

STANDARDS AND ETHICS COMMITTEE

18th MARCH 2020

REPORT OF THE DIRECTOR OF GOVERNANCE AND LEGAL SERVICES AND MONITORING OFFICER

HEARINGS PANEL – DECISION (SUBJECT TO APPEAL AGAINST SANCTION) & RECOMMENDED AMENDMENT OF THE CARDIFF UNDERTAKING, AND PROCEDURAL AND ADMINISTRATIVE ARRANGEMENTS FOR HEARINGS

**APPENDICES A, B & C TO THIS REPORT ARE EXEMPT FROM
PUBLICATION UNDER THE LOCAL GOVERNMENT ACT 1972, SECTION
100I & SCHEDULE 12A PARAGRAPHS 12, 18A, 18C & 21; AND
REGULATION 26(2A) OF THE STANDARDS COMMITTEES (WALES)
REGULATIONS 2001**

Reason for this Report

1. To inform the Committee of the recent decision of the Hearings Panel (currently subject to appeal in respect of sanctions) in relation to a complaint referred to the Committee by the Public Services Ombudsman for Wales; and, in light of experience gained from this hearing, to consider:
 - (a) recommended amendments to the Cardiff Undertaking;
 - (b) amendments to the Committee's Hearings Procedure; and
 - (c) improvements made to administrative arrangements for hearings.

Background

2. The Standards and Ethics Committee's terms of reference (paragraph (i)), include the responsibility:
 - i) To hear and determine any complaints of misconduct by Members or a report of the Monitoring Officer, whether on reference from the Ombudsman or otherwise.

3. On 7th June 2019, the Monitoring Officer received a referral from the Public Services Ombudsman for Wales ('the Ombudsman') in relation to misconduct allegations made against a Councillor.
4. The duties and powers of the Monitoring Officer and the Standards and Ethics Committee in relation to any misconduct complaints referred by the Ombudsman are set out in the Local Government Investigations (Functions of Monitoring Officers and Standards Committees)(Wales) Regulations 2001 ('the Regulations').
5. On 1st July 2019, the Standards and Ethics Committee resolved to set up a sub-committee, 'the Hearings Panel', comprised of three members of the Committee, including at least two independent members, to consider the Ombudsman's referral and determine the matter on behalf of the Committee, in accordance with the Committee's approved Hearings Procedure.
6. A Hearings Panel was duly convened and met on 30th July 2019 to consider the evidence presented in the Ombudsman's investigation report and to make its initial determination (as required under Regulation 7 of the Regulations). The Panel was advised by the Deputy Monitoring Officer, because the Monitoring Officer had declared a potential conflict of interest in the matter as she was named in the evidence submitted by the Councillor during the course of the Ombudsman's investigation. The Panel made its initial determination that the Councillor should be given an opportunity to make representations, either orally or in writing, in respect of the Ombudsman's investigation findings and the allegations. The Panel asked the Deputy Monitoring Officer, in consultation with the Chair, to make all necessary arrangements to prepare for a hearing, in accordance with the provisions of the Hearings Procedure.
7. The Panel met, in closed session, on 15th October 2019, 16th December 2019 and 3rd January 2020 to discuss administrative and procedural matters in preparation for the hearing,

Issues

8. A full hearing was held on 6th, 7th, 8th, 13th and 14th January 2020 at City Hall, Cardiff. The hearing was attended by the Councillor and a representative of the Ombudsman, and heard evidence from five witnesses, in addition to the Councillor. The hearing was open to the public, except for certain parts of the proceedings when the Panel resolved to exclude the public. The hearing attracted considerable attention from the public and was reported in the press and on social media.
9. On the final day of the hearing, 14th January 2020, the Panel deliberated in private with its legal advisor, and at 5pm the Chair announced the Panel's decision. The Panel's decision was that the Councillor had breached the following duties of the Members' Code of Conduct:
 - i Paragraph 4(b), duty to show respect and consideration to others;

- ii Paragraph 4(c), duty to not using bullying behaviour or to harass any person; and
 - iii Two separate breaches of paragraph 6(1)(a), duty to not conduct yourself in a manner which could reasonably be regarded as bringing the office of Councillor or the authority into disrepute.
10. After hearing representations from the parties in respect of potential sanctions, and deliberating in private with the Panel's legal advisor, the Chair announced that the decision of the Panel was that the Councillor would be suspended as a Councillor for 4 months.
 11. The draft minutes of the hearing and of the preliminary Panel meeting on 3rd January 2020 are appended as **Appendix A (Exempt from publication)**.
 12. The Panel's written decision, with a full account of the facts and reasons, was issued on 24th January 2020 and sent to the Councillor, the Complainant and the Ombudsman. The timescale for issuing the Panel's decision was extended by the Chair, by variation of the Procedure, as permitted under paragraph 7(a) of the Procedure), to ensure it fully reflected all the evidence considered during the 5 day hearing. A copy of the Panel's decision is attached as **Appendix B (Exempt from publication)**.
 13. Under the Regulations, any period of suspension takes effect after the end of the appeal period (21 days from the full written decision), or after any appeal is concluded.
 14. On 18th February 2020, the Monitoring Officer received notification from the Adjudication Panel for Wales (APW) that an application for permission to appeal against the Panel's decision had been submitted on 14th February 2020. The President of the APW wrote to the Monitoring Officer by letter dated 5th March 2020 with notification of her decision to allow the appeal against the sanction imposed, based on the findings of the Panel about facts and breach alone. This means that the Appeals Tribunal will decide whether, on the basis of the facts and breaches found by the Hearings Panel, the sanction of 4 months is disproportionate or not. However it will not reconsider the determinations of the Hearings Panel about the facts in the case, or whether the facts constitute a breach of the Code of Conduct. The decision and cover letter received from the President of the APW is attached as **Appendix C (Exempt from publication)**.
 15. The APW may hold a hearing to determine the appeal or, with the agreement of the parties, may determine the matter by written representations. It may endorse the penalty imposed by the Hearings Panel or refer the matter back to the Standards Committee with a recommendation that a different penalty be imposed, giving reasons for its decision.
 16. If the Standards Committee receives a recommendation from the APW that a different penalty be imposed, the Committee may either uphold its original sanction or decide to accept the recommendation, giving reasons for its decision, which must be notified to the APW and the parties.

17. If the APW endorses the suspension imposed by the Hearings Panel, the suspension will take effect the day after notification of the APW's decision. If the APW recommends a different sanction to the Panel for reconsideration, any suspension imposed by the Panel will take effect the day after the Panel's further determination .
18. After conclusion of the appeal proceedings in respect of the sanction (either by determination of the APW or a further determination of the Hearings Panel following a referral back), the Committee is required to produce a report on the outcome of the investigation within 14 days. The report must be published on the Council's website and made available for public inspection for a period of 21 days; and a newspaper notice must be published to inform the public of the availability of the report (Regulation 13 of the Local Government Investigations (Functions of Monitoring Officers and Standards Committees)(Wales) Regulations 2001).
19. Members are advised that further discussion in public of the details of this case is not appropriate until the APW has dealt with the appeal. The Committee should consider exclusion of the public for discussion about any details of this particular case.

Compliance with Safeguarding Protocol – Amendment to Cardiff Undertaking

20. In January 2016, the Council adopted a Protocol on the Role of Elected Members in Safeguarding Vulnerable Children and Adults ('the Safeguarding Protocol'), based upon the recommendations of the Standards & Ethics Committee. The Protocol (appended as **Appendix D**) provides guidance and advice to elected Members on their roles and responsibilities in relation to safeguarding vulnerable children and adults; and on how Members should raise any concerns and receive assurance about children and adults who may be at risk. An independent review of the Safeguarding Protocol is currently being undertaken.
21. At the hearing, the Councillor sought to argue that Councillors are not obliged to follow the Safeguarding Protocol as it is not legally binding. However, the Council obtained a Counsel's opinion on this issue in August 2016, which concluded that 'given it has been duly adopted, then it binds all Council Members'.
22. Members of the Hearings Panel have recommended that the Committee gives consideration to recommending that the Cardiff Undertaking or the Members' Code of Conduct should be amended to include a commitment to complying with the Safeguarding Protocol. As the Members' Code of Conduct is based on the statutory model Code, and any changes to the Code must be publicised by way of public notice and notified to the Ombudsman, an amendment of the Cardiff Undertaking would be more straightforward than amending the Code of Conduct.
23. Under the Council Meeting Procedure Rules, Rule 2(b)(vi), all Members are asked to publicly affirm their commitment to the Cardiff Undertaking at

Annual Council each year. If the Committee is minded to recommend amendment of the Cardiff Undertaking, this recommendation could be submitted to Constitution Committee for consideration at its next meeting (scheduled for 27th April 2020), prior to submission to Annual Council for approval. All Members would then be asked to affirm their commitment to the revised Undertaking at the Annual Council meeting in May 2020.

24. Suggested amendments to the Cardiff Undertaking (including some minor drafting improvements) are shown in **Appendix E**.
25. It is also recommended that the Committee recommend to Constitution Committee that the Safeguarding Protocol adopted by Council should be incorporated within the Constitution (Part 5 Codes and Protocols) for clarity, transparency and ease of reference.

Arrangements for Hearings

26. In light of the experience gained from this hearing, a number of potential improvements to procedural and administrative arrangements have also been identified, for the Committee's consideration, as follows:

Recording of the Hearing

27. There is currently no provision for audio recording of hearings. As the Hearings Panel is a sub-committee of the Standards and Ethics Committee, a clerk produces minutes of the proceedings in line with standard practice for committee and sub-committee meetings. The minutes are not a verbatim record of the proceedings, but they record the decisions made and information (evidence) upon which those decisions are based. During the recent hearing, it was suggested that hearings should be digitally recorded. Members are invited to consider whether provision should be made for audio recording of hearings, to avoid any dispute over the evidence heard or discussions during the proceedings.
28. The recording of hearings is not universal, and practice varies depending on the type of proceedings concerned. Hearings before the Adjudication Panel for Wales are audio recorded. Where an audio recording is made, clear rules are needed to clarify which parts of the hearing will be audio recorded, for example, to make clear that the Panel's deliberations will not be recorded. Also, to set out when, how and by whom the recording may be accessed. It is suggested that recordings should only be made available after the end of the hearing, to avoid the proceedings being disrupted and delayed by requests to listen to the recording whilst the hearing is in progress.
29. As the Hearings Panel is a sub-committee of the Standards and Ethics Committee, the Committee Meeting Procedure Rules apply. [Rule 18 of the Committee Meeting Procedure Rules](#) states that committee meetings may be webcast (in accordance with the Webcasting Protocol set out in Part 5 of the Constitution), although Standards and Ethics Committee meetings are not included in the list of committees which are currently webcast. Rule 18

also permits other filming, recording and use of social media during committee meetings, as long as the meeting is being held in public, and the recording is not disruptive or hidden, and subject to various other conditions. The Chair is given discretion to prohibit recording if he/she thinks it appropriate, after considering legal advice and representations from the parties.

30. In respect of hearings, it is possible that recordings by third parties could distract witnesses, raise questions about the purpose for the recording and the risk of misrepresentation or information being presented out of context. For these reasons, it may potentially impede the administration of justice. Private recording is not permitted in civil or criminal court proceedings; nor in misconduct hearings before the Adjudication Panel for Wales. If an official audio recording is available, then this may obviate any need for private recording.
31. Members are invited to give views on whether provision should be made for audio recording of hearings, and if so, the rules to be applied. A draft rule for consideration is shown within the marked up copy of the Hearings Procedure, attached as **Appendix F**.

Late evidence

32. It is important that advance notice is given of all evidence and documents which are to be relied upon at the hearing, so that they can be shared with both parties and properly considered, allowing an opportunity for response. This is important in order to ensure a fair hearing. If evidence is submitted after the hearing has commenced, the proceedings will be delayed whilst the Panel considers whether the evidence is relevant to the allegations, and if so, to share it with the other party and allow time for proper consideration and response.
33. It is recommended that the Hearings Procedure rules should be amended to make it clearer that late evidence must be provided at the earliest opportunity (and no later than 2 days prior to the hearing, as currently stated); and that late evidence will only be accepted at the hearing in exceptional circumstances. The marked up copy of the Hearings Procedure (at **Appendix F**) includes draft amendments to this effect. Members should note, however, that in practice, the Panel may be advised to accept late evidence which is relevant to the alleged breach, in order to comply with principles of natural justice and avoid giving grounds for appeal.

Timescale for written decision

34. The Hearings Procedure currently states that the Panel's written decision, with full reasons, will be issued within 5 working days from the end of the hearing. However, for complex, multi-day hearings, this timescale is too short. It is important that the Panel's decision is fully and clearly set out, including all the evidence considered, the Panel's assessment of the evidence and reasons for its decision. This enables all parties to understand the basis for the Panel's decision and to inform any prospective appeal.

35. It is recommended that the timescale should be extended to 'within 10 working days' and amended to include explicit provision for the timescale to be extended if necessary. It should be noted that this amendment will not, in any way, delay the issue of decisions on less complex cases. Draft amendments are included in the amended Hearing Procedure appended as **Appendix F**.

Administrative arrangements

36. A detailed checklist has been drawn up for officers' internal use, informed by feedback from Panel members and officers involved in the recent hearing, to improve the administrative arrangements for hearings. The checklist includes matters such as scheduling of the hearing; rooms and layout; security; equipment and stationery; refreshments; contents and checking of the hearings bundle; training, advice and support for Panel members; and clarification of roles. The new checklist will be used to facilitate arrangements for all future hearings.

Legal Implications

37. The duties and powers of the Standards and Ethics Committee and the Monitoring Officer, and the procedure to be followed in dealing with a misconduct complaint referred by the Ombudsman, are set out in the Local Government Investigations (Functions of Monitoring Officers and Standards Committees)(Wales) Regulations 2001 ('the Regulations').
38. Subject to any express provisions in the Regulations (or the Standards Committees (Wales) Regulations 2001), the procedure to be followed by a Standards Committee in exercising its functions under the Regulations is for the Committee to decide (Regulation 8).
39. When a meeting of a Standards Committee or sub-committee is convened to consider a misconduct complaint referred by the Ombudsman, the statutory access to information rules (which apply to meetings of the Council and its committees and sub-committees under Part VA of the Local Government Act 1972) provide the following exemptions:
- (i) There is no requirement to publish or make publicly available the agendas, reports, minutes or background papers connected to this matter until after the conclusion of the proceedings (after the appeal period ends or any appeal is concluded) – Regulation 26(2A) of the Standards Committee (Wales) Regulations 2001;
 - (ii) The deliberations of the committee or sub-committee in reaching its findings; and any confidential information are exempt, if and so long, as in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information – Regulation 4 of the Standards Committees (Wales) Amendment Regulations 2007 and paragraphs 18A and 18C of Schedule 12A of the Local Government Act 1972; and

- (iii) The public may be excluded from any meeting where exempt information is to be discussed. The categories of exempt information for these purposes includes information about an individual, provided the committee or sub-committee is satisfied that the public interest in exempting the information outweighs the public interest in disclosing it (Local Government Act 1972, Schedule 12A, paragraphs 12 and 21).
40. Any changes to the Cardiff Undertaking or the Constitution should be submitted to the Constitution Committee for consideration, prior to submission to full Council for approval.
41. Other relevant legal implications are set out in the body of the report.

Financial Implications

42. There are no direct financial implications arising from this report. Any costs associated with the proposed changes to the Procedure for Hearings, through the provision of audio recordings, are to be contained within the Democratic Services budget.

Recommendations

The Committee is recommended to:

- (i) Note and approve the minutes of the hearing held on 6th, 7th, 8th, 13th and 14th January 2020; and the preliminary Panel meeting held on 3rd January 2020, appended as **Appendix A (Exempt)**;
- (ii) Note the decision of the Hearings Panel appended at **Appendix B (Exempt)**;
- (iii) Note the decision of the President of the Adjudication Panel for Wales, appended at **Appendix C (Exempt)**; and the next steps in relation to this matter, as set out in paragraphs 15 to 19 (inclusive) of this report;
- (iv) Note that the Hearings Panel is authorised to discharge the functions of the Standards & Ethics Committee in relation to determination of this complaint, to include consideration of any recommendations which may be issued by the Adjudication Panel for Wales in relation to the appeal and any further determinations required to be made; and the production and publication of a report on the outcome of this matter, all of which will be reported back to the Committee for information;
- (v) Consider the amendments to the Cardiff Undertaking shown in **Appendix E**, and recommend any agreed amendments to the Cardiff Undertaking and or the Constitution, as set out in paragraphs 24 and 25 of this report, to Constitution Committee;
- (vi) Consider the draft amendments to the Hearings Procedure set out in

Appendix F and provide any further comments; and

- (vii) Authorise the Monitoring Officer, in consultation with the Chair, to approve the revised Hearings Procedure, as set out in **Appendix F**, subject to any further amendments.

DAVINA FIORE
DIRECTOR OF GOVERNANCE AND LEGAL SERVICES AND MONITORING OFFICER

11th March 2020

APPENDICES

- Appendix A Draft minutes of the Panel's preliminary meeting held on 3rd January 2020; and the full hearing held on 6th, 7th, 8th, 13th and 14th January 2020 **(Exempt from publication)**
- Appendix B Decision of the Hearings Panel, Case Reference CDC 18/003, dated 24th January 2020 **(Exempt from publication)**
- Appendix C Decision of the President of the APW in respect of the application for permission to appeal, with cover letter, dated 5th March 2020 **(Exempt from publication)**
- Appendix D Protocol on the Role of Elected Members in Safeguarding Vulnerable Children and Adults, January 2016
- Appendix E Cardiff Undertaking, marked up to show proposed amendments
- Appendix F Standards and Ethics Committee, Procedure for Hearings (Ombudsman Referrals) – marked up to show proposed amendments

Background papers

Standards and Ethics Committee report 'Hearings Panel and Procedure', 1st July 2019

Standards and Ethics Sub-Committee report 'Ombudsman Referral – Alleged Breach of the Code of Conduct by a Councillor', 30th July 2019

Minutes of Hearings Panel meetings held on 15th October 2019 and 16th December 2019

Letter from APW to the Monitoring Officer, dated 18th February 2020

Counsel's Opinion, Ruth Henke QC, 18/08/2016