

Draft Guidance to Monitoring Officers by the Standards Board for England: local investigation of allegations of misconduct under the Local Authorities (Code of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

The Standards Board for England is preparing guidance for Monitoring Officers of all relevant authorities in England on carrying out local investigations under section 62 of the Local Government Act 2000. The guidance will be issued at the same time as The Local Authorities (Code of Conduct) (Local Determination) (Amendment) Regulations 2004 (the Regulations). The Office of the Deputy Prime Minister is conducting a separate consultation exercise on the Regulations.

Our consultation exercise is only concerned with the guidance that the Standards Board for England proposes to issue. The guidance covers cases referred back to Monitoring Officers by Ethical Standards Officers (ESO). It does not cover in detail local adjudications which have been dealt with in earlier guidance.

As part of our formal stakeholder consultation process, we are seeking your comments on the draft guidance by **18 May 2004**. Your input is valuable to us, as it will help to ensure that our guidance meets the needs of our target audience and enables Monitoring Officers to carry out their duties in the most appropriate way.

We are inviting comments both on the general content and tone of the guidance and also on any specific points within the guidance. However, we would be particularly interested to hear your views on the following issues:

1). Page 4.

Are the circumstances which an ESO will consider when deciding whether to refer an allegation for local investigation reasonable?

Are there other factors they should consider?

2). Pages 5 and 6.

The Regulations allow cases to be passed back to the ESO in certain circumstances. We have set out what we believe these limited circumstances might be.

Are there other circumstances where cases might be referred back?

Does the guidance distinguish clearly between those circumstances that warrant a referral back to the ESO and those circumstances that warrant a new allegation being made?

Are the circumstances outlined in the guidance reasonable?

3). Pages 6 and 7.

Is the Board correct to want to seek to maintain confidentiality?

Is the guidance clear on the issue of confidentiality?

4). Pages 7 and 8.

Is it appropriate not to have to produce draft reports in all cases? Are the factors to take into account when considering whether to issue a draft comprehensive?

5). Pages 7 and 8.

Does the Report Checklist, with regard to draft and final reports, provide sufficient steps to producing a comprehensive report?

6). Pages 9 and 10.

When appointing someone else to conduct an investigation on their behalf, should the Guidance give direction as to how Monitoring Officers can delegate their investigative role and to whom?

7). Pages 9 and 10.

Is the section on conflicts of interests clear and appropriate?

Is the Board right to suggest that a Monitoring Officer's chief role is to advise the Standards Committee rather than to investigate?

In addition we are considering issuing a guide on how to conduct an investigation. Would Monitoring Officers find this helpful?

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Local investigations

Draft Guidance for monitoring officers

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About this guide

This guide is for monitoring officers and ‘any person nominated by a monitoring officer as his [or her] deputy for the purposes of section 5(7) of the *Local Government and Housing Act 1989* and any person nominated to perform any function under the provisions of section 82A(2) or (3) of the *Local Government Act 2000*.’

In accordance with regulation 6 of the *Local Authority (Code of Conduct) (Local Determination) (Amendment) Regulations 2004*, anybody conducting an investigation must have regard to this guidance. In addition, they should be familiar with the regulations, and have effective procedures in place to enable them to conduct local investigations and determinations.

The Local Authority (Code of Conduct) (Local Determination) (Amendment) Regulations 2004 amend the *Local Authority (Code of Conduct) (Local Determination) Regulations 2003* and references throughout refer to the *Local Authority (Code of Conduct) (Local Determination) Regulations 2003* as amended.

Referring allegations for local investigation

The *Local Government Act 2000* enables ethical standards officers to refer allegations that a member has breached the Code of Conduct to monitoring officers for local investigation. The regulations set out the framework under which this can be done.

An ethical standards officer may refer an allegation for local investigation at any point before they complete an investigation into the allegation. When considering whether or not to refer the allegation to you, ethical standards officers will use their discretion and take into account all relevant circumstances. For example, the ethical standards officer may consider whether, in their opinion:

- the matter does not appear to need the heavier penalties only available to The Adjudication Panel for England;
- the matter is an isolated occurrence and is unlikely to be repeated;
- the member has given a prompt, adequate and unreserved apology and whether remedial action has been taken;
- there is evidence that a local investigation would be perceived as unfair or biased;
- the allegation is of an entirely local nature and does not raise matters of principle;
- there are any relevant local political issues that may have a bearing on a local investigation.

When referring an allegation to you, the ethical standards officer will forward a copy of the allegation letter, along with any other information that they consider appropriate. Relevant legislation such as the *Data Protection Act 1998* and the *Human Rights Act 1998* may sometimes affect whether they are able to forward the original allegation letter. Where, for example, a letter contains allegations against multiple members but only one member is to be investigated, the ethical standards officer may edit the allegation letter before sending it to you.

Ethical standards officers can also refer completed investigation reports to monitoring officers for local determination by a standards committee. This is a separate process explained in The Standards Board for England’s guidance *Standards committee determinations: guidance for monitoring officers and standards committees*.

First steps: notifying the parties to an investigation

When an ethical standards officer refers an allegation for local investigation and determination, in addition to sending it to you they will notify the member who is the subject of the allegation, the complainant and, if appropriate, the clerk of any relevant town and parish council.

Regulation 5(2)(a) states that you must inform the member who is the subject of the allegation, the complainant and, if relevant, the parish clerk, when you receive a matter for local investigation. You should explain to them what will happen next, let them know that you will be in contact again, and provide any directions that you want to make regarding the forthcoming investigation.

In addition, regulation 5(1)(a) states that you must send the member who is the subject of the allegations details of the matter referred to you. This will enable the member to respond to the allegation that has been made against them. It is not necessary to send a copy of the original allegation to the parish clerk or to the complainant.

Notifying the standards committee

At this stage you should simply let your standards committee know that you are carrying out an investigation. In order to protect the confidentiality of your information, you should do this by confidential memo to the chair and all members. The memo should not name the complainant or the member against whom the allegation has been made, and should not be considered at a standards committee meeting. Keep the summary brief to avoid prejudice or the perception of prejudice in your investigation and the subsequent standards committee determination.

Next steps: conducting your investigation

When carrying out local investigations, you should be aware at all times of your obligations under the *Data Protection Act 1998*, the *Human Rights Act 1998* and the *Regulation of Investigatory Powers Act 2000*.

We will publish a separate guide to conducting investigations at a later date. This will not be statutory guidance and is therefore not included in this guidance.

Evidence of new breaches

In the course of an investigation, you may uncover evidence of activities by members that breach the Code of Conduct but extend beyond the scope of the investigation referred to you by the ethical standards officer.

Your powers relate only to the allegation that you have been given. If you uncover evidence of a possible breach that does not directly relate to the investigation, you should ask the person from whom you have obtained the information to make an allegation to The Standards Board for England, or make an allegation yourself. You should not investigate it.

You may uncover additional matters that relate directly to the allegation referred to you — for example, an isolated instance of rudeness that reveals a consistent pattern of behaviour. In these circumstances, you may, in accordance with regulation 5(4), write to the ethical standards officer to

request that the original allegation be referred back to them for investigation. Regulation 5(5) enables the ethical standards officer to decide whether to direct you to continue with your investigation or refer the matter to them and stop your investigation.

Under regulation 5(4), the ethical standards officer is not able to consider your request to accept a referral back after you have sent your report to the standards committee.

Disclosure of information

Section 63 of the *Local Government Act 2000* limits the circumstances in which information obtained by an ethical standards officer during an investigation can be disclosed. Any person who discloses information in breach of section 63 is guilty of an offence.

If an ethical standards officer refers an allegation for local investigation part-way through their own investigation into that allegation, under section 63 (as amended by the regulations), they are allowed to disclose any information that they have obtained during that investigation to enable you to carry out your own. There may be circumstances in which the ethical standards officer will be unable to disclose information — for example, where the Secretary of State has advised them that the disclosure would not be in the public interest.

The information that a monitoring officer obtains during the course of a local investigation is not covered by section 63 of the Act, but you should treat this information as confidential.

Confidentiality

We appreciate that it may be difficult to ensure complete confidentiality within your authority. While you are conducting your investigation, it is good practice to treat the information that you gather as confidential, and to ask the people that you interview, and anyone else aware of the investigation, to maintain confidentiality. This will help to ensure that your investigation is not seen as prejudiced. Maintaining confidentiality reduces opportunities for evidence to be seen as unfair or biased, and preserves the integrity of the investigation.

Any information that has been obtained by you during an investigation should not be disclosed unless:

- the disclosure will assist an ethical standards officer to perform their statutory functions under the law;
- the disclosure will assist the monitoring officer to perform their statutory functions under the law;
- the subject of the information has given their consent to the disclosure;
- the information has already lawfully been made public;
- the disclosure is made for the purposes of criminal proceedings in the UK.

Members should be reminded of their obligation under paragraph 3(a) of the Code of Conduct not to disclose information that they have received or that has been given to them in confidence.

Any draft report that you issue on the outcome of the investigation should be marked as confidential to preserve the integrity of any further investigation that you may need to undertake.

In addition, you should also consider whether the information that you collect during your investigation should be treated as confidential information under section 100(A) of the *Local Government Act 1972*, or be categorised as exempt information under schedule 12A of the 1972 Act as amended by the regulations.

Producing draft and final reports

When you have concluded your investigation, you should consider whether to produce a draft report. Factors to be taken into account when deciding whether to do this include:

- Is there factual complexity or ambiguity in your statement of facts?
- Is there a genuine dispute as to the material facts of the case?
- Has your investigation created an expectation that the parties will receive a draft for comment?

If you decide to produce a draft report it should be sent to the complainant and to the subject of the allegation for comment on your findings of fact. You do not need to send the draft to other witnesses or parties interviewed, although you should have confirmed individual statements with the witnesses who gave them. You do not need to send the draft report to the relevant parish clerk.

At this stage, members may make representations in whatever manner is most appropriate to them. See the report checklist below for more information on producing and circulating reports.

Responses to your draft may reveal the need for further investigation, or they may add nothing of further relevance. Once you have considered whether they add anything of substance to the investigation, you will be able to make your final recommendations.

Report checklist

Draft and final reports should contain the information listed below. The level of detail required will vary for each report, depending on the complexity of information to be considered and presented.

- a confidential marking (draft reports only)
- the date
- the legislation under which the investigation is being carried out
- a summary of the allegation
- the relevant sections of the Code of Conduct
- evidence
- your findings of fact
- your finding
- your reasoning

In addition, final reports should also contain documents relevant to your report:

- a schedule containing background documents;

- a schedule containing notes of telephone conversations, letters, and notes of interviews with witnesses; and
- a schedule containing chronology of events.

Draft reports

Draft reports should be clearly labelled as draft. They should state that they do not necessarily represent your final finding, and explain that you will issue a final report that will be presented to the standards committee.

Final reports

Final reports should be clearly labelled as final. They should state that these are your final findings and will be presented to the standards committee. Where your finding is that there has been no breach of the Code of Conduct, you should explain that the report will be sent to the standards committee for consideration. Where your finding is that there has been a breach of the Code of Conduct your report should make clear that the standards committee will conduct a hearing into the allegations.

The report should be accompanied by information explaining the circumstances under which the standards committee may conduct a hearing into the allegations, and the procedure for these events (see 'Consideration of the final report' below).

The final report should be sent to:

- the member who is the subject of the allegation;
- the person who made the allegation;
- the standards committee of your authority;
- any parish councils concerned;
- the ethical standards officer who referred the matter for investigation.

Consideration of the final report

If your report states that there has not been a breach of the Code of Conduct, the standards committee must decide at a meeting if they agree with that finding. At this meeting they should simply consider the report. They should not seek to interview witnesses or take representations from the parties. Their role is to decide whether, based on the facts set out in the report, there is a case to answer.

If the standards committee decides that, on the balance of probabilities, there is a case to answer, the full committee, or an appointed sub-group of the committee, will hold a hearing to make a final determination. The standards committee's decision will be based on careful consideration of the information in your report.

If, on the balance of probabilities, the standards committee agrees that there has not been a breach of the code of conduct, you should arrange for a notice to be published (see 'Publishing findings of no breach' below).

Standards committees may at this point make recommendations to their authorities on matters arising from the report.

If your report states that you consider that there has been a breach of the Code of Conduct, you must refer it directly for a hearing by the standards committee, or an appointed sub-group of the committee, to make a final determination.

Publishing findings of no breach

If the standards committee finds that there has been no breach of the Code of Conduct, regulation 8(1)(b) requires you to arrange for a notice to be published in an independent local newspaper.

The notice should contain a statement that the member did not breach the Code of Conduct and should also give a short explanation of how the decision was reached.

The member who is the subject of the allegation can request that the notice is not published. You should contact them at the conclusion of the standards committee's determination to find out their preference.

Arranging a hearing

You will need to arrange a standards committee hearing if:

- the final report concludes that there was a breach of the Code of Conduct;
- if the standards committee, having considered a report that concludes there was no breach, decides there is a case to answer.

You must arrange for a hearing to be held within three months of issuing the final report.

The hearing must be carried out in accordance with the Local Authorities (Code of Conduct)(Local Determination) Regulations 2003 as amended by the 2004 regulations and our guidance, *Standards committee determinations: guidance for monitoring officers and standards committees*.

Conflicts of interest

Monitoring officers have four main roles in relation to the Code of Conduct:

- to provide advice to the standards committee;
- to advise members who are the subject of an allegation and the person making the allegation;
- to investigate alleged breaches of the Code of Conduct that an ethical standards officer has referred for local determination (this is a statutory role that can be delegated);
- to advise members about conduct issues before any alleged misconduct takes place.

Each role is important but may lead to a conflict of interest in relation to an investigation. For example, if you are asked to investigate an allegation against a member to whom you previously gave advice on the same issue, then it is likely that a conflict of interest would arise. If such a situation arises, you should delegate the investigation to somebody else.

In previous guidance, The Standards Board for England recommended that, in cases referred by an ethical standards officer for local determination, the monitoring officer should act as the main advisor to the standards committee, unless they have an interest in the matter that would prevent them from performing this role independently. Where a matter is referred back for local investigation, it is still vital that the standards committee has access to appropriate advice. You therefore need to consider whether you wish to investigate the matter and delegate the role of advising the standards committee or if it is more important to delegate the investigative role. Such a decision will need to be based on a careful assessment of the circumstances that are appropriate to your role and to your council.

For further information, refer to our guidance booklet, *Standards committee determinations: guidance for monitoring officers and standards committees*.

Delegation of investigations

Under section 113 of the *Local Government Act 2003*, monitoring officers can delegate investigations to their deputy or to any other person they nominate to conduct a local investigation. In common with monitoring officers, deputies and nominated people do not have to be legally qualified but they are equally obliged to follow guidance issued for monitoring officers.

Under section 5(1)(b) of the *Local Government and Housing Act 1989*, local authorities must provide you with sufficient resources to perform your duties. Deputies have the right to the same support as monitoring officers.

In many authorities, monitoring officers will be able to appoint a member of staff to carry out their investigation. Smaller authorities may find it useful to make reciprocal arrangements with neighbouring authorities to make sure that an appropriately experienced officer is available to carry out a local investigation. Authorities may also decide to hire suitable people from outside the organisation to carry out investigations.

To ensure that there is no confusion concerning the role and authority of the person delegated to conduct the investigation, monitoring officers should use a formally instituted procedure to record that they have delegated their investigative role to another person. Ethical standards officers must be informed of the outcome of the deputising process, as they may need to provide the person carrying out the investigation with further information.

Personal conflicts

You should take care to avoid any personal conflicts of interest. If you find that you have a direct or indirect interest in a local investigation, (for example, you have a direct financial interest in the subject of the allegation, or you know that a family member or friend is involved), you must not participate. Instead, you should notify the standards committee, the member concerned, the complainant and the ethical standards officer, explaining:

- that you will not take part in the investigation;
- the nature of your interest;
- who will carry out the investigation in your place.