

Taunton Deane Borough Council

Full Council – 14 July 2015

Regulatory Amendments to Statutory Protection Provisions for Statutory Officers

Report of the Legal Services Manager

(This matter is the responsibility of Executive Councillor Richard Parrish)

1. Executive Summary

The Local Authorities (Standing Orders) (England) (Amendment) Regulations 2015 came into effect on 11 May 2015. These Regulations amend the statutory provisions in relation to (a) the taking of disciplinary action or (b) the dismissal of the key statutory posts of Chief Executive Officer (Joint Chief Executive), Chief Finance Officer (Director – Operations and Deputy Chief Executive) and Monitoring Officer (Assistant Chief Executive and Monitoring Officer). The Regulations require all local authorities to adopt revised Standing Orders at their first 'ordinary' meeting after 11 May 2015.

The Somerset Monitoring Officers Group (SMOG) met on 21 May 2015 and agreed to recommend a consistent approach across the six Councils within the county, in response to the implementation of these regulatory requirements. This report goes on to detail why SMOG at this stage is proposing that the six Councils defer making any changes to their standing orders on this matter until later in 2015.

2. Background

- 2.1 The Chief Executive Officer, the Monitoring Officer, and the Chief Finance Officer have statutory responsibilities to discharge to their Councils. Since 2001 they have benefitted from statutory protection in the form of mandatory Standing Orders requiring any investigation of misconduct in respect of such officers to be undertaken by a Designated Independent Person (DIP). The DIP is appointed at an early stage in the procedure, when it appears to a Council that an allegation of misconduct on the part of the officer in question requires investigation. Disciplinary action may only be taken against these officers in accordance with a recommendation in a report made by a DIP. Therefore, to date all Councils have been required to have in place appropriate standing order provisions within their constitutions to reflect these requirements. The intention of these provisions was to ensure that these officers were able to discharge their duties without the potential for undue pressure of influence from elected Members, with any dismissal of such officers only following a full independent investigation.

- 2.2 The Local Authorities (Standing Orders) (England) (Amendment) Regulations 2015 attempt to simplify, as well as localise, this process by removing the requirement for the appointment of a DIP. The 2015 Regulations also remove any specific enhanced protection for these posts where disciplinary action short of dismissal is proposed. In place of the DIP process, but only in relation to a proposed dismissal, the Regulations provide that a decision to dismiss a post-holder in one of these statutory posts can only be taken by Full Council. In considering such matters, Full Council must first consider any advice, views or recommendations from an independent panel, the conclusions of any investigation into the proposed dismissal, and any representations from the officer concerned.
- 2.3 Following the coming into force of the 2015 Regulations a debate amongst professional associations at national level has emerged which identifies numerous concerns about the detailed content of the Regulations. It is felt that there is a lack of clarity within certain key elements of the Regulations, with resulting legal complications. There is also felt to be a significant level of uncertainty over how the Regulations should be interpreted. These concerns have been identified at a number of local authorities and also by the Local Government Association (LGA). As a consequence, representations have been made to the Department for Communities and Local Government (DCLG requesting clarification of and preferably amendments to the 2015 Regulations.

The issues that are causing concern are:-

- 2.4 Any reduction in the statutory protection provisions must by definition increase the risk of these posts being exposed to political pressure and of inappropriate sanctions potentially being imposed against post-holders. The lack, under the 2015 Regulations, of any specific protection for disciplinary action other than dismissal is a particular concern given the elected Member exposure that such officers have as a result of their roles.
- 2.5 A particular concern relates to the independent panel required to advise Council in relation to a dismissal. The 2015 Regulations require relevant independent persons appointed by Councils for the purposes of the Members' conduct regime under section 28(7) of the Localism Act 2011 to be invited to participate in an independent Panel established to advise a Council on a proposed dismissal. The uncertainty relates to whether such a Panel should consist solely of independent persons (minimum of two required) or whether the Panel can also include elected members. The 2015 Regulations state that the Panel is a committee of the council and "may consist of such persons (whether members of the appointing authority or authorities or not) appointed for such term as may be determined by the appointing authority...." However, the letter from DCLG to Chief Executives and the explanatory memorandum which accompanied the 2015 Regulations both imply that the panel should only comprise of independent persons and should not include Members as well. Therefore the Regulations appear to be in partial conflict with related Departmental advice.

- 2.6 As stated the Council must invite relevant independent persons to be considered for appointment with a view to appointing at least two such persons to the Panel. The Council must appoint to the Panel such relevant independent persons who accept an invitation and in the following priority order:-
- (a) A relevant independent person who has been appointed by the Council and who is a local government elector;
 - (b) Any other relevant independent person who has been appointed by the Council; and
 - (c) A relevant independent person who has been appointed by another authority or authorities.
- 2.7 The particular problem and direct conflict in relation to the involvement of independent persons is that the 2015 Regulations require them to be voting members of the Panel to advise the Council on dismissal of the Statutory Officers but the Localism Act 2011 does not allow an individual to be appointed as an independent person by a Council if that individual is a co-opted voting member of a Committee of that Council. As a result, independent persons appointed by this Council would be unable to participate in the Panel advising the Council on the dismissal of a Statutory Officer.
- 2.8 The current DIP process is often incorporated into Statutory Officers' contracts of employment, so authorities will need to agree variations to such contracts in order to implement the new regime as set out in the 2015 Regulations. Any attempt to deal with chief officers in accordance with the new regime before contracts of employment have been formally revised would in effect represent a breach of contract.

In fact, for Taunton Deane and West Somerset Councils, the procedures are incorporated into protected officers' contracts of employment as they form part of the JNC Conditions of Service Handbook for Chief Executives.

There are several methods for varying or changing a contract of employment but the Local Government Association have advised that they are seeking to amend the JNC model procedures through collective agreement, thereby potentially avoiding any need to make changes at a local level.

Having established that the DIP process is contractual then, until such time as the contracts of employment are amended nationally through collective agreement or locally (through agreement by the parties or termination and re-engagement) it is necessary to ensure both the Regulations and contractual requirements are met. The Local Government Association (LGA) has proposed a potential model for

authorities to use where this is the case. This model is set out in the LGA Advisory Bulletin No. 624 relating to Workforce: Employment Relations.

- 2.9 Finally, independent persons were recruited under the Localism Act 2011 for a specific and different purpose (in connection with the then-new standards regime) and may not wish to participate (or may not have the required skills).

Therefore, taking into account the matters set out above, there is currently a lack of clarity as to how the new regulations can be enacted by councils without the serious risk of legal challenge.

Response of the DCLG to representations

- 2.10 At the time of writing this report a response has been received from an officer contact at the DCLG in answer to representations made by the Association of Democratic Officers (ADSO) specifically in relation to the make-up of the panel. This confirms the Government's intention that the advisory panel should only comprise independent persons and not elected Members and this remains inconsistent with the regulations. However, this response does not address the issues of the conflict between the legislative requirements applying to the appointed independent persons. As the situation stands SMOG is unable to identify a suitable local solution that the Councils in Somerset can apply to overcome this conflict.

Proposal

- 2.11 SMOG has considered the options available for recommendation to the six Councils at this stage as follows:-
- (a) Defer amendment of existing standing order provisions to the autumn in the hope that a satisfactory way forward can be achieved in consultation with DCLG. This carries some risk if a Somerset Council is faced with a relevant disciplinary or dismissal situation in advance of any changes being formally agreed to a Council's constitutional arrangements. Given that this sort of situation is rare the view of SMOG is that this is a risk worth carrying at this stage on the basis that if a situation arises that requires a panel to be established then a Chief Executive can use his or her emergency powers to agree a suitable way forward in consultation with Members as required by that Council's Constitution and depending on national developments. This was the preferred option identified by SMOG and forms the basis of the recommendation in this report. As has already been referenced, the LGA has issued guidance on this matter that could be followed if required; or
 - (b) Each Council proceeds with the establishment of a panel comprising independent persons or a mix of independent persons and elected members. Either of these options runs a significant risk of not being compliant with the new regulations or in conflict

with other legislative requirements and would require considerable work to put in place locally.

The consensus was that option (a) was the more appropriate way forward at this stage and that there was strength and sense in the six Councils applying a consistent approach to this course of action.

3. Legal Comments

3.1 Covered in the background information (above).

4. Environmental and Community Safety Implications

4.1 None in respect of this report.

5. Equalities Impact

5.1 None in respect of this report.

6. Risk Management

Risk Matrix

Description	Likelihood	Impact	Overall
By not changing standing orders as required under the new regulations, the council could be open to challenge	3	4	12
<i>This risk is clearly acknowledged and considered less of a risk than to adopt a process that could be legally flawed; there is also a process in place to deal with any allegation that may need to be considered in the interim</i>	2	4	8

The scoring of the risks identified in the above table has been based on the scoring matrix. Each risk has been assessed and scored both before and after the mitigation measures have been actioned.

7. Health and Wellbeing

7.1 None in respect of this report.

8. Asset Management Implications

8.1 None in respect of this report.

9. Crime and Disorder Implications

9.1 None in respect of this report.

10. Consultation Implications

10.1 None in respect of this report.

11. Recommendations

11.1 That Council defer agreeing revisions to the existing Standing Order provisions relating to the statutory protection arrangements for the posts of Chief Executive, Director - Operations and Deputy Chief Executive and Assistant Chief Executive and Monitoring Officer to the December 2015 Full Council meeting for the reasons outlined in Section 2 of this report.

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Background Papers

Local Government Association Advisory Bulletin No. 624 Workforce:
Employment Relations