1. I am instructed to advise the Association of Council Secretaries and Solicitors ("ACSeS"), the professional association representing monitoring officers in England and Wales, with respect to a number of matters arising from the recently enacted Localism Act 2011 ("the 2011 Act").

2. **First**, I am asked to advise as to the range of options open to local authorities to impose sanctions for breaches of the code of conduct under the 2011 Act.

3. **Second**, I am asked to advise as to whether past independent members of standards committees are eligible to assume the role of "independent person" under the 2011 Act.

   **I. Range of Sanctions**

   (i) **Statutory Position**

4. The 2011 Act, which received Royal Assent on 15th November 2011, makes substantial changes to the standards regime for local authority members in England and Wales. Section 27 of the 2011 Act provides that:

   (1) A relevant authority must promote and maintain high standards of conduct by members and co-opted members of the authority.
(2) In discharging its duty under subsection (1), a relevant authority must, in particular, adopt a code dealing with the conduct that is expected of members and co-opted members of the authority when they are acting in that capacity.

5. The 2011 Act does not prescribe a model code of conduct. Section 28(1) merely requires local authorities to secure that the code which they adopt is ‘when viewed as a whole, consistent with the following principles— (a) selflessness; (b) integrity; (c) objectivity; (d) accountability; (e) openness; (f) honesty; (g) leadership’ (that is, the Nolan principles of standards in public life).

6. Section 28(4) of the 2011 Act provides that: ‘A failure to comply with a relevant authority’s code of conduct is not [to] be dealt with otherwise than in accordance with arrangements made under subsection (6)’. Subsection (6) provides that:

   ‘A relevant authority other than a parish council must have in place—

   (a) arrangements under which allegations can be investigated,
   and

   (b) arrangements under which decisions on allegations can be made.’

7. The 2011 Act does not prescribe the detail of the arrangements for investigating allegations, and does not prescribe the detail of the arrangements under which decisions on allegations can be made, save for the requirement (discussed further below) that the arrangements must include the involvement of an “independent person”.

8. Section 28(11) of the 2011 Act provides that:
‘If a relevant authority finds that a member or co-opted member of the authority has failed to comply with its code of conduct (whether or not the finding is made following an investigation under arrangements put in place under subsection (6)) it may have regard to the failure in deciding—

(a) whether to take action in relation to the member or co-opted member, and

(b) what action to take.’

9. Section 28(11) of the 2011 Act does not prescribe the range of ‘actions’ that the local authority can take; but does envisage that some action can be taken against a member or co-opted member who fails to comply with that authority’s code of conduct.

10. Under the previous standards regime (still in force until the new provisions are implemented), the legislation listed a range of sanctions that were available to local authorities:

(a) censure of that member;

(b) restriction for a period not exceeding six months of that member's access to the premises of the authority or that member's use of the resources of the authority, provided that those restrictions—

(i) are reasonable and proportionate to the nature of the breach; and

(ii) do not unduly restrict the person's ability to perform the functions of a member;

(c) partial suspension of that member for a period not exceeding six months;

(d) suspension of that member for a period not exceeding six months;

(e) that the member submits a written apology in a form specified by the standards committee;
(f) that the member undertakes such training as the standards committee specifies;

(g) that the member participate in such conciliation as the standards committee specifies;

(h) partial suspension of the member for a period not exceeding six months or until such time as the member submits a written apology in a form specified by the standards committee;

(i) partial suspension of the member for a period not exceeding six months or until such time as the member has undertaken such training or has participated in such conciliation as the standards committee specifies;

(j) suspension of the member for a period not exceeding six months or until such time as the member has submitted a written apology in a form specified by the standards committee;

(k) suspension of the member for a period not exceeding six months or until such time as that member has undertaken such training or has participated in such conciliation as the standards committee specifies.

See regulation 19(c) of the Standards Committee (England) Regulations 2008 (SI 2008/1085) (“the 2008 Regulations”). These regulations will be repealed by Schedule 4 to the 2011 Act.

11. Section 34 of the 2011 Act provides for criminal sanctions -- a fine not exceeding level 5 on the standard scale -- where a local authority member fails to notify disclosable pecuniary interests. Furthermore, the Court considering whether an offence has been committed under this section may ‘disqualify the person, for a period not exceeding five years, for being or becoming (by election or otherwise) a member or co-opted member of the relevant authority in question or any other relevant authority’ (section 34(4)).

(ii) **Common law position**
12. As the 2011 Act is silent as to what measures can be taken against a member who breaches the code of conduct, it is necessary to look at common law principles. In particular, assistance can be gained from the case law that pre-dated the statutory standards regime.

13. Looking at the earlier case law, it seems to me that the common law did not afford local authorities the ability to issue sanctions that interfered with local democracy. See e.g. R. v Flintshire CC Ex p. Armstrong-Braun [2001] B.L.G.R. 344, where the Court of Appeal expressed real concern at the use by a local authority of standing orders to damage local democracy. See also the discussion in R v. Broadland District Council, ex parte Lashley (2000) 2 L.G.L.R. 933, referred to below.

14. It is clear, therefore, that a local authority cannot ‘disqualify’ one of its own members. Members are democratically elected to serve in that role, and there would be a very strong presumption that only statute can confer a power to interfere with the will of the local electorate by removing them from their role or interfering generally with the performance of their duties. There are express statutory provisions dealing with disqualification -- see section 80 of the Local Government Act 1972 (“the 1972 Act”) (holding of paid office with the authority, bankruptcy etc); as well as the power of the Court under the 2011 Act when considering the criminal offence under section 34 – and there is, in my view, no room for the common law to confer any power to disqualify a member.

15. I consider that the same most probably applies to suspension from performing the role of member. Once again, this interferes with the will of the local electorate, and an express statutory power is most probably required.
16. Similarly, the sanction of exclusion from meetings of the authority. There is a statutory power to exclude from meetings, at section 94(4) of the Local Government Act 1972:

A local authority may by standing orders provide for the exclusion of a member of the authority from a meeting of the authority while any contract, proposed contract or other matter in which he has a pecuniary interest, direct or indirect, is under consideration.

There is no room, in my view, to confer a power to exclude from meetings as a disciplinary sanction in other circumstances. This interferes with the democratic process.

17. As for other sanctions, my general view is that the range of measures available to local authorities is limited. This is supported by the case law that predated the legislation for the standards regime, and the ‘Third Report of the Committee on Standards in Public Life’, which led to the legislation. The Report noted that ‘There is at present no way in which a council collectively can act against an individual councillor for non-compliance with the code of conduct, other than by exclusion from committees with the consent of the councillor’s party group’ (see paragraph 170). In ex parte Lashley, Munby J. did not agree with this broad statement insofar as it was intended to mean that a local authority could not censure an offending member, but Munby J. observed that the sanctions available were very limited.

18. In ex parte Lashley, the Administrative Court was concerned with an application for judicial review of the decision of a local authority’s standards committee, established before the statutory standards regime was brought into force. The local authority was investigating an allegation of misconduct by a member, relating to his dealings with an officer of the authority. It was contended that the member had made remarks to an officer which had resulted
in her going on sick leave suffering from stress. Munby J observed, in an *obiter* part of the judgment, that a local authority could censure a member for breaching the authority’s code of conduct. That is, it could ‘name and shame’ a councillor for falling short of standards expected of councillors.

19. Munby J. accepted, however, that there was no power to impose restrictions on a delinquent councillor of the kind that had initially been imposed in that case. The restrictions were set out in a letter to the member from the authority’s Chief Executive:

“Today, I have issued an instruction to all staff that, for their protection, they are not to have any dealings with you. If you require any information, I request that you contact Mr Bland, Mr Kirby or myself, in writing, and we will ensure that any response is dealt with by the appropriate person in the organisation. With regard to the inspection of planning files relating to your duty as a Councillor, please make an appointment, in advance, in order that arrangements can be made for you to view the files. You are not permitted to enter this building, or the Training Centre, other than to attend Council meetings and you are requested to report to the main Reception on each occasion.’

Munby J. explained that these restrictions ‘would be an unacceptable – indeed unlawful – restraint of the [councillor’s] right to perform her functions and duties as a democratically elected representative.’

20. Munby J. went on to analyse the law relating to access to committees and sub-committees of a local authority, and access to information. He observed that:

‘The councillor’s membership of committees and sub-committees and his right of access to meetings of those committees or sub-committees of which he is a member are protected by law. Thus, although as Nolan J accepted in *R v. Brent London Borough Council ex p Gladbaum* (1989) 88 LGR 627 the statutory power under section 102 of the 1972 Act to appoint to committees by necessary implication
includes power to remove and replace committee members, that power, being as he put it “not merely incidental, but fundamental to the proper discharge of the functions which the council were elected to perform”, cannot be delegated and therefore falls outside the statutory power of delegation in section 101. Moreover, a councillor who has been appointed to a committee or sub-committee in accordance with the provisions of sections 15 and 16(1) of the 1989 Act (sections described in the act as relating to “Political balance on committees etc”) can by virtue of section 16(2) of that Act be removed from the committee or sub-committee only “in accordance with the wishes of” the political group pursuant to whose wishes he was originally appointed. Furthermore, although section 94(4) of the 1972 Act empowers a local authority to provide for standing orders for the exclusion of a member of the authority from a meeting of the authority, that power permits such exclusion only while a matter in which he has a pecuniary interest is under consideration. And finally, although as R v. Bradford City Metropolitan Council ex p Wilson [1990] 2 QB 375n shows there is no objection to one councillor moving in full council a vote of no confidence in another councillor, it is equally clear from the judgments in that case that a councillor cannot be removed from office by such a vote.’

21. Munby J. went on to consider a number of suggested options available to a local authority with respect to misconduct. He was inclined to agree with the suggestion that the local authority could take action such as ‘giving advice or making observations, either generally or specifically about a councillor’s misconduct’, ‘reporting matters to the police’, and even making ‘a recommendation to the full authority to remove a councillor from a committee’. (This view is consistent with the decision of the Divisional Court in R v. Portsmouth City Council, ex parte Gregory 89 LGR 478, which presupposed that the full council had power to suspend members from a committee). However, he was not convinced that a local authority could impose “arrangements” of working practices or “instructions” to staff ‘which sought to impose on a particular councillor or councillors specific restrictions more onerous than those imposed on councillors’. Munby J. observed that these ‘might very well be ultra vires’ if imposed for disciplinary reasons.
22. Munby J. explained that ‘In approaching this question one needs always to have in mind that anything which fetters the otherwise appropriate activities of a democratically elected representative must . . be subject to the most searching and rigorous scrutiny and is something which requires the most cogent and compelling justification.’ Munby J. was ‘sceptical as to whether any significant restraints of a practical nature imposed on an individual councillor’s otherwise appropriate activities (that is, restraints more onerous than those imposed on councillors generally) can be justified in the absence of express statutory authority.’

23. The case was appealed to the Court of Appeal: see [2001] LGR 264. The Court did not expressly endorse Munby J’s observations, nor did it disapprove them. The Court’s observations were that the sanctions available to local authorities were limited. Kennedy LJ observed at §26 that ‘So far as the councillor is concerned, the committee’s powers are restricted, but they are not non-existent. In extreme cases it can report matters to the police or to the auditors. In less extreme cases it may recommend to the council removal of a councillor from a committee, or simply state its findings and perhaps offer advice.’

(iii) Possible Sanctions

24. Against this background, I will consider the various sanctions proposals suggested in my Instructions: are they available to a local authority and whether any of them would engage Article 6 of the European Convention on Human Rights (“the Convention”) so as to require an independent appeals process if they were implemented.
25. I agree with my Instructing Solicitor that there is no objection to a local authority (or a committee of a local authority) sending a formal letter to a councillor who has been found to have breached the authority’s code. This kind of measure does not, in any way, interfere with the member’s duties or the will of the electorate. Nor does it, in my view, amount to ‘determination of civil rights’ for the purposes of Article 6 of the Convention.

26. The Strasbourg jurisprudence suggests that ‘political rights’ (including the electoral process) are not to be treated as ‘civil rights’, and that this may apply even where the decision in question has economic consequences: see Pierre-Bloch v France (1998) 26 E.H.R.R. 202 (member of French Assembly disqualified from retaining his seat as a result of exceeding election expenses); and Porter v. United Kingdom (2003) 37 EHRR CD 8 (surcharge of local authority member). A formal letter may interfere marginally with ‘political rights’, but does not interfere with ‘civil rights’.

27. In Pierre-Bloch, the European Court of Human Rights held at §50 that the ‘right to stand for election to the National Assembly and to keep his seat [was] . . . a political one and not a “civil” one within the meaning of Article 6(1) so that disputes relating to the arrangements for the exercise of it—such as ones concerning candidates' obligation to limit their election expenditure—lie outside the scope of that provision.’ The fact that there was an ‘economic aspect of the proceedings in issue does not, however, make them “civil” ones within the meaning of Article 6(1)’: at §51.
28. In Porter, the Court did not make a definitive decision on the matter, but noted that the councillor’s argument that the surcharge proceedings to which she had been subject fell under Article 6 in its civil aspect was not necessarily the case:

‘proceedings do not become “civil” merely because they also raise an economic issue or have an impact on the applicant’s pecuniary interests (Schouten and Meldrum v Netherlands: (1995) 19 E.H.R.R. 432, para. [50], Pierre-Bloch v France, judgment cited above, para. [51]). The Court notes that the liability to pay the surcharge arose from regulations governing the duties and obligations of public officials and thus could be regarded as pertaining to the sphere of public law.’

The House of Lords in Porter had assumed that Mrs. Porter’s ‘civil rights’ were involved, and that Article 6 was engaged. Porter v. Magill [2002] 2 A.C. 357.

(b) formal censure e.g. through a motion

29. I agree with my Instructing Solicitor that there is no objection to a local authority (or a committee of a local authority) issuing a formal censure towards a councillor, eg. through a motion. This kind of measure does not, in any way, interfere with the member’s duties or the will of the electorate; nor does it engage Article 6 of the Convention. A formal censure may interfere marginally with ‘political rights’, but does not interfere with civil rights.

(c) removal of member from committees

30. As a matter of principle, the sanction of removing a member from a committee of a local authority would be open to the authority. The case law referred to above suggests that this power was thought to be available before the introduction of the statutory standards regime, so long as the removal decision was made by the local authority itself and not by a committee of that authority.
However, where the appointment of a member to a committee is the decision of one of the political groups, it was envisaged that only the leader of the relevant political group could remove the member from the committee. The power of removal from a committee (which is the inverse of the power of appointment: see Gladbaum) yields to the political balance requirements.

31. Accordingly, it would appear that where the committees are governed by the rules of proportionality, the most that can be done is to make a recommendation to the relevant political group that the member be removed from a particular committee or committees. This will, of course, create difficulties in practice where the relevant political group is very small. It does not mean, however, that the recommendation should not be made.

32. As a matter of process, the recommendation to the relevant political group to make its change to a particular committee or committees could come directly from the full council, or from the committee of the council that is responsible for dealing with the code of conduct issue. If the former mechanism was adopted, this will be likely to involve discussion and debate at full council, leading to a greater airing of the underlying conduct issues and greater transparency to the whole process.

33. I do not consider that this kind of measure (whether the recommendation is made by a committee or full council) engages Article 6 of the Convention, even if removal from a committee may have financial consequences, in that the member will lose special responsibility allowances. Primarily, the decision interferes with ‘political rights’, albeit there may be some consequential impact on pecuniary interests.
(d) Press release/publicity

34. It seems to me that there is no overriding legal objection to a local authority publicising a decision that a member had breached the authority’s code of conduct. The new statutory scheme does not provide for the decision to be kept confidential, and the ‘right to know’ whether or not members are complying with an authority’s code of conduct provides a ‘rational’ reason for publicising that decision.

(e) Withdrawal of allowances

35. One suggestion of a sanction would be to include in a local authority’s scheme of members’ allowances the ability to withhold an allowance for a breach of the code of conduct. I am most doubtful that this sanction would be lawful.

36. Members allowances are set annually by local authorities pursuant to the Local Authorities (Members’ Allowances) (England) Regulations 2003 (SI 2003/1021). The Regulations clearly contemplate that the scheme for allowances reflects the nature of the functions or activities performed by members.

37. Thus, local authorities are obliged to ‘make a scheme in accordance with these Regulations which shall provide for the payment of an allowance in respect of each year to each member of an authority, and the amount of such an allowance shall be the same for each such member (“basic allowance”): regulation 4(1)(a). Where the term of office of a member begins or ends part way through the year, ‘his entitlement shall be to payment of such part of the basic allowance as bears to the whole the same proportion as the number of days during which his term of office as member subsists bears to the number of
days in that year’: regulation 4(2)(b). Where a member is suspended (under the current standards regime), ‘the part of basic allowance payable to him in respect of the period for which he is suspended or partially suspended may be withheld by the authority’: regulation 4(3).

38. For the special responsibility allowance, although the amount of the allowance does not need to be the same for each member, regulation 5(2)(c) provides that ‘where a member does not have throughout the whole of a year any such special responsibilities as entitle him to a special responsibility allowance, his entitlement shall be to payment of such part of the special responsibility allowance as bears to the whole the same proportion as the number of days during which he has such special responsibilities bears to the number of days in that year.’ In other words, the level of allowance should reflect the functions performed. There is also power to withhold payment where the member is suspended: regulation 5(3).

39. It seems to me that there is no room for a local authority to make a scheme which involves the payment of allowances to a member which does not reflect the nature of their activities and functions: whether as a ‘basic allowance’, or a ‘special responsibility allowance’. Furthermore, the express provision conferring power on a local authority to withhold a payment when the member is suspended suggests that there is no power to withhold a payment, or part of a payment, in any other circumstances.

40. If local authorities do seek to apply this sanction, however, then I consider that there is a reasonable prospect that this would be treated by the Courts as involving a ‘determination of civil rights’ within the meaning of Article 6.

41. Although the payment of an allowance is connected with the ‘political rights’ of a member (they only receive the payment in return for serving as a
councillor), it amounts to a form of remuneration for the work that they do for the authority which, ordinarily, would be regarded as a ‘civil right’. Withdrawing the allowance is not merely a consequence of another sanction (as with removal from a committee), but is the sanction itself. The ‘determination’ that is being made by the authority, once it has decided that a breach of the code has taken place, is to interfere directly with that remuneration.

42. On the other hand, a respectable argument can be made that the payment of the allowance, and its subsequent withdrawal (as prescribed by the local authority’s scheme for allowances) should be considered as falling properly within the ‘public law’ realm. It is not dissimilar to the situation in Porter, where the Court declined to find that ‘civil rights’ were engaged when the councillor was subject to the statutory discharge procedure.

43. The two sets of arguments are, in my view, quite finely balanced. I consider, however, that the former argument is (just) more likely to prevail. The allowance will be treated as akin to remuneration.

44. If the ‘civil rights’ aspects of Article 6 had to be complied with, however, then it seems to me that it would not be possible for this to be done within the local authority committee structure, as there would not be sufficient independence or impartiality; and the supervisory jurisdiction of the Administrative Court by way of judicial review is unlikely to remedy the lack of impartiality at the first stage: the role of the Administrative Court will be to review, rather than to re-hear the case against the councillor.

45. It would be necessary, it seems to me, for the local authority to establish some form of independent appeal. The members of that appeal panel could not include council members or co-opted members, as they would be regarded as
‘judges in their own cause’ or, at the very least, their presence and involvement would give rise to the appearance of bias, as it is the ‘standards’ of their authority which will have been called into question.

46. There is a question mark as to whether the panel could include an ‘independent’ person; albeit not the same ‘independent’ person who has been involved in the particular decision that led to the sanction. The ‘independent’ person is not a member (or co-opted member) of the authority in question, and so it can be argued that they have no vested interest in the outcome of the appeal and, as they are ‘independent’ of the authority in question, could not sensibly be seen to the ‘fair minded observer’ as being biased.

47. On the other hand, an argument could be made that the ‘independent person’ participates generally in a ‘prosecutorial capacity’ with the authority in question; and the Court of Appeal has recently explained that this ‘will disqualify’ that individual from taking part in decision-making involving that authority or may ‘else raise concern in the mind of the fair-minded observer about the appearance of impartial justice’: see R (Kaur) v. Institute of Legal Executives Appeal Tribunal [2011] ELR 614 at §35. As explained further below, the 2011 Act states that the ‘independent person’ must have his or her views ‘taken into account, by the authority before it makes its decision on an allegation that it has decided to investigate’.

48. The ‘independent person’ will, therefore, have a regular working relationship with the members of the particular authority involved in decision-making on standards issues. The ‘independent person’ will also have a close interest generally in the outcome of code of conduct matters for that particular authority. The ‘fair minded’ observer might, therefore, have doubts about the ability of the ‘independent person’ to be impartial on any appeal.
49. Given the availability of this argument, which in my view is more than respectable, it would be sensible not to include an ‘independent person’ of an authority on that same authority’s appeal panel.

(f) Withholding of confidential information

50. I am most doubtful that a sanction of withholding confidential information is available for breach of the code; even where the breach of the code involves the breach of a duty of confidentiality by the councillor in question.

51. Where the councillor ordinarily has the right to access confidential information, then depriving him or her of this right is likely to be viewed by the Courts as an undue interference with their rights as a councillor, and as interfering with the democratic process. Although a councillor does not have an unrestricted access to the books, papers, records and files of the authority, the member is entitled to such access as is necessary to enable him or her properly to discharge the duties as a councillor if he or she has a ‘need to know’: see discussion of the authorities (e.g. R v. Birmingham City Council, ex parte O [1983] 1 AC 578) by Munby J. in ex parte Lashley.

52. Furthermore, councillors have statutory rights of access to information: see the Local Authorities (Executive Arrangements) (Access to Information) (England) Regulations 2000 (SI 2000/3272). These rights cannot, in my view, be interfered with or qualified without express statutory authority to do so.

II. The Independent Person

53. I am asked to consider whether past independent members of a local authority’s standards committee would be permitted to take on the role of ‘independent person’ for the same authority under the 2011 Act. I am informed
that there is serious concern at the loss of experience for local authorities if past independent members cannot serve as the ‘independent person.’

54. In my opinion, it is not permissible for a past independent member (that is, an independent member who has served in the past 5 years) to serve as the ‘independent person.’

55. The role of the ‘independent person’ is set out at section 28(7) of the 2011 Act.

‘Arrangements put in place under subsection (6)(b) by a relevant authority must include provision for the appointment by the authority of at least one independent person—

(a) whose views are to be sought, and taken into account, by the authority before it makes its decision on an allegation that it has decided to investigate, and

(b) whose views may be sought—

(i) by the authority in relation to an allegation in circumstances not within paragraph (a),

(ii) by a member, or co-opted member, of the authority if that person's behaviour is the subject of an allegation, and

(iii) by a member, or co-opted member, of a parish council if that person's behaviour is the subject of an allegation and the authority is the parish council's principal authority.

56. The definition of the ‘independent person’ is set out at section 28(8) of the 2011 Act.

For the purposes of subsection (7)—

(a) a person is not independent if the person is—

(i) a member, co-opted member or officer of the authority,

(ii) a member, co-opted member or officer of a parish council of which the authority is the principal authority, or
(iii) a relative, or close friend, of a person within subparagraph (i) or (ii);

(b) a person may not be appointed under the provision required by subsection (7) if at any time during the 5 years ending with the appointment the person was—

(i) a member, co-opted member or officer of the authority, or

(ii) a member, co-opted member or officer of a parish council of which the authority is the principal authority;

(c) a person may not be appointed under the provision required by subsection (7) unless—

(i) the vacancy for an independent person has been advertised in such manner as the authority considers is likely to bring it to the attention of the public,

(ii) the person has submitted an application to fill the vacancy to the authority, and

(iii) the person's appointment has been approved by a majority of the members of the authority;

(d) a person appointed under the provision required by subsection (7) does not cease to be independent as a result of being paid any amounts by way of allowances or expenses in connection with performing the duties of the appointment.

It can be seen, therefore, that a person cannot be an ‘independent person’ if he or she was ‘a member, co-opted member or officer of the authority’ at any time during the 5 years ending with the date of the intended appointment. There must, therefore, be a five year break.

57. A ‘co-opted member’ of the authority is defined by section 27(4) of the 2011 Act as ‘a person who is not a member of the authority but who—

(a) is a member of any committee or sub-committee of the authority, or
(b) is a member of, and represents the authority on, any joint committee or joint sub-committee of the authority,

and who is entitled to vote on any question that falls to be decided at any meeting of that committee or sub-committee.

58. This definition is identical to the definition of “co-opted member” for the purposes of Part III of the Local Government Act 2000 (“the 2000 Act”): see section 83(1), referring to section 49(7) of the 2000 Act.

59. In my opinion, the previous definition of “co-opted member” (which is the same as the 2011 Act definition) was apt to include an independent member of a local authority’s standards committee.

60. Section 53(4)(b) of the 2000 Act required a local authority to include on its standards committee ‘at least one person who is not a member, or an officer, of that or any other relevant authority’. Section 53(8) of the 2000 Act provided that ‘A member of a standards committee of a relevant authority . . . who is not a member of the authority is entitled to vote at meetings of the committee.’ In other words, the independent member of the standards committee was not a member of the authority, but was entitled to vote at meetings of the standards committee. The standards committee was a ‘committee’ of the authority: see section 53(1), (3), (4), referring to ‘a standards committee of a relevant authority’.

61. If, as I consider to be the case, a standards committee was a committee of a relevant authority, then on a literal reading of the legislation the independent member of the standards committee was a ‘co-opted member’ of the authority for the purposes of section 49(7) of the 2000 Act, and the same applies to the 2011 Act.
62. My Instructing Solicitor has suggested to me that it had never been argued that independent members were prevented from being reappointed by virtue of regulation 5 of the 2008 Regulations, and so presumably there is no reason in principle why they should be prevented from being appointed under the 2011 Act. I agree with the first part of the suggestion, but the second point does not follow where, as here, there are textual differences between regulation 5 and section 28 of the 2011 Act.

63. Regulation 5(2) provided that:

‘a person may not be appointed as an independent member of a standards committee if that person—

(a) has within the period of five years immediately preceding the date of the appointment been a member or officer of the authority; or

(b) is a relative or close friend of a member or officer of the authority.

64. That is, a ‘member’ of the authority in the previous five years could not be appointed as ‘independent member’ of the standards committee. The definition of ‘member’ for these purposes did not include a ‘co-opted member’ (save for co-opted members of a parish council), however:

First, regulation 5 distinguishes between the term ‘member’ and ‘co-opted member’ (see regulation 5(4)).

Second, for the purposes of Part III of the Regulations, regulation 9 provides that “member”, except where the context otherwise requires, includes a co-opted member, former member or former co-opted member of an authority’. Part III deals with the investigation of allegations – which could include allegations against ‘co-opted members’. Regulation 5, which is concerned with
the composition of the standards committee, is contained within Part II of the regulations.

Third, regulation 2, which deals with the regulations as a whole provides that “‘member’, in relation to parish councils, includes persons appointed under section 16A of the 1972 Act’ (that is, a person ‘appointed’ to a parish council).

65. There is, therefore, a clear textual difference between the 2011 Act and the 2008 Regulations. Under the existing standards regime, there is no prohibition against an independent member of a standards committee being re-appointed to that role. However, the same language does not appear in the 2011 Act: it would have been possible to repeat the language had Parliament intended to do so.

66. Given the unambiguity in the language of section 28(7) of the 2011 Act – that the ‘independent person’ cannot have been a ‘co-opted member’ – and the fact that Parliament could quite easily have used the same language as in the 2008 Regulations had it wished to permit independent members from serving as independent persons but did not do so, the better reading of the legislation is that such persons are not permitted to serve as independent persons within a period of five years from their previous service.

67. I appreciate that good arguments can be made that Parliament cannot have consciously intended to do that, as this would involve a loss of experience from the former independent members. On the other hand, it can be said that the new standards regime is designed to mark a break with the previous regime, and so it is not surprising if there are to be differences in approach.

68. Indeed, whereas previously the ‘independent member’ sat on the standards committee, and actually chaired the committee, the ‘independent person’ does
not make the decision as to whether there has been a breach or not, but is merely consulted for his or her views. The role of the ‘independent person’ is therefore different, and there is not necessarily a complete overlap of skill sets and experience between the two roles.

CLIVE SHELDON QC

11kbw

11th January 2012