Association of Council Secretaries and Solicitors

ACSeS President Open Letter to Brandon Lewis MP 24 January 2013 - Westminster Hall debate on 16 January 2013 – Local Government standards regime

24 January 2013

Dear Mr. Lewis,

WESTMINSTER HALL DEBATE ON 16 JANUARY 2013 – LOCAL GOVERNMENT STANDARDS REGIME

As you will be aware, the Association of Council Secretaries and Solicitors (ACSeS) is the professional association for chief and senior local authority lawyers, monitoring officers and corporate governance managers in England and Wales.
Following the above debate, the Association feels it necessary to clarify as follows in an open letter some apparent misconceptions

1. Numerous references were made to the quality and nature of advice of monitoring officers to members of their authorities in a range of circumstances, referred to Members of Parliament in various cited anecdotes.
   I. The nature of the advice received is a matter for the local authorities concerned. It is of course for the local authority to create its own local regime for standards and decision making, as required by the Localism Act, and we are therefore surprised that it was debated in this way. Nonetheless, as a result it is the local authorities and not central government who set the parameters for local standards regimes and consequently the place, timing, quality and context in which questions may be asked. It should therefore be unsurprising that the answers to those questions may at times be variable. ii. The quality of advice received is also of course a matter for the local authorities concerned. Whilst ACSeS is a professional association, it is not a vetting or qualification body. It is the local authority which determines the quality of lawyer it appoints, if it in fact chooses to appoint a lawyer as monitoring officer. Mr Neill expressed this rather well in his comment that "Many monitoring officers—those in my local authority, for example—are excellent; they do a thoroughly good and professional job and it would be wrong to say otherwise. In other instances, however, the role is either amalgamated with other functions or, frankly, does not always seem to be held by somebody with any considerable degree of legal expertise, which is not satisfactory."
2. ACSeS does, however, provide support and engagement and the organisation has offered consistent and clear advice to its members and their authorities and others. Where there is ambiguity or controversy we have sought, often in conversation with leading counsel, the Local Government Association and your Department wherever possible, to agree a common approach. We consider that the advice and guidance

issued by ACSeS to its members is always framed as practical, proportionate and pragmatic. For example:

i. ACSeS has always been clear that an expression of view does not automatically amount to predetermination. Whilst a view is just that (and consequently inherently changeable) a determination in its nature decides (or terminates) the issue.

ACSeS well appreciates that it is only if there is clear evidence that a member has, before the actual decision, already decided (determined) the issue that an issue of potential predetermination arises. The evidential threshold is appropriately high for local authority decisions, given the democratic mandate of councillors.

However, it is of course sensible for local authority members in their own interest (and that of the public) to be aware of the parameters of that legal threshold for predetermination and also bias. In our view, section 25 of the Localism Act 2011 merely substantially reflected the mature state of the common law in this area. It is worth noting that ACSeS guidance for council members on taking planning decisions, published as far back as 2007, puts it quite simply in that, as a councillor, you should be aware that

'. . .you can engage in discussions [about a planning matter before and during the application process] but you must have and be seen to have an open mind at the point of decision making'.

ii. ACSeS has recently issued to its members practical and pragmatic advice on the taking of executive decisions following widespread concern on the drafting of the Local Authorities (Executive Arrangements) (Meetings and Access to Information) (England) Regulations 2012 (S.I. 2012 No. 2089). This guidance has been well-received by local government generally.

3. On the issue of Council Tax and disclosable pecuniary interests, ACSeS appreciates that there are different views on this and it is of course a matter for individual authorities to decide how to proceed in the light of advice from their senior legal advisers.

   Nevertheless, the 2007 Model Code specifically included as an exemption from the purview of former prejudicial interests: 'setting council tax or a precept under the Local Government Finance Act 1992.'. If it was then considered necessary to include such an exemption in the relevant statutory order, it is surely not unreasonable for an authority now to choose to put in place a block dispensation to obviate any remote likelihood of criminal liability under the present statutory scheme.

4. Most of the contributions to the Westminster Hall Debate seemed to display an unfortunate degree of prejudice and animus towards monitoring officers generally. This appeared to be based upon anecdotal (and in their nature one-sided reports) of particular disagreements and other difficulties. Monitoring Officers certainly have no wish to gold-plate or otherwise complicate existing statutory requirements. On the other hand, as I am sure you will appreciate, such officers already have their work cut out as senior authority advisers in a time of pressing financial austerity to ensure safe and sound corporate operations in the public interest, whilst also providing creative and pragmatic legal advice to yield increasing value from diminishing resources.

5. ACSeS welcomes Mr Neill's succinct summary of the role given monitoring officers by the 1989 Act and now the 2011 Act, "which is to ensure that the council acts lawfully and intra vires, and appropriately to police whatever the code is" and his acknowledgment and concern as to the appointment and position of monitoring officers as cited above. ACSeS certainly does not accept, however, the comment made in the debate that the majority of monitoring officers fulfil this role through displaying 'excessive caution, bureaucrats' love of bureaucracy for its own sake, or a

misplaced belief that they and not members should be in the driving seat on standards. . .'. Operating as they do in often very testing political and managerial environments, and at a time of rising public expectation against tight fiscal constraints, monitoring officers hold an unenviable task to ensure high standards of corporate governance within their authorities and, where necessary as part of this, to speak truth appropriately unto power. Most monitoring officers quietly discharge these duties with acuity, tact, political sensitivity and practical proportionality.

6. Whilst in the nature of things the actions of some monitoring officers may at times fall somewhat short of the form or quality we might wish, such instances should properly be addressed in their context and at a local level rather than ventilated intemperately in a public Parliamentary forum. We hope you would agree that it is surely wrong to effectively 'name and shame' individual council officers in such an elevated public forum, with an intrinsically one-sided and potentially partial set of accusations, when the officers in question have no right of reply. You will no doubt appreciate that we feel this is inappropriate and unfair.
7. ACSeS has raised with your department a number of issues concerning interpretation of the standards provisions where the drafting has given rise to doubt and ambiguity. However, we have not received a response which has the benefit of apparent legal input. In the absence of certainty from the legislation, some authorities have properly and reasonably sought external legal advice. As you will appreciate, the wording of the Act and relevant Regulations does not always lend itself to the particular interpretation that Ministers might desire. The issue as to dispensations concerning property and other interests in relation to budget and precept discussions is one example of the Act and Regulations simply being unclear. When politicians are put at risk of criminal prosecution it seems sensible for them, prompted by their legal advisers, to opt for the more cautious approach.

In the circumstances, ACSeS would welcome meeting with yourself and your officials so that relevant concerns can be addressed positively and constructively in the public interest.

Yours sincerely,

Philip McCourt
President of ACSeS