criticised for the length of time investigations have taken and by deciding to investigate minor complaints. In its early days it decided to investigate pretty much all the complaints it received to gain experience. However what resulted were 'sledgehammer to crack a nut' comments and substantial delays in completing all enquiries. This decision affected all the Board's work, both serious and not so serious with many cases taking well over a year to complete. The Board was also criticised for the way in which the Code was introduced, mid way through the election cycle. Without a common local election cycle some were always going to be disadvantaged. However this led to threats of mass resignations, albeit that many decided not to take this dramatic step. Some rejected the Code in principle, although declined to resign, and this prompted a large number of references to the Adjudication Panel leading to automatic disqualification. It was these issues which seemed to prompt constant criticism of the Standards Board in certain sections of the press. This criticism still continues although I think most would accept that the Code of Conduct is now seen as a benefit to regulation in local government.

Ethical Standards Officers were certainly in the Board's early days criticised for almost anything they did, being the direct enforcers of an unpopular regime. And all ESO's have at one time or another been publicly criticised for taking a certain view or action concerning a particular case, it being an ESO rather than the Board who has ultimate case responsibility. However it is human nature that there will often be different views on similar circumstances. All ESO's have disagreed with others in the Standards Board on case related matters, which is only to be expected where there is sometimes a fine dividing line between decisions. With some of these they have been proved right and

others not. However this is probably no different to any other regulatory or prosecuting regime. I do not feel that a more collective approach to decision making would work more effectively. And there now appears to be little dispute that the investigative provisions in the Local Government Act are appropriate for the job in hand.

Standards Committees, one of the ultimate arbiters of the Code, have had some of their rulings overturned by the Adjudication Panel. The rulings by the Panel have not always been accepted by the local government community, with in my view good reason, but taking cases further in such circumstances is an expensive option. Members of Standards Committees have also been faced with a very difficult situation over the last few years. Many have found little to do. Some have been kept busy with Code of Conduct or other regulatory matters but others have still yet to determine a case under the Code. Clearly the less Code of Conduct work they do, and indeed we all hope that there is the need for few determinations, perhaps the more difficult and time consuming it may be to resolve procedural and adjudicatory issues when they do arise.

The Adjudication Panel itself has been heavily criticised in relation to some of its decisions. And the High Court, while supporting many of the Panel's decisions when asked, overturned the decision in its most celebrated case, that of the Mayor of London, going against the interpretation which the President of the Panel himself placed on one of the key areas of the Code. In some cases the ordinary member, let alone the ordinary man or woman in the street, simply does not understand how a particular decision has been arrived at. And this is not probably helped procedurally by even well briefed reporters continuing to confuse the Board and the Panel. Whether this is deliberate or not I can't say. But it does not promote an effective and independent regulatory regime.

Some problems have been overcome but some still remain. So let's look to the future and see where we might go from here.

The Standards Board was set up to be independent of both Central and Local Government. It was to be responsible for the decision whether or not to investigate an allegation in every case, and whether to investigate at a national level or refer the case for local determination and/or investigation. However, as you all know, in future the system will be markedly different. Decisions on whether to investigate complaints, the investigation of those cases, and determinations on the results of those investigations, will become the responsibility of local government itself in all but a minority of cases. With a substantially reduced Standards Board concentrating on what it decides are major cases in keeping with its now stated aim to be a strategic regulator.

Self regulation is back. But, as with self regulation in many other areas, what also comes is self financing. It is local government which is being asked to pay. This includes local investigation costs, either by using outside investigators which have direct cost implications, or internal staff which have indirect costs. And I'm not aware that savings in the reduced structure at the Standards Board are being ploughed back into local government to assist.

Standards Committees, or sub-committees constituted for the purpose, will need to meet at regular intervals to consider complaints. They will also need to be trained, with consistency required across the country in terms of what is considered needs investigating and what does not. Inconsistencies bring the threat of legal action, with more cost. And getting members together for more regular meetings, perhaps at short notice, might be difficult. Perhaps amalgamating standards committees may be the way forward but what about existing committees which are already doing a good job? And how local will local regulation be if committees cover a much wider area?

Difficulties have already emerged in some authorities with local investigations, both in terms of quality and timescale. Pressure is being brought to bear on apparently tardy authorities by the Standards Board, although the extra resources it was granted by Central Government a few years ago to clear its own backlog is a luxury which is unavailable at local level. And often the authorities with the most resources in terms of both staff and finance also have the least number of allegations referred for investigation. Conversely many smaller authorities with much more limited budgets have responsibility for parish councils in their area, in some cases up to 100.

Historically parish councils have been a fertile ground for complaints and have also been the most likely complaints referred back to local authorities by the Standards Board. Consequently smaller authorities will be required to deal with more than their fair share of complaints. There may be limited staff in-house to deal with these cases, officers in other authorities in the area who might be called upon to help out have their own workload, both in relation to normal work and their own local investigations. And while there are independent investigators with experience of the Code who can provide both an expert and speedy solution, local authorities will need to find the finance to fund these services.

To recap on the Standards Board's history, when it first started investigating cases it dealt with them all. If it was considered further action was required then all that could be done was reference to the Adjudication Panel. Later regulations allowed reference of concluded cases back to Standards Committees for local adjudication. And later still cases were able to be referred back at any stage for local investigation. And for the future if Standards Committees and the local monitoring officer consider the Standards Board should investigate a particular case the onus is on them to persuade the Board to this view.

The Standards Board provides very good guidance on all aspects of the investigation and adjudication process. The Board also provides advice concerning the Code directly to Monitoring Officers, has an informative website, and members of its policy department lecture at various events around the country. However it tends, for perhaps obvious reasons, to concentrate on Code of Conduct problems that have occurred rather than seeking to prevent them, or indeed any other problems, from occurring in the first place. And while guidance is helpful more and more work will still be in the domain of local authorities. In short, locally the pressure is on.

So is there another way? Clearly there is a statutory investigation and adjudication process which has to be followed. However might there be a more informal route which could be applied in certain situations to make regulation overall more efficient and effective, which is obviously what we all want?

The Standards Board already has the power to make a direction to an authority. This would be to take action concerning a complaint other than by investigating. Essentially training and/or mediation. However having received a formal complaint, making a direction has only proved appropriate in a few cases.

And while training can be offered there is no statutory obligation to undertake it, or indeed to learn from it even if attended. And as we all know it is invariably those who need help the most in terms of their behaviour that are the least likely to get involved in formal events and processes.

I have seen practical problems with the Code of Conduct from the inside, which like many regulatory systems can sometimes be heavy handed. This is perhaps only too evident when you look at the results of the Standards Board's completed enquiries during the financial year 06/07 where 93% of their cases resulted in a finding of no evidence of a breach of the Code or no action. To give you an indication of the numbers involved, in the same period 631 complaints were referred for investigation with 284 retained for investigation by the Board.

We all know that whatever procedures are in place misconduct will always occur. There will always be individuals whose behaviour is simply totally unacceptable. There will also always be individuals who think they can get away with it. In these cases an investigation is the only solution. However as the Standards Board has consistently set out these represent a very small minority of members.

It can also be the case that even where no action is taken as a result of an investigation, the investigation itself may assist in resolving some of the issues involved.

So investigations will always be necessary, and useful. But what happens when they are really only a means to an end. There will be misunderstandings, mistakes, personal squabbles, petty issues which may not require such an approach. And in many cases when an investigation begins, a process is in place which often works against the efficient resolution of the cause of the problem at its heart. In other words is it possible to head off the need for investigations before the Standards Board, or in the future a Standards Committee, has no alternative but to approve one.

From my own point of view I was always frustrated as an ESO with cases which often from a very early stage were clearly simply going nowhere. And of course it is the statutory role of an ESO to investigate and report, not to seek to resolve a problem or improve matters for the future. So in various meetings with monitoring officers and others involved in local government I've discussed whether a more pre-emptive approach might be worth trying. Those who I have spoken to seem receptive to such an approach and indeed some are already following this course.

First of all I think it would be useful for Standards Committees and Monitoring Officers and their teams to ask themselves whether they are already aware of any issues which might result in a problem in the future. Or whether they could obtain such information easily. Obviously if a Standards Board investigation has already identified an issue then this can be tackled. But even if an ESO has made a 'no further action' report a Standards Committee can ask to see such reports, and ESO's reports are of course routinely sent to MO's. So while no formal action should be taken as a result of such a report, informal action might assist. And even where the Standards Board currently rejects cases for investigation this may not effectively resolve a case. There remains a complainant who has not been satisfied. And similarly to ESO's 'no further action' reports, rejected complaints could suggest an area or procedure where changes might be worthwhile.

In short, it is my view that Standards Committees, Monitoring Officers and indeed local government in general should be continually proactive in seeking to identify areas where some small action now might prevent an Exocet missile later. This term has actually been used in relation to an ESO's investigation. And ESO's have been described as the CIA, FBI and worse. So best in my view, whatever the lack of merit in such descriptions, to try the carrot approach at an early stage rather than the Standards Board, or in the future Standards Committees, having to later follow the statutory route.

So, do you think you know enough about what is happening locally? Is your 'finger on the pulse?' Well I'm not advocating the return of the whistleblowing provision in the old Code. In any event this obviously only related to members and was criticised for being deconstructive rather than constructive. It's my thought that it might be helpful for those involved in the regulatory process within local government to be aware of what is happening in their patch at the earliest opportunity, and consider whether any action could constructively be taken as a result. While some problems concern purely one off issues, many concern some sort of pattern of behaviour. They may seem minor in many instances but the earlier they can be identified, and possibly acted upon, the better. So could your involvement help to resolve an issue? This could conceivably be in various capacities; member of the same political group, Standards Committee member, MO, colleague or friend. And what might not work in one capacity might well work in another.

I'm sure you can all think of some issues which have started off small and taken an unfortunate course later on.

Here are just a few examples.

Is a member being a bit too hasty in commenting about the actions of officers. Does this suggest a lack of knowledge? Does it suggest that others are taking a similar approach.

Has a member been seen drinking heavily and then representing the authority, perhaps with no ill effects on this occasion but what about the future? Is there a drinking culture among a group in the authority?

Does a member forcefully argue the case for his local area but, perhaps genuinely, not fully appreciate that they are getting a little too close to the issue and that they are beginning to effectively argue for themselves?

Do a member's connections with a local developer seem a little too close?

Is a male member's approach to women potentially inappropriate on occasions?

Do some council or committee meetings get a bit too heated, take too long, not accomplish everything they might? Does this suggest possible wider problems?

Now such issues may relate to one individual or more. And if personal action is thought too direct, and it was felt undesirable to approach a particular member, why not consider taking a more general approach. What about issuing some guidance, some leaflets on notice boards, perhaps start an authority wide health campaign, which might cover at least some of these points.

And I know some council meetings can get something of a reputation for, lets say, taking their time. However its probably the case that the longer a meeting the more frustrated and tired participants can become and perhaps the more likely events could degenerate. This might suggest training for the chair in chairing meetings could assist in moving things along and I'll come on to training generally in a minute. And if a parish council meeting, would a chat with the clerk or attendance at the next meeting by the MO or another officer also be useful. Would it be worthwhile establishing a rota of visits if there isn't one already?

However probably the most crucial heading under the issue of local knowledge is difficult relationships. The most awkward of my cases at the Standards Board covered this area. And the very worst of these cases have involved a breakdown in the relationship between a chief executive and a leading member of the Council, and in several cases between a senior officer or officers and the whole of the executive. These had obvious serious financial and performance implications for the authority. And in all these particular situations it had been evident for some time that there was a problem. Earlier acceptance of it, and the will to address it, would have undoubtedly proved beneficial.

It is of course a fact of life that some people simply do not get on. While this may often not result in any real problems, in other cases things can escalate. But do some people really need to work together? Is it a good idea for two particular members who have crossed swords in the past to be on the same committees, or maybe it would be in that this could give them the opportunity to work together constructively. If a particular member does not work well with a particular officer is it really necessary for them to be involved in the same project, particularly when they would have to work closely together for long periods? It may not be possible to influence such events. But it could be worth a try. So might some informal discussions between senior officers and group leaders assist in such situations?

Training. Monitoring officers generally provide a very effective training regime for members. However there may be a problem in reaching all members, particularly those with full time jobs or other conflicting demands on their time. This may support a case for one to one training, perhaps at evenings or weekends, and bringing in outside assistance, to cover those 'difficult to reach' members. For practical purposes this would be most likely to cover a specific area of the Code shown to be of particular relevance to that member, perhaps disrespect/disrepute or personal/prejudicial interests. Clearly it is better to get some connection and put part of your message across rather than accomplish nothing at all.

We also need to be frank and accept that what might be seen by you and I, and the public at large, as unacceptable behaviour might well not be sufficient for the Adjudication Panel to take the ultimate step of disqualification. Which is being viewed more and more as a very draconian sanction. And which perhaps leads to more tribunals making recommendations to the Authority involved, which the Standards Board will follow up on. This all adds weight to consideration of action at the earliest possible stage. Because if something will need to be done anyway, doing it earlier will invariably be cheaper and more effective.

Some of these issues could be relatively straightforward to follow through with, subject of course to time constraints. Even on an individual basis members will hopefully in the main be receptive to being given a 'heads-up' on how their actions could be viewed by others. And be willing to work to improve the way things operate in their area. However in some authorities it may be difficult for officers to raise almost any regulatory issues with particular members, one reason being perhaps a perceived lack of independence. And if a matter involves personalities then views may have become entrenched on both sides making things even more difficult. However any difficulties will only increase with time and so it may be worthwhile exploring bringing in someone from outside the authority who would be seen as independent. On one level this could be simply to reinforce the message from officers within the authority. At the other end of the spectrum a mediation service could be justified between individuals or groups.

I think that we focus too much on the Code of Conduct. It is true that it can be awkward to apply in certain situations. And it can have severe implications if breached. But in the main it is generally straightforward and follows commonsense lines. I've often been told about the Private Eye test, in other words what would we think of our own actions if they appeared in that publication. Most of us have a good understanding of what is appropriate and what is not. And so in simple terms, perhaps what we really need to focus on is whether our actions would appear appropriate to others, learn from our mistakes, take advice from respected colleagues and remember that all those in local government, from the smallest parish council to the largest metropolitan authorities, are here to make the lives of local people a little better.

So where does this all leave us.

In my experience seeking to address potential problem areas at an early stage, either by dealing with them internally within the authority, or bringing someone in from outside,

can save substantial amounts of time and consequently money. It is perhaps worth bearing in mind that in even the smallest locally investigated case the MO, local investigator, the subject member, possibly other members and officers as witnesses and the Standards Committee will all be involved. And just the investigation itself may take at least a week of someone's time to complete.

Dealing with issues early can be easier than doing so later when positions can be more entrenched.

Early action improves the standing of the authority among its employees, members, the local population and regulators.

Early action can also avoid negative publicity.

Proactive action might not be appropriate in all situations or be successful when attempted. But I think that authorities should consider making it part of their regulatory environment. If only because it would be much more preferable for a situation to be resolved without the time, expense, publicity and stress to all those involved of either an investigation or tribunal hearing.

The Standards Board titled the Fourth Annual Assembly of Standards Committees 'In your Hands', referring to local investigations and adjudications. I think this line is even more relevant now but should be extended not just to cover Code of Conduct issues but all ethical and behavioural issues which affect an authority. And the more local authorities lead on this issue, without the need for any recourse to central government or statutory procedures, the more efficient and effective local government will be.

So having heard something from me I would be very interested in your own views. Do you feel you already take a proactive approach? Would you, or indeed do you, feel comfortable about taking such action outside a formal investigative process? Might this vary depending on the individual or the situation? Do you think some cases which have been formally investigated could have been resolved without going down this route?

So over to you.

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