

Hoey Ainscough Associates Ltd

Supporting Local Governance

ARUN LOCAL ASSESSMENT PROCEDURES

INTRODUCTION

1. As part of our contract to support Arun DC in handling Code of Conduct cases we were asked to carry out a review of the Council's current Local Assessment Procedures and make any recommendations for change.
2. This review is based partly on our experience of having worked for 3 months with the Arun procedure, including assessing cases, commissioning an investigation and supporting a hearing. It is also, however, based on our experience of having supported some 400 authorities on standards-related issues and benchmarking the Arun process against existing good practice.

RECOMMENDATIONS

3. The Committee is asked to note and/or agree the following:
 - a) That different texts be produced of the process aimed at different audiences – councillors, the public and officers (paragraph 9)
 - b) That the subject member usually be informed by the MO upon receipt of a complaint (para 11)
 - c) That the MO be given greater flexibility around potential criminal offences (para 15)
 - d) That there be a clear presumption against anonymous complaints but that the MO be allowed some discretion (para 16)
 - e) That it be clarified that a parish clerk be consulted only on factual matters (para 17)
 - f) That the hearings process be compressed into one process rather than divided between the complainant and subject member (para 21)
 - g) That it be judged on a meeting-by-meeting basis whether hearings are open or closed (para 34)
 - h) That the Committee consider whether political proportionality should apply to a Hearings Panel (para 35)
 - i) That the subject member be present throughout the consideration of the hearing (para 46)

- j) That the Independent Person is not part of the Panel's private considerations (para 50)
- k) That the committee consider whether they wish to retain an appeals mechanism (para 55)
- l) That officers be delegated to make these changes and other more minor drafting issues and bring a finalised version to the next meeting, but that any new cases in the meantime are carried out in line with these recommendations

OVERALL CONCLUSION

4. The Localism Act does not specify how cases are to be handled – it simply says councils must make arrangements for handling complaints (with the principal authority handling parish council complaints) but does not specify how to discharge that duty. Arun process is broadly in line with processes in most authorities and represents good practice in many aspects. In a nutshell the process is broken down into key stages:

- a) Receipt of a complaint – when a complaint is received by the Council the initial assessment of the complaint is done by the Monitoring Officer (MO). This is in effect a 2-stage process – at the first stage the MO decides if the complaint meets a legal jurisdiction test – that is, is it about a member, issues relate to the Code of Conduct etc. The MO has discretion to reject complaints which do not meet the legal criteria without consultation. This is standard practice in most authorities.

If a complaint passes the jurisdictional hurdle the MO then has the discretion to decide what to do with the complaint – that is, to investigate formally, to seek an informal resolution or to take no further action. In doing so he or she will consult with an Independent Person (IP) – again this is standard practice

- b) Informal resolution – where the MO decides that an informal resolution is appropriate it is within the MO's discretion to decide whether the informal resolution has worked and if so whether the matter can be closed or if not if any further action is needed. Again this is standard practice
- c) Formal investigation – where a case is sent for formal investigation, the MO will instruct an Investigating Officer (IO) and notify the relevant parties. At the end of the investigation, if the IO decides (and the MO agrees) that no breach has in fact occurred the MO can close the file. In doing so he or she will again consult with the IP as is standard practice elsewhere. If the conclusion is that a breach of the Code may have occurred it is sent to a hearing

- d) Determination hearing – a Panel is convened to hear the case, consider whether there has been a breach and, if so, what if any sanction should be imposed. This is again standard practice
 - e) Review – at the end of the process, both the subject member and/or the complainant can appeal against a decision and ask for a review. Arun is one of only a handful of councils that include this step insofar as we are aware, so this is the one step that is outside standard practice. There is no statutory requirement to allow an appeal.
5. With the exception of the final review stage, therefore the Arun process in its headlines is in line with existing good practice and allows for efficient and proportionate disposal of complaints. We do however have a number of comments on some of the detail within the process which we will set out below. Our main concerns relate to the way the Hearings process is run and also the role of the IP and the appeals process.
6. We will deal with each of our concerns below and welcome the Committee's view to enable us, as appropriate, to prepare an updated procedure. Please note there are some minor drafting issues in terms of consistency of language, for example, we have raised separately with officers and which we would pick up in any redraft but would not change the strategic process.

The document

7. Our review was based upon the document on the Council website called 'Local Assessment Procedure' which is divided into a number of sections starting with 'How to make a complaint'. It is in effect the public face of the process and is primarily written to explain to the public how they can make a complaint and what can happen. However, the document becomes confused in its audience at several places so at times it appears to be written for the complainant, at times it appears to be written for councillors sitting on a Hearings Panel and at times it is written for a general audience.
8. In places it goes into detail which in our view the public do not need to know and the length of the document may make it hard for the public to engage.
- 9. We would suggest that in any revision several versions should therefore be written - a 'boiled down' version for the public; a similar guide for the subject member; and a more detailed procedural guide for the Panel members.**

Receipt of a complaint

10. We have one issue we wanted clarification on around this section. That is when the subject member is told they have a complaint against them. It is common in most (but not all) councils that when a complaint is made against a councillor, the councillor is invited to comment on that complaint before the MO makes a decision as to whether to take any further action. This can often be helpful to provide context and give an early indication as to whether a matter could be resolved amicably. In many cases, the member may anyway have been made aware of a complaint and may attempt to comment. On the other hand, there is a risk of a perception that a member's comments may have unduly influenced a decision, particularly where no further action is taken, and in some cases where one councillor has complained against another it can result in a string of tit-for-tat complaints.
11. **On balance we believe, once the MO has applied the legal jurisdiction test, the subject member should be informed about the complaint and invited to comment.** We think the Arun process may already do that but it is not clear. For example 4.3c) of the document says that the MO may decide not to proceed with the complaint if a satisfactory local resolution has already been agreed. However that could only usually happen if the member already knew about the complaint. Yet 5.4 (the investigation stage) says the IO at the start of the formal investigation will send the complaint to the subject member which could imply they haven't yet seen it. This may simply be loose drafting but we would ask **the committee to clarify whether they agree the subject member should normally be informed of a complaint once the first legal assessment has been made.**
12. There may be circumstances where the MO uses their discretion not to inform the member – for example, where the complainant requires confidentiality or the MO believes there is a risk of intimidation or destruction of evidence but these are few and far between and we will build that discretion into the process.
13. The process also says Complaints which identify criminal conduct or breach of other regulations by any person, **will** be referred by the Monitoring Officer to Sussex Police. We recommend that 'will' is changed to 'may'. As currently drafted it implies that anything which could potentially be a criminal offence would have to be referred to the police, for example a bit of shoving in the council chamber could potentially be assault; a racist term used in a meeting could be potentially criminal so the MO would have to make an assessment on each complaint as to whether it could technically engage any criminal offence, no matter how minor, rather than dealing with it appropriately as a regulatory matter.

14. A further effect of this emphasis on referring matters to the police automatically is that it can build in a long delay into matters which could ordinarily be resolved more quickly. Thus, for example, while it is right to refer an alleged non-disclosure of a Disclosable Pecuniary Interest to the police as it is a specific offence under the Localism Act, we recommend that the current police protocol be revisited by the MO to allow some greater flexibility to deal with a matter internally where the police appear disinclined to act.
15. **The committee are therefore asked to agree that the process allows the MO greater flexibility around potential criminal offences.**
16. The process also says that anonymous complaints will not be accepted. We believe there should be that presumption but some important whistleblowing complaints for example have been made anonymously and it would be difficult for the Council to turn a blind eye to compelling evidence. **We therefore recommend that at 2.3 there is a clear presumption against anonymous complaints but that the MO is allowed some discretion.**
17. For a parish council case 3.6 says that the MO will also seek the clerk's views at this stage. **We think this needs clarifying to say that the clerk's view is being sought on factual matters (for example was the councillor present at the meeting complained about) rather than matters of opinion.** As it currently stands it is not clear what the clerk is being asked to comment on nor what weight is to be given to those comments.

Investigation stage

18. Our only significant comment on this is that this stage in your process is called 'Assessment Stage 1' which we find confusing. The assessment stage is normally the initial assessment of whether or not a complaint should proceed, We therefore recommend that this is renamed 'Investigation Stage' or similar.

Determination stage

19. Again we recommend this is renamed 'determination stage' or 'hearing stage' rather than 'assessment stage 2'
20. We have a number of issues we want to address in the Hearings Panel process. Our overall view is that it is 'skewed' towards the complainant and against the councillor. For example, the complainant is told the outcome of the case before the subject member and there is a lot of emphasis on hearing the complainant's side of the story. We understand the the Council is keen to ensure the complainant feels their complaint has been dealt with fairly by the Council. In fact, in many cases we have been involved with the complainant has little role beyond that of a witness at this stage. For example, a complaint that a councillor may have failed to declare an interest does not necessarily mean that the complainant is an 'aggrieved party' – merely that they have

observed a failure at a meeting and raised a question. In such cases the complainant does not need to explain their story; it is for the investigator to establish whether an interest did in fact need to be declared and for the subject member to explain why they felt it was not necessary. Obviously in a case of bullying, for example, it would be important to hear from the complainant or 'victim'.

21. **We therefore recommend that the Hearings process is re-written to move emphasis from hearing the complainant versus the subject member and is more compressed into one phase during the body of the hearing.**
22. At the October committee meeting we previously suggested there were two further areas in the procedures which the Panel should consider carefully as we felt two variations in the process would represent better compliance with legal duties and/or natural justice.
23. The procedures allow the Panel's chairman to vary them but the Panel wanted to consider the issue more formally. These are set out below.

Confidentiality and political proportionality

24. Paragraph 2 of Appendix 1 of the Procedure says '*Hearings of the Panel will be held in closed session.*' In our view it is unlawful to have such a blanket statement.
25. Any decision-making body of a council (including any committee set up in order to discharge standards functions under the Localism Act) is to be considered an 'ordinary committee' of the authority. That means for the Panel (as it has decision-making powers in that it can find a breach and impose or recommend a sanction) the same rules apply to it as apply to all other committees of the authority which do not have specific statutory rules applying to them. (An example of a 'statutory committee' was a standards committee under the previous national standards framework as such a committee was mandatory by law and certain rules relating to its constitution, including access to information provisions, had been specified by law but those rules were repealed by the Localism Act).
26. As an 'ordinary committee' there are two particular rules which apply. The first is that the committee must reflect the political balance of the council as a whole unless the council as a body or the parent committee of a sub-committee has resolved to waive that requirement (the so-called 'proportionality rules').

27. The second is that the committee is subject to local government access to information provisions. These are procedural rules set out in law which say that a committee must meet in public but that certain items can be taken in closed session if the information is covered by one or more category of 'exempt information'.
28. If information is deemed to be 'exempt information' the committee must vote on whether the matter be dealt with in private and can decide in actual fact still to hold the meeting in public if they believe it is nevertheless in the public interest to do so.
29. That decision on whether or not to hold the Hearing in closed session must therefore be considered on a case-by-case basis and not as a blanket exemption as set out in the procedures.
30. We have therefore said to the Panel that they will have to consider as their first item of business whether or not to hold the meeting in public.
31. That has a number of implications. As the presumption has to be that the meeting will be in public it would need advertising in advance and if appropriate the papers would need to be made available in advance as with other Council meetings unless the officer recommendation was clearly that the matter was to be considered exempt information.
32. The general presumption in most places in our experience has been that a hearing is open to the public. This is on the basis that hearing a case against an elected member would be considered to be in the public interest, particularly given the Government's stated view that the major sanction against any councillor found guilty of wrongdoing is the court of public opinion or the ballot box. How can the public be expected to make an informed decision if they have not been presented with all the evidence?
33. In order to be exempt the matter must fall within one of a small number of categories within legislation. Given the stated public interest, you would expect a high threshold to be placed on when a standards issue is dealt with in private – for example, there is a real risk to somebody involved were certain information to come into the public domain, or information disclosed could prejudice other matters.
34. **The Committee is therefore asked to agree that there should not be a blanket presumption towards closed hearings but that each meeting must consider the facts on its merits at the start of proceedings.**
35. **We also note that the process says nothing about the required 'political proportionality' of the Panel. The Committee is asked to consider whether political proportionality should apply or whether they wish to pass a resolution to waive proportionality of the sub-committee.**

The role of the subject member

36. The Arun procedure is designed to be 'inquisitorial' rather than 'adversarial' – that is it is about establishing facts and reaching conclusions. That is quite an appropriate approach as the framework is relatively 'light touch'.
37. As there is no power to suspend or disqualify a councillor it does not legally have to comply with the 'right to a fair trial' under human rights legislation – that only applies where someone's livelihood is at stake, for example. That said any hearing must be procedurally fair and comply with natural justice if it is to avoid potential challenge. However as we have said above we think the procedure as written seems skewed towards the complainant.
38. The Arun hearings procedure broadly divides into two parts. In the first the investigator sets out his or her case and then the complainants are also invited to put 'their side of the story'. That is done in the absence of the subject member. The Panel can question the investigator and complainants (and any relevant witnesses) and satisfy themselves of the facts.
39. The complainants then withdraw and the subject member is invited in to put 'their side of the story' and again the Panel can question them.
40. This process, while allowing for fact-finding, does not allow the subject member (whose reputation is at stake) to hear what complainants or witnesses may have said about them and where necessary to challenge assertions.
41. In our experience it is common in most disciplinary processes for the 'accused' to hear the case against them and in many standards hearings we have been involved in, a subject member has had legal representation to cross-examine witnesses.
42. We therefore ask the committee to consider whether they would allow the subject member to be present through the hearing to hear the evidence (even if not able to question the complainants).
43. Arguments in favour of this would be that it is more likely to meet the tests of natural justice and therefore less resistant to appeal.
44. On the other hand a less adversarial approach is to be commended given the relative sanctions and there is a danger in some cases (particularly those which may, for example, involve allegations of bullying) that it would be uncomfortable for a complainant to give their evidence in front of the subject member, let alone be cross-examined.

45. Similarly, after the committee has deliberated the complainant is told of the outcome before the subject member whereas in our view it is the subject member who should be the first to know and is likely to be under the most stress.
46. **The Committee is therefore asked to consider whether the process should be changed to ensure that the subject member is present throughout the formal hearing aside from the deliberations.**
47. Please note the chair is able to vary the procedures at any time so could for example ask for the subject member to withdraw if for example it was causing distress to a witness.

Role of the Independent Person

48. Under the Localism Act the Council must appoint at least one Independent Person to support them in this process. S28(7) of the Act says of the IP's role:
- (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—
 - (c) (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.
49. This section makes it clear that the IP is not a decision-maker but a 'giver of views'. This is reflected in the Arun process to a large extent. However, under the Arun process the IP retires with the committee to help them reach a conclusion. This is not common practice and we do not believe this is lawful (although it has not been tested in court). There is a similar role of an independent adviser in disciplinary cases held by the General Medical Council and in a challenge to their proceedings the Court ruled that the independent adviser's views had to be made in public so that they could potentially be challenged by the other side and that they should not therefore retire with the Panel.

50. We recommend the Arun procedure is amended to ensure that the IP is not part of any private deliberations by the Panel.

Right of review

51. The final stage of the Arun process allows both the complainant and the subject member to appeal against the decision. As stated above this is very unusual. The general thrust in the Localism Act in moving away from more severe sanctions was that any framework should be 'light touch' and proportionate to the sanctions available. Most councils have therefore decided not to include an appeals stage (although parties are of course entitled to seek JR of a decision as with any public body and the complainant – if a member of the public – can seek redress from the Ombudsman if they believe there has been maladministration leading to an injustice).
52. If the Council decides it does want to continue to allow an appeal it needs to clarify how such a mechanism might work. At present the procedure is very unclear on the face of it. For example, is it the MO who decides whether to grant an appeal and refer it on to the Panel or does it automatically get referred on to the Panel (which should of course be of a different composition from the original panel). If the latter, does that Panel simply decide whether to grant 'leave to appeal' and then refer the case for a hearing to a third panel?
53. It also is unclear on what grounds an appeal would or would not be granted. Any appeal mechanism would need a 2-stage process which is not spelt out explicitly in the process:
- a) Whether to grant appeal
 - Who would do this and on what basis? Is it open-ended i.e., it is automatically granted? Is it only if new evidence has become available? Or is it only on certain criteria in the decision notice (for example the Panel has ruled that the member was or was not acting as a councillor at the time of the incident and the appellant wishes to challenge that assertion)?
 - b) If the appeal is granted is the decision considered afresh (i.e. the Panel substituting its judgment for the original Panel) or is it merely looked at to see whether the first decision was reasonable (even if it may have been a fine call either way)?
54. If the Council do continue with an appeals process, we believe it should say something like an appeal would only be allowed on one or more of the following grounds:
- (i) the assessment/hearing was procedurally flawed, for example due process was not followed; a relevant consideration was not taken into account; or an irrelevant consideration was taken into account;

- (ii) new evidence or material has arisen with a direct and significant bearing on the case; or
- (iii) the Panel's decision was irrational, i.e. so unreasonable that no sensible Panel, having applied its mind to the complaint, could have arrived at that decision.

55. We therefore ask the Panel to consider whether they wish to continue with an appeals mechanism, whether this should be open to both the subject member and the complainant, who would grant 'leave to appeal' and on what grounds.

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