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**To:** County Council

**Date:** 21 May 2015

**Subject:** **STATUTORY OFFICER DISCIPLINARY PROCEDURES**

**Classification:** **Unrestricted**

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## **SUMMARY:**

To consider the recommendations of Personnel Committee in response to the Department for Communities and Local Government's (DCLG) proposal to remove the "Designated Independent Person" (DIP) from the disciplinary process for the Head of Paid Service, Chief Finance Officer and Monitoring Officer, and to reduce legal, financial and reputational risk and cost to the Council of managing statutory officer disciplinary processes.

## **RECOMMENDATIONS**

The County Council is requested to approve for inclusion in the Personnel Management Rules provision for the proposed procedures for the Head of Paid Service, Monitoring Officer and Chief Finance Officer as outlined in this report, and that this process be extended to include all statutory roles, including the Director of Children's Services, Director of Adult Social Services and Director of Public Health.

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## **BACKGROUND**

1. The current DIP procedure dates from 1993, but the origins of the concept of 'statutory protection' – whereby an officer of a local authority is protected from capricious or unjustified disciplining or dismissal by a prior requirement for an independent review of the alleged justification – are much older than that. Section 4(3) of the Local Government (Clerks) Act 1931 provided that ministerial consent was required to dismiss the clerk of a county council, even though that office was held "*during the pleasure of the council*," and this, repeated in section 100 of the Local Government Act 1933, was the position until 1974.
2. By 1974, when the reform of local government under the Local Government Act 1972 took effect and some 1,500 principal local authorities were reduced to 454, the concept of tribunal redress for unfair dismissal had been introduced under the Industrial Relations Act 1971.

3. In the mid-1980s, the government appointed the Widdicombe Committee. Their report *The Conduct of Local Authority Business* was published in June 1986. No. 49 of 88 recommendations was that “the legislation should be amended to prevent a local authority dismissing a chief executive except on the vote of two thirds of the membership of the council” (a statutory requirement to appoint a chief executive had been the subject of recommendation 35). It is worthwhile revisiting the argument in paragraph 6.203 of the report that led to recommendation 49. The latter part of that paragraph reads:

*“In some cases the exercise of these [new chief executive] responsibilities would require them to be unpopular with the majority party. These recommendations would be undermined if the majority party could get rid of chief executives, and no less so simply because the chief executive leaves by mutual agreement. Accordingly we propose that a chief executive may only be dismissed on the vote of two-thirds of the members of the council. The two-thirds test is preceded by the requirement in the local Government (Scotland) Act 1947...but we have deliberately phrased it more stringently so that it applies to the whole council not just those voting.”*

4. Three years later the Local Government and Housing Act 1989 enacted both these recommendations, but in a modified form. A *head of paid service*, rather than a chief executive, had to be appointed, while the statutory protection that the Widdicombe report recommended came in the form of council standing orders, required to be adopted under the Local Authorities (Standing Orders) Regulations 1993. The DIP requirement was included in paragraph 4(1) of Part I of Schedule 1 to these regulations, rather than a requirement for a two-thirds majority vote.
5. These provisions were amended and augmented by the subsequent Local Authorities (Standing Orders) (England) Regulations 2001. As well as heads of paid service, the same statutory protection has since been extended to chief financial (“section 151”) officers and monitoring officers.

### **The use and impact of the Statutory Protection provisions**

6. Regulation 7 refers to its “*appearing to the local authority that an allegation of misconduct...requires to be investigated*” before requiring that a DIP must be appointed for that investigation. Such a requirement can only formally come to appear necessary to the authority by the taking of a legally valid decision to that effect. That decision in itself must comply with the statutory procedure; accordingly the authority may well carry out, or appoint someone to carry out, a preliminary investigation or inquiry to help them decide if the test of regulation 7(1) is met. Any such person carrying out such preliminary inquiries is not a statutory DIP, but must still take care not to act in a prejudicial manner.
7. The 1993 Regulations were hardly used in their first few years, but more recently there have been a number of cases being referred by councils for ‘full’ investigation by a DIP. However, the number of cases where the process has been completed, leading to a recommendation to the council by

the appointed DIP, is very small, as often the reference to a DIP (or even the possibility of such reference) has had the effect of encouraging reluctant parties to consider alternative resolution of the issue in view of the time and costs potentially involved.

8. After some twenty years' experience of these protection rules, it is safe to say that their continued existence acted as a powerful tool in ensuring good governance and the maintenance of high standards of legal, ethical and financial conduct and probity by an authority. It is important, therefore, that Kent County Council implements the new regulations in a way that ensures that protection is maintained while effectively managing and reducing the cost and any risks to the Council.

### **Protection of Statutory Officers**

9. The relevant local authority statutory officers affected are the Head of Paid Service, the Monitoring Officer and the Chief Finance Officer. Their statutory responsibilities are manifold, but can be summarised as follows:
  - Head of Paid Service - has a duty to report to Council where he considers it to be appropriate in respect of the co-ordination of the discharge of the various functions of the authority, or the adequacy or pay of staff, or its organisation or management.
  - Monitoring Officer - has a duty to report where he is of the opinion that the authority has or proposes to act unlawfully.
  - Chief Finance Officer - has a duty to report where there is unlawful or improper expenditure/financial dealings, etc.
10. These are important regulatory functions to protect the Council's ability to discharge its functions effectively and lawfully, to prevent the politicisation of employees and to safeguard against the inappropriate or illegal use of public resources. Exercising these functions could bring the statutory officers into conflict with the political leadership of the Council.
11. The DCLG has proposed the replacement of the current DIP process with a requirement that decisions to dismiss a statutory officer must be taken by full Council, with regard being given to a report on the dismissal from a panel consisting of at least two independent persons. These persons to be drawn from those people appointed under section 28(7) of the Localism Act 2011. The DCLG considers that the current arrangements lead to a higher prevalence and high overall cost of severance payments as part of compromise agreements, which are implemented instead of disciplinary proceedings requiring a DIP.
12. The DCLG conducted a 4 week consultation on the proposals in March 2013 and has now followed it up with a further short consultation on draft amendments to the Local Authorities (Standing Orders) (England) Regulations 2001. This has resulted in regulations that require the new process to be approved by the County Council no later than its first ordinary meeting after 11 May 2015.

13. It is important that those statutory officers who have a responsibility to serve the wider public good must also have the freedom 'to speak truth unto power' without undue fear of summary removal from office for so doing. The cost and risk to the Council, in terms of local democracy, reputation, probity and good governance would be threatened if a statutory officer was reluctant to properly discharge their functions in case they may be subject to dismissal as a consequence
14. It may be considered that removal of the DIP process may weaken the Council's ability to discharge its functions effectively and lawfully and to safeguard against the inappropriate or illegal use of public resources. However, the 2015 regulations do not remove the possibility of the appointment an investigator if required to report to the panel of independent persons.

### **Cost of Severance Payments**

15. There are understandable concerns about the length of time as well as the financial costs of using the DIP process, particularly where an employee remains suspended whilst the matter is dealt with by the appointed DIP. There is little evidence that the DCLG's changes will significantly reduce the cost of dismissing the officers under consideration.
16. Consideration of cost also needs to consider the impact of the statutory employment protection regime currently in place whilst KCC needs to be confident that the decisions made are sound within this context. The Authority needs to ensure that decisions made are defensible in the face of any unfair or wrongful dismissal claims made to an Employment Tribunal or High Court.
17. Therefore, scope to appoint someone to investigate the matters and recommend to the panel, if required, can support the mitigation of any risk in relation to the dismissal decision. The timescales and costs of this can be managed by the use of a "Select List" with set fee arrangements.
18. Equally, high severance settlements do not arise when an authority seeks to dismiss a statutory officer for good cause, but are high only when it seeks to do so without a case which would stand up to scrutiny in an Employment Tribunal or Court. If the Council has a strong disciplinary case, then it should have no fear of pursuing disciplinary action.
19. Outside of disciplinary procedures, it is however important that there is still sufficient scope to allow lawful and defensible settlements where continuation of a statutory officer contract is untenable because there has been a fundamental breakdown in trust and confidence.
20. The existing disciplinary process is enhanced by there being a limitation on the Council's ability to suspend a statutory officer for a period of more than two months, which can only be extended with the consent of the DIP. This restriction encourages the Council to conduct the investigation expeditiously and so limits the cost of paying salary during a prolonged period of

suspension. There is merit in retaining an equivalent provision in any revised procedure.

### **Proposed KCC Procedure**

21. In consideration of the context in this report it is proposed that the Council adopts a procedure as provided for in The Local Authorities (Standing Orders) (England) (Amendment) Regulations 2015.
22. This will require the Council to appoint a panel of at least two independent persons to consider any case for dismissal made against the Head of Paid Service, Chief Finance Officer and Monitoring Officer. In addition to the requirements of the regulations a 'Select List' of investigators is maintained for use if the panel requires their services. The Personnel Committee also commented that the provision of non-HR advice to the Panel would be a matter for the Panel to decide in each case.
23. The panel will make a recommendation on the dismissal to Personnel Committee who will consider this alongside any advice, the conclusions of any investigation into the proposed dismissal and representations from the officer concerned.
24. Under the 2015 regulations if a committee discharges, on behalf of the Council, the decision to dismiss, full Council must approve that dismissal before notice of dismissal is given. Therefore it is proposed that Personnel Committee makes the recommendation to County Council if a dismissal is required so it can make a decision as required by the regulations.
25. There would be an explicit assumption that the Council would abide by the recommendations of the independent panel unless there were exceptional reasons to justify departing from them.
26. It is recommended that a statutory officer may only be dismissed on the vote of two-thirds of the members of the Council, as per the original Widdicombe Committee recommendation referred to in paragraph 3. It should be noted that as any decision to dismiss will be taken by the County Council it will not be possible to provide any internal appeal process.
27. The recommended procedure to manage a dismissal is, therefore:
  - Appointment of a panel of independent persons (arranged by the Head of Democratic Services)
  - Consideration of the appointment of an investigator
  - Consideration of the case against the post holder by the panel
  - The panel makes a recommendation on dismissal to Personnel Committee
  - A decision is made by Personnel Committee in consideration of the panel's recommendation
  - If Personnel Committee decides the post holder should be dismissed it recommends this action to County Council
  - County Council makes a decision on whether to dismiss or not

## **Appointment of the Independent Persons**

28. The 2015 regulations state that two independent persons should consider any dismissal of the Head of Paid Service, Chief Finance Officer and Monitoring Officer. The people must be drawn from those appointed under section 28(7) of the Localism Act 2011. Currently KCC has one person (Mr Michael George) it calls upon in line with the minimum requirement under the 2011 Act.
29. KCC has a reciprocal arrangement with the Kent and Medway Fire and Rescue Authority to use their appointed independent person (Mrs Janet Waghorn) in situations where the Council's Independent Person may not be available or is conflicted. Therefore there is scope to appoint two people for the purposes of constituting a panel under the 2015 regulations.
30. If one or both of the people identified above cannot be appointed to the independent persons' panel, there is also scope to use the Kent Secretaries network with other authorities in order to ensure an appropriately constituted panel. Also, the County Council has scope to appoint additional persons if the pool of people available is required to be expanded on a more permanent basis.

## **Extended Coverage of the Procedure**

31. This paper sets out why it is necessary to have a procedure in place that effectively manages any dismissal of the Head of Paid Service, Chief Finance Officer and Monitoring Officer which ensures the role of these officers in maintaining effective local democracy, reputation, probity and good governance is protected. There is an argument to be made that these considerations could also be extended to all statutory roles which would include the Director of Children's Services, Director of Adult Social Services and Director of Public Health. This paper recommends that extension to the County Council.

## **RECOMMENDATION**

32. The County Council is requested to approve for inclusion in the Personnel Management Rules provision for the proposed procedures for the Head of Paid Service, Monitoring Officer and Chief Finance Officer as outlined in this report, and that this process be extended to include all statutory roles, including the Director of Children's Services, Director of Adult Social Services and Director of Public Health.

**Background documents:** None

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