

AGENDA MANAGEMENT SHEET

Name of Committee **Audit and Standards Committee**

Date of Committee **3rd February 2010**

Report Title **Standards For England – Bulletin No 46**

Summary The report encloses the latest issue of the Standards for England Bulletins

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Would the recommended decision be contrary to the Budget and Policy Framework? No.

Background papers None

CONSULTATION ALREADY UNDERTAKEN:- Details to be specified

- Other Committees
- Local Member(s) N/A
- Other Elected Members
- Cabinet Member
- Chief Executive
- Legal Sarah Duxbury, Greta Needham.
- Finance
- Other Chief Officers
- District Councils
- Health Authority
- Police

Other Bodies/Individuals

FINAL DECISION YES

SUGGESTED NEXT STEPS:

Details to be specified

Further consideration by this Committee

To Council

To Cabinet

To an O & S Committee

To an Area Committee

Further Consultation

Agenda No

**Audit and Standards Committee – 3rd February 2009.
Standards For England - Bulletin No.46**

**Report of the Strategic Director Customers, Workforce and
Governance**

Recommendation

That the Committee notes the contents of the latest Standards for England Bulletins.

1. This report attaches the latest Standards for England Bulletins
2. Bulletin 46 - highlights include:
 - Bias, Predetermination and the Code
 - Local Assessment: sharing lessons learnt

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Strategic Director of Customers, Workforce and Governance

Shire Hall
Warwick
4 January 2010

Standards and Ethics Award

The closing date for entries to the 2010 Local Government Chronicle (LGC) awards was Friday 20 November. Around 20 authorities entered the Standards and Ethics Award, which is supported by Standards for England. Our judges, Dr Robert Chilton, Dr Michael Macaulay and Nick Raynsford MP have reviewed the entries and shortlisted six authorities who will be announced on 17 December. The judges will then meet in London to choose a winner which will be announced on 24 March 2010.

More information on the shortlisted authorities will be available on our website in January.

Bias, Predetermination and the Code

At this year's Annual Assembly we ran a session called 'Understanding Predetermination and Bias'. It looked at the relationship between bias, predetermination and the Code of Conduct (the Code). The session proved to be hugely successful in providing information that all standards committees and monitoring officers should be aware of, particularly as it drew on recent and relevant case law in this area. This article attempts to draw out some of the key messages from the session that make understanding predetermination and the Code easier.

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/or expressing that view publicly.

There are two types of predetermination; actual and apparent:

- **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.

Recent 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?

It is important to note that 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.'

This could include information on any other relevant facts affecting the decision, for example, council procedures. 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.

The test is objectively 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.

The courts have accepted that these practicalities mean that the **fair minded and informed observer** accepts that:

- a) 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.
- b) 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.
- c) 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.

d) To suspect predetermination because all members of a single political group have voted for it is an unwarranted interference with the democratic process.

e) 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.

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.

The Adjudication Panel for England (APE) in case reference 0352 has also looked at the relationship between the Code and predetermination and gave 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.

An 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.

For more information on the relationship between predetermination and the Code, what the practicalities of local government have been held to be and case details please see [Day One](#) on the events page of our Annual Assembly website.

For further information on determination please see our [Online Guide on Predetermination and Bias](#).

Local Assessment: sharing lessons learnt

One of the breakout sessions at our Annual Assembly in October was entitled *Local Assessment, sharing lessons learnt*. This session took the form of a discussion forum giving delegates the opportunity to share their experiences of the local assessment process since its introduction in May 2008.

Sessions were held in tandem for monitoring officers and standards committee members respectively. This gave each group the opportunity to share with their peers the challenges that had arisen in their authority and the solutions they had developed to meet these challenges. In addition, delegates

suggested a number of changes to the local standards framework. We value these suggestions but, clearly, many need further evaluation before a decision could be taken whether to make any changes.

A full breakdown of feedback from the sessions can be found on our dedicated [Assembly website](#), but we thought you might be interested in hearing what some of the main issues discussed were.

Top five issues discussed

1. Vexatious or Persistent Complainants

This topic was raised in all four sessions that took place. Potential solutions suggested by delegates included:

- asking for further Standards for England guidance on the definition of what a vexatious complaint is
- change legislation to allow monitoring officers to filter out such complaints and allow committees to refuse complaints from vexatious complainants
- having robust assessment criteria to filter out such complaints at assessment
- to write warning letters to complainants deemed vexatious by the council procedures
- to deliver targeted training
- to publish the average cost of assessing and investigating a complaint.

We are aware that persistent vexatious complainants are causing problems for a number of authorities. This is one area where we intend to provide further guidance for standards committees early in 2010, although we recognise that guidance alone is unlikely to solve this issue.

2. The role of the monitoring officer

Delegates questioned what role, if any, a monitoring officer should have in filtering out complaints before formal assessment by the standards committee. A variety of suggestions were made including that:

- Standards for England should produce further guidance on what steps monitoring officers can take before assessment
- monitoring officers should be given the power to filter complaints before assessment in consultation with the standards committee chair
- monitoring officers should make the initial assessment decision with any review undertaken by the assessment sub-committee

- monitoring officers should make the initial assessment decision for parish complaints
- there should be discretion to halt the formal process if a local solution is reached.

3. Informing the subject member that a complaint has been made

Currently monitoring officers can take the administrative step of informing a member that a complaint has been made about them. However, the current regulations do not allow them to disclose any details of the complaint. Many delegates felt that this puts monitoring officers in a difficult position, especially in circumstances where the complainant has spoken to the press.

Delegates suggested a number of solutions and changes that they would like to see including:

- asking members in advance whether they would like to be told if a complaint is made about them, and make them aware they cannot be told any details until after the assessment
- giving monitoring officers the discretion to reveal some details of a complaint to the subject member depending on the circumstances, in consultation with the standards committee chair
- requesting guidance from Standards for England on what the subject member should be told prior to assessment
- requesting guidance from Standards for England on what the subject member should be told prior to an investigation.

4. Resources

A number of delegates highlighted problems with finding resources to deal with processing complaints. There were some suggestions that monitoring officers could use the Local Government and Housing Act 1989 to ensure they had adequate resources to perform their functions.

Another suggestion was that parishes should either be asked to contribute or alternatively they should be charged for processing complaints about parish members. Currently parish councils cannot be charged for any costs incurred during the assessment or investigation of a complaint about a parish member.

5. Quality of complaint information

Delegates stated that poorly written complaints and lack of information from the complainant could make it difficult to make an assessment decision.

Delegates suggested that:

- a model complaint form from Standards for England would be helpful (we have already published a complaints form – [click here to download](#)).
- complainants should be encouraged to use, or that it should be mandatory to complete, an official form
- monitoring officers should request further information from the complainant if there is insufficient information to make an assessment decision
- the complainant should be asked what they would like the outcome of the process to be.

We are currently undertaking a review of the local standards framework and information gathered from the sessions will feed into this review process. However, some of the changes to the standards framework suggested would be difficult to implement as they would require primary legislation to be amended.

A number of requests were made during the sessions for further guidance from Standards for England. We will consider these requests and use the feedback to inform future guidance updates.

Annual return 2010

In April 2009 we collected annual information returns from the 438 local authorities that we work with, covering the period 8 May 2008 to 30 March 2009.

It is important for us to collect information from monitoring officers and standards committees on how they are helping to maintain high standards of ethical conduct in their authorities. This assists us in ensuring the effectiveness of local standards arrangements.

Last year's return was an opportunity for monitoring officers and standards committees to tell us in detail about the particular achievements, successes and difficulties they had in supporting and promoting the ethical framework. We used the returns to build up a bank of notable practice examples to share across the standards community. Many of these can be found on a dedicated [notable practice](#) section of our website and in our [annual review of 2008-9](#).

We will be continuing to collect examples of notable practice in the annual return 2009-10. The information we gather will allow us to cultivate a national overview of the local operation of the standards framework. We will use this to identify strengths and weaknesses of the framework, prompting where we should be producing guidance or seeking policy changes in response to emerging national trends.

The questions in the annual return are currently being developed. Some will stay the same as last year so that we can report on progress, but many of them will change.

Our reasons

We are aiming to have a shorter questionnaire which will use tick boxes where possible to capture practices that are common across many authorities. This should mean that less time is required completing responses; unless there are exceptional circumstances or innovative activities to tell us about. We only expect authorities to provide lengthy responses where they think that a narrative will help others in the standards community who may find themselves in a similar position.

We appreciate that the timing of the annual return is not ideal. April marks the start of the new financial year and is inevitably a busy time for all concerned. However, we want to be able to relay the messages from the year as soon as possible. Therefore, like last year, we will be asking for annual returns to be completed during April and May.

To help authorities complete this task during a busy time, we will be publishing the questions earlier. We hope to communicate the questions to monitoring officers in January 2010. This is so authorities have more time to plan and consult with their standards committee and other key figures, such as the council leader and chief executive, when preparing their responses.

Governance Toolkit for Parish and Town Councils

The second edition of the Governance Toolkit for Parish and Town Councils was well-regarded, winning a *Municipal Journal* Legal Achievement of the Year Award in 2007. The third edition of this valuable resource was finalised in April and is now available to download.

This edition has been revised, updated and produced in partnership between the National Association of Local Councils, the Society of Local Council Clerks, Standards for England and the Association of Council Secretaries and Solicitors. It is also endorsed by the Local Government Association. Milton Keynes Council, a fully parished part urban and part rural authority, is recognised as having been at the forefront of parish council initiatives for many years, and undertook the editing and production of this edition of the toolkit.

This new edition toolkit is a comprehensive, practical reference guide. The topics covered include governing documents, public engagement and managing information, creation of new town and parish councils and elections.

The toolkit will be most useful for

- town/parish clerks and councillors
- those interested in becoming a parish councillor

- principal councils wanting to establish parish councils in their areas
- monitoring officers.

If you would like to download a copy, you can find it in the [Resource Library](#) on our website under 'toolkits'.

Assessment Made Clear DVD

Copies of our new DVD – '*Assessment Made Clear*' have now been distributed to local authorities. We are keen to hear your feedback and so with each DVD there is a freepost feedback postcard, which should be quick and easy to complete and return to us. If you prefer to provide feedback online there is now an [online form](#) on our website.

So far we have been pleased with the response you've given to its approach in dealing with different assessment scenarios. However, some monitoring officers have expressed disappointment that it is not possible to freely copy the DVD as was the case with our previous DVD.

We have not envisaged a need for authorities to consider widespread distribution of this particular DVD. Our view is that this DVD is targeted at standards committee members serving on assessment sub committees and is best watched in a training situation, where group discussion supports the learning points set out in the DVD.

While it may be considered informative for a wider community of local councillors and appropriate officers, for such audiences we believe the context of the DVD, and discussion around it, are best moderated within a group training setting.

We do appreciate there may be cases where exceptions are to be made - so we have taken the decision to make further copies of the DVD available from us for £12.50.

Using the DVD

Alongside the usual features, the DVD includes 'pause and discuss' slides to allow you to pause after each case study and, as a group or as individuals, discuss or think through what you would do in that situation.

Subtitles are provided as an extra and scene selection allows you to revisit easily the sections that are of most interest to you. A pdf of the learning points is also available when viewing the DVD on your PC.

You can [view a trailer](#) of the DVD on Standards for England's website.

To order further copies please contact publications@standardsforengland.gov.uk or call our reception number – 0161 817 5300.

Police authorities and joint standards committees

In the *Joint standards committee guidance* we state that a police authority is unable to enter into joint arrangements with another police authority because Section 107(2) of the Local Government Act 1972 prevents them from having any of their functions carried out by other police authorities.

After receiving a large number of queries about this from police authorities we consulted again with Communities and Local Government. As a result of this liaison we now believe that our original interpretation of the legislation was incorrect. It is now understood that the 1972 Act does not prevent police authorities from forming joint standards committees with each other in line with the [Standards Committee \(Further Provision\) \(England\) Regulations 2009](#).

We would like to take this opportunity to apologise for the confusion. Our guidance will be modified shortly to reflect our updated position.

Review of the standards framework

We have all been operating the new standards framework for 18 months. As such, now is a good time for Standards for England, as the strategic regulator responsible for making sure it works effectively, to carry out a review of its effectiveness and proportionality. Where necessary we want to make recommendations to Communities and Local Government (CLG) for improvement.

We already have much of the information we need gathered from our research among various stakeholder groups (to which many of you have contributed - thank you), and from our own experience of monitoring and working with the standards framework. Soon we will be consulting with various bodies representing key local government and standards interests on what they think and about any recommendations we want to make. Our intention is to send these recommendations to CLG in March of next year.

We will keep you informed on the progress of the review through future bulletins and on our website. If, in the meantime, you have any queries then please contact Dr Gary Hickey on 0161 8175416 or gary.hickey@standardsforengland.gov.uk

Share your experiences of local standards

You can discuss anything you find topical in this Bulletin with fellow monitoring officers or standards committee members by using our new online forum. The Standards Forum, launched in October, provides a place for you to network, ask questions, share good practice, make recommendations and discuss any topics relating to the local standards framework.

All monitoring officers were automatically registered for the Forum and asked to send us the details of any members of their standards committees who wanted to join along with one other nominated officer. We have had a positive response and registered an additional 300 users, with more requests for membership being received daily. We intend to open membership up further by granting a further two officer registrations for each authority once we have registered this first wave of users. This is likely to happen early in the new year.

There are currently over 30 different subjects being discussed on the Forum. Popular topics include recommendations for external investigators and trainers; debates about protocols including the notification of subject members and the publication of decision summaries; and advice on the recruitment of parish members.

To find out more please access the [forum](#).

If you have any questions please contact forum@standardsforengland.gov.uk

Reminder: the importance of completing information returns

Within part 10 (Ethical Standards) of the Local Government and Public Involvement in Health Act 2007 it states that local authorities must send a periodic information return to us when we request one.

The periods we have specified, in the interest of not placing an unnecessary burden on local authorities, are the financial year quarters. In addition, we request a further return on an annual basis, meaning that there are five information returns required per year.

The information returns are extremely important. We need them to keep us up-to-date with how the local framework is functioning. They allow us to identify individual authorities that are not complying with the local standards framework or who are facing difficulties in implementing it.

So far authorities have been responsive in providing us with information on their experience, and the average percentage of returns completed for each quarter of the year is 99%. Over the 6 quarters for which we have requested returns, there have been just **13** instances where authorities have not provided a response. This is not bad when you consider there are over 400 authorities that we send requests to.

However, it often takes a significant effort to collect all of the returns. Roughly 75% of authorities complete their return by our deadline which is 10 working days after the close of each quarter. But the remaining authorities, who number more than 100, require multiple e-mail reminders and telephone calls before they complete their return. This is unacceptable, as it means it takes us longer than we would like to pull together all of the data and report on our findings.

Ultimately, we expect the authority's monitoring officer to complete our information returns. However, they can delegate this task to a colleague if they wish. For consistency we will always send our email correspondence directly to the monitoring officer, but if they know that they are not going to be available when a return is due they should delegate the task to somebody who is.

For more information on Standards for England's information returns please contact our monitoring team on 0161 817 5300.

Update on the transfer of the Adjudication Panel for England into the unified Tribunal structure

On 1 September, the General Regulatory Chamber (GRC) was launched as part of the First-tier Tribunal. The work of the Adjudication Panel for England will be transferred into the GRC in January 2010.

Legislative process

A 'Transfer of Tribunal Functions Order', transferring the functions of the Adjudication Panel into the GRC, has now been laid in Parliament. The order requires Parliamentary approval. Debates on the order will take place before the end of the year. The order contains amendments to the Local Government Act 2000, to the Standards Committee Regulations and to the Case Tribunal Regulations. Once Parliamentary approval has been obtained an amended version of each of those provisions will be available on the [Tribunals Service website](#).

The Order abolishes the Adjudication Panel for England, whose functions will then be undertaken by the First-tier Tribunal and will be known as the First-tier Tribunal (Local Government Standards, England). The President and members of the Adjudication Panel will be transferring as either judges or members of the First-tier Tribunal assigned to work in the General Regulatory Chamber of that Tribunal. The President will also be a deputy judge in the Upper Tribunal.

Impact on users

References and appeals made to the President of the Adjudication Panel are determined by Case Tribunals and Appeals Tribunals. The people who sit on those Tribunals will be the same people who determine these kinds of matters in the name of the First-tier Tribunal (Local Government Standards, England). The associated administrative work will also be undertaken by the same people as currently do this. Such work will continue to be based at the Tribunals Services offices in Leeds.

Since it was established, the Adjudication Panel has operated without any formal rules. That situation will change 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, including power to summon witnesses.

All proceedings taking place after the transfer order comes into effect will be conducted in accordance with the rules of the First-tier Tribunal unless, in the case of proceedings which have already started, it would be unfair to apply particular provisions of those rules.

You can view regular updates on the [GRC page](#) of the Tribunals Service website.