

**REVIEW OF THE ARRANGEMENTS FOR DEALING WITH ALLEGED MISCONDUCT OF  
SENIOR OFFICERS WITHIN LOCAL GOVERNMENT IN WALES**

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**6<sup>th</sup> March 2020**

**REQUEST FOR THIS REVIEW REPORT**

This is our report in response to a request made by the Minister for Housing and Local Government in her written statement dated 7<sup>th</sup> October 2019 (which is at appendix 1). She asked us to review whether the statutory process for investigating allegations of misconduct against certain senior local authority officers in Wales remains appropriate.

The statutory process in question is set by the Local Authorities (Standing Orders) (Wales) Regulations 2006 (“the 2006 Regulations”) as amended by the Local Authorities (Standing Orders) (Wales) (Amendment) Regulations 2014.

The senior officers to whom the 2006 Regulations apply are an authority’s head of paid service; monitoring officer; chief finance officer; and head of democratic services. We refer to these officers as “Senior Officers” in this report.

The process involves the local authority appointing a designated independent person (“DIP”) to investigate and determine whether the Senior Officer committed

misconduct and, if misconduct is found, to recommend to the local authority what, if any, disciplinary action should be taken.

The 2006 Regulations were made by the National Assembly for Wales under the Local Government and Housing Act 1989 (“the 1989 Act”).

## **THE STRUCTURE OF THIS REPORT**

In Part 1, we describe the purpose and structure of the 2006 Regulations.

In Part 2, we describe how misconduct allegations against senior local government officers are dealt with in other parts of the UK.

In Part 3, we summarise the views about the 2006 Regulations which we heard from people we interviewed. We are extremely grateful for the information and assistance which we received from everyone we spoke to. All interviewees were most helpful, and gave us the benefit of their expertise and insights. We are also very grateful to all those who submitted written material, which was similarly helpful and informative.

In Part 4, we refer to various other employment protections which Senior Officers have. This is part of the context for deciding whether the 2006 Regulations remain appropriate.

In Part 5, we give our views on whether the 2006 Regulations remain appropriate, and if so whether they should be changed in any way.

## **PART 1: THE PURPOSE AND STRUCTURE OF THE 2006 REGULATIONS**

### **The purpose of the 2006 Regulations**

The predecessor to the 2006 Regulations were the Local Authorities (Standing Orders) Regulations 1993 (“the 1993 Regulations”). The 1993 Regulations applied to England and Wales, so that they were also the predecessor to the English equivalent of the 2006 Regulations, the Local Authorities (Standing Orders) (England) Regulations 2001 (“the 2001 Regulations”). As relevant to this report, the Local Authorities (Standing Orders) (England) (Amendment) Regulations 2015 (“the 2015 Regulations”) amended the 2001 Regulations very significantly.

The Explanatory Memorandum to the 2015 Regulations explained the purpose of the 1993 Regulations, and their successors:-

*“The most senior officers of a council i.e. the head of paid service, the monitoring officer, and the chief finance officer, have statutory responsibilities to discharge to their councils. Since they work with and report to the elected members, they discharge these responsibilities in a political environment. As a result, statutory protection requiring an appointment of a Designated Independent Person (DIP) to investigate any allegation of misconduct against these senior officers was introduced in the 2001 Regulations. Prior to 2001, a similar provision, but only in relation to the Head of Paid Service, was included in the Local Authorities (Standing Orders) Regulations 1993.”*

Consequently it is clear that the purpose of the 2006 Regulations is to protect certain officers from allegations about their conduct or capability which are motivated (consciously or otherwise) because they are bringers of politically unwelcome news, or are insisting on the discharge of the authority's functions in a due and lawful manner, or such like.

As we explain below in Part 3, those we spoke to confirmed that this was also their understanding of the purpose of the 2006 Regulations.

### **The structure of the 2006 Regulations**

The 2006 Regulations do broadly two things, as relevant to this review.

First, reg 8 requires local authorities to adopt standing orders, set out in Schedule 4 to the 2006 Regulations, dealing with disciplinary action against Senior Officers. They apply to Senior Officers in post, and to Senior Officers who no longer hold such a post when the investigating committee is appointed (see below), but who held the post at the time the alleged misconduct occurred.

Second, reg 9 imposes a particular procedure for the investigation of the alleged misconduct, which we refer to as the DIP procedure.

We will consider the standing orders and the DIP procedure in turn.

## Standing orders

The standing orders in Schedule 4 provide as follows.

*2(1) No disciplinary action (other than action to which paragraph 3 applies) in respect of the [the Senior Officers] may be taken by the relevant authority, or by a committee, a sub-committee, a joint committee on which the relevant authority is represented or any other person acting on behalf of the relevant authority, other than in accordance with a recommendation in a report made by a designated independent person under regulation 9 of the [2006 Regulations].*

*2(2) An officer in relation to whom disciplinary action is proposed where—*

*(a) the officer was, but at the time of the proposed disciplinary action no longer is, an officer referred to in sub-paragraph (1); and*

*(b) the alleged misconduct or, as the case may be, the reason for the proposal for dismissal, occurred during the period when the officer was an officer referred to in sub-paragraph (1).”*

“Action to which paragraph 3 applies”, and so excepted from paragraph 2, is:-

*“suspension of the officer for the purpose of investigating the alleged misconduct occasioning the action; provided such suspension is on full pay and terminates no later than the expiry of two months beginning on the day on which the suspension takes effect.”*

“Disciplinary action” is defined by reg 2 as follows:-

*“disciplinary action” (“camau disgyblu”) ... means any action occasioned by alleged misconduct which, if proved, would, according to the usual practice of the authority, be recorded on the member of staff’s personal file, and includes any proposal for dismissal of a member of staff for any reason other than redundancy, permanent ill-health or infirmity of mind or body, but does not include failure to renew a contract of employment for a fixed term unless the relevant authority has undertaken to renew such a contract.*

As an initial point, we think that this definition is curious. It starts by defining disciplinary action by reference to “alleged misconduct” (note, not “conduct”). The term “conduct” might not imply culpability<sup>1</sup>, though the term “misconduct” normally does, whether by commission or omission. But the definition then states that “disciplinary action” “includes any proposal for dismissal for any reason other than redundancy, permanent ill health and infirmity”. That would include (for instance) a proposal based on failure in performance i.e. capability. An employee who, without fault, falls short in the performance of duties by reason of inability to do the job – whether through lack of inherent skills or training – would not normally be said to have committed misconduct. In any event the important point is that, notwithstanding

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<sup>1</sup> See, in the context of s 98(2) of the Employment Rights Act 1996 (potentially fair reasons for dismissal), J.P. Morgan Securities plc v Ktorza UKEAT/0311/16.

the use of the word “misconduct”, the definition of “disciplinary action” appears to include proposals for dismissal based on allegations of the employee’s lack of ability.

We return to this point in Part 5.

Turning to a different issue, paragraph 2(1) says that no disciplinary action may be taken against a Senior Officer other than in accordance with the DIP’s recommendation.

Our understanding of the effect of paragraph 2 does not entirely accord with the way in which it is widely understood operated in practice. We think that the literal meaning of paragraph 2 is that where a DIP is appointed, the only disciplinary action that may be taken is that which the DIP report recommends. If our view is correct, this means that:-

- (1) if the DIP recommends dismissal, the local authority may, but need not, dismiss. It cannot impose a lesser sanction, or any sanction on top of dismissal;
- (2) If the DIP recommends a lesser sanction, the local authority may, but need not, impose that sanction. It cannot impose a lesser or greater sanction;
- (3) If the DIP recommends no sanction, the local authority may not impose any sanction.

There is a widespread view that paragraph 2 allows the local authority to impose a lesser sanction than that recommended by the DIP. For instance, we note that the Outline revised Model Disciplinary Procedure for Local Authority Chief Executives at

Appendix 5Wa of the JNC for Local Authority Chief Executive Conditions of Service Handbook<sup>2</sup> presents a flow chart which envisages the possibility of the DIP recommending dismissal but the authority imposing a lesser penalty. As we have said, we do not think that this is what paragraph 2 means. We think that a straightforward interpretation of the words “No disciplinary action ... other than in accordance with a recommendation in a report made by a designated independent person ... ” means that the authority may impose the recommended penalty, or no penalty at all, but cannot impose any penalty not recommended by the DIP, whether more or less serious.

The position might be different if the DIP report recommended imposing one of a range of measures. In that case we think that, on the correct interpretation of paragraph 2, it would be open to the local authority to impose any of the recommended sanctions. However, we do not think that it would be good practice for the DIP to recommend one of a range of measures. It would not be conducive to clarity or certainty of outcome.

### The DIP procedure

The DIP procedure is provided by reg 9 of the 2006 Regulations as follows:-

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<sup>2</sup> It is important to be aware of the interrelationship of the JNC for Local Authority Chief Officers Conditions of Service Handbook of 8<sup>th</sup> August 2017 with the JNC for Local Authority Chief Executive Conditions of Service Handbook of 13<sup>th</sup> October 2016. Part 3 of the Chief Officers Handbook deal with “Discipline, Capability and Redundancy” in the case of the monitoring officer, s 151 officer and, in the case of Wales, the Head of Democratic Services. Paragraph 1.2 of Part 3 cross-refers, as regards England, to paragraphs 13 and 13A and Appendix 5A of the Chief Executives Handbook, and paragraph 1.3 of Part 3 cross-refers, as regards Wales, to paragraphs 13 and 13B and Appendix 5B of the Chief Executives Handbook. There is a flow diagram for England in Appendix 5a (lower case) of the Chief Executives Handbook and for Wales in Appendix W5a.

(1) Where it appears to an authority that an allegation of misconduct which may lead to disciplinary action has been made against a Senior Officer, the authority must appoint an investigating committee ("IC") to consider the alleged misconduct.

(2) The IC must consist of a minimum of three members of the authority and must be politically balanced in accordance with s 15 of the 1989 Act.

(3) Within one month of its appointment, the IC must consider the misconduct allegation, and decide whether it should be further investigated. For this purpose, the IC may

- make enquiries of the Senior Officer or any other person it considers appropriate

- request the Senior Officer or any other person it considers appropriate to provide it with such information, explanation or documents as it considers necessary within a specified time limit; and

- receive written or oral representations from the Senior Officer or any other person it considers appropriate.

(4) Where it appears to the IC that an allegation of misconduct should be further investigated, it must appoint a DIP for the purposes of the standing orders i.e. to investigate, determine whether there has been misconduct and make a recommendation as to disciplinary action.

(5) The identity of the DIP must be agreed between the authority and the Senior Officer within one month of the date on which the requirement to appoint a DIP arose, and failing agreement, a person chosen by Welsh Ministers.

(6) The authority and the Senior Officer must consult the DIP and attempt to agree a timetable for the DIP's investigation. Failing agreement the DIP must set such as the DIP considers appropriate.

(7) The DIP has power to

- determine whether the Senior Officer should remain suspended, and if so on what terms, and to direct that, prior to the DIP reporting, the authority takes no step by way of disciplinary action or further disciplinary action against the Senior Officer, other than steps taken in the presence, or with the agreement, of DIP;

- inspect documents relating to the conduct of the Senior Officer which are in the authority's possession or which it has power to authorise the DIP to inspect;

- require any member or member of staff of the authority to answer questions concerning the conduct of the Relevant Officer.

(8) The DIP must make a report to the authority, which must be sent to the Senior Officer:-

- stating an opinion as to whether (and, if so, the extent to which) the evidence obtained supports any allegation of misconduct against the Senior Officer; and

- recommending any disciplinary action which appears appropriate for the authority to take against the Senior Officer.

(9) The authority must consider the DIP's report within one month of receiving it.

(10) The authority must pay reasonable remuneration to the DIP appointed by the investigation committee and any costs incurred in the discharge of functions under regulation 9.

### **The issue of contractual procedures alongside the 2006 Regulations**

We believe that some local authorities operate contractual procedures which add to the procedures set out in the 2006 Regulations. This is demonstrated by the JNC for Local Authority Chief Officers Conditions of Service Handbook<sup>3</sup>. It provides:-

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<sup>3</sup> It is important to be aware of the interrelationship of the JNC for Local Authority Chief Officers Conditions of Service Handbook of 8<sup>th</sup> August 2017 with the JNC for Local Authority Chief Executives Conditions of Service Handbook of 13<sup>th</sup> October 2016. As stated in this excerpt, paragraphs 1.2 and 1.3 of Part 3 of the Chief Officers Handbook, which deals with "Discipline, Capability and Redundancy", cross-refers, as regards England, to paragraphs 13 and 13A and Appendix 5A of the Chief Executive Handbook, and as regards Wales, to paragraphs 13 and 13B and Appendix 5B of the Chief Executive Handbook. There is a flow diagram for England in Appendix 5a (lower case) of the Chief Executives Handbook and for Wales in Appendix W5a.

## *“PART 3 - DISCIPLINE, CAPABILITY AND REDUNDANCY*

### *1. SPECIFIC STATUTORY OFFICERS*

*1.1 Where disciplinary action against the Monitoring Officer or s151 Officer or, in Wales, the Head of Democratic Services is contemplated, the Local Authorities (Standing Orders) (England) Regulations 2001 (as amended by the Local Authorities (Standing Orders) (England) (Amendment) Regulations 2015) in England, and the Local Authorities Standing Orders (Wales) Regulations 2006 in Wales, provide a degree of protection for these officers against unwarranted political interference in their statutory role within local authorities.*

*1.2 (England) Paragraph 13 and 13A and Appendix 5A of the Conditions of Service Handbook of the Joint Negotiating Committee for Local Authority Chief Executives, which give effect to these statutory requirements, can be used as a reference guide in circumstances where disciplinary action against the Monitoring Officer or s151 Officer is contemplated.*

*1.3 (Wales) Paragraph 13 and 13B and Appendix 5B of the Conditions of Service Handbook of the Joint Negotiating Committee for Local Authority Chief Executives, which give effect to these statutory requirements, can be used as a reference guide in circumstances where disciplinary action against the Head of Democratic Services is contemplated.”*

Paragraph 13 of the Chief Executives Handbook, referred to at paragraph 1.3 of the Chief Officers Handbook above, provides:-

***“13. PROCEDURES FOR, DISCIPLINE, CAPABILITY, REDUNDANCY AND OTHER  
DISMISSALS***

*13.1 In principle it is for each local authority to determine its procedures and practical arrangements for the handling of disciplinary action and termination of the employment contract, taking into account the relevant considerations in general employment law. However, in the case of a chief executive (head of paid service) there are further legal requirements for certain types of disciplinary action and dismissal.*

*13.2 In England, the Local Authorities (Standing Orders) (England) Regulations 2001 (as amended by the Local Authorities (Standing Orders) (England) (Amendment) Regulations 2015) and in Wales, the Local Authorities Standing Orders (Wales) Regulations 2006 provide a degree of protection for chief executives against unwarranted political interference in their role as heads of paid service of local authorities. .... In Wales, the regulations require that a Designated Independent Person is required to investigate and make a recommendation in the event of disciplinary action being taken against the chief executive on the grounds of misconduct or if there is any other proposal to dismiss the chief executive for any reason other than redundancy, permanent ill-health or the expiry of a fixed term contract unless the authority has undertaken to renew that fixed term contract. The considerations and the*

*management of these different types of disciplinary action and potential dismissal therefore will vary.*

*13.3 ... The model procedures with guidance on their application and operation in both countries are introduced below A England and B Wales, and contained at Appendix 5a (England) and Appendix W5a (Wales)."*

We do not think that it is unlawful in principle for contractual provisions to supplement the DIP procedure in the 2006 Regulations. But we make two comments. First, any provision which is contrary to any part of the required standing orders in Schedule 4 or the procedure in reg 9 would be void as contrary to statute. Second, assuming that the 2006 Regulations are not already over-elaborate, the need for further procedural detail in locally or collectively agreed terms should in our view be considered carefully. This is a matter to which we return in Part 5.

## **PART 2: HOW MISCONDUCT ALLEGATIONS AGAINST SENIOR OFFICERS ARE DEALT WITH IN OTHER PARTS OF THE UK**

We consider England, Scotland and Northern Ireland in turn.

### **ENGLAND**

As stated above, the DIP system was replaced in England by amendments to the 2001 Regulations made by the 2015 Regulations.

In the following discussion of the English procedure under the amended 2001 Regulations, and its difference from the Welsh system under the 2006 Regulations, there are three key points to bear in mind, and it may be helpful if we refer to them now.

First, the amended 2001 Regulations provide for a far simpler procedure than the 2006 Regulations.

But second, collectively agreed terms, for those English local authorities adopting them, have significantly added to that procedure.

Third, however, the single most important reform made by the 2015 Regulations is that the decisions as to whether the Senior Officer is guilty of misconduct, whether to dismiss, or what alternative disciplinary sanction, if any, to impose, are left to members. The amended 2001 Regulations provide for independent input, but in a less decisive way, at least on paper, than the 2006 Regulations. We explain this further below.

#### The reasons for the reforms in England

We think that it is worth quoting from the explanatory memorandum to the 2015 Regulations at some length, as follows:-

##### ***“7. Policy background***

*7.1 The most senior officers of a council i.e. the head of paid service, the monitoring officer, and the chief finance officer, have statutory responsibilities*

*to discharge to their councils. Since they work with and report to the elected members, they discharge these responsibilities in a political environment. As a result, statutory protection requiring an appointment of a Designated Independent Person (DIP) to investigate any allegation of misconduct against these senior officers was introduced in the 2001 Regulations. Prior to 2001, a similar provision, but only in relation to the Head of Paid Service, was included in the Local Authorities (Standing Orders) Regulations 1993 (S.I. 1993/202). The DIP is appointed early in the procedure, when it appears to a council that an allegation of misconduct by the relevant officer requires to be investigated. No disciplinary action in respect of these most senior officers may be taken other than in accordance with a recommendation in a report made by a Designated Independent Person. In practice, often the DIP appointed by councils is a barrister with experience of employment law. The intention of this provision is to ensure that these officers can discharge their duties without any fear of being influenced by elected members and being dismissed without good reason.*

*7.2 There have been for some time concerns that the DIP process in its application to councils is in practice complex and expensive. It has placed councils as the employer at a great disadvantage in comparison to the position of the employee, particularly given that the recommendation of the DIP must be followed. The Local Government Association Group has estimated that the minimum legal cost of the process is £100,000, excluding the cost of the investigation, preparing the case and briefing lawyers. The DIP process is time*

*consuming particularly where the council and the senior officer concerned could not agree on a DIP, where the process can take over 15 months to reach completion.*

*7.3 In addition, where there are disciplinary actions against these most senior officers, there have been some suggestions that some councils prefer to negotiate severance payments rather than go through the formal DIP process. This is evidenced in the House of Commons Communities and Local Government Committee's report, which highlights the view of the Local Government Association witness that undertaking a performance management process for top staff can currently be "very damaging and timing consuming." The Government believes that such a process is not appropriate as it defeats the purpose of having the DIP process in place. Councils ought to act in the best interest of local taxpayers and not be paying inflated sums to senior officers in order to avoid taking the costly and bureaucratic DIP route.*

*7.4 These Regulations simplify, as well as localise, the disciplinary process for the most senior officers by removing the bureaucratic and mandatory requirement that a DIP should be appointed. In place of the DIP process, the decision will be taken transparently by full council, who must consider any advice, views or recommendations from an independent panel, the conclusions of any investigation into the proposed dismissal, and any representations from the officer concerned. This means that councils can consider and decide the best*

*disciplinary process that will deliver value for money for their local taxpayers, whilst retaining independent scrutiny.*

*7.5 In the case of a proposed disciplinary action against one of the most senior officers, the council is required to invite independent persons who have been appointed for the purposes of the members' conduct regime under section 28(7) of the Localism Act 2011 to form an independent panel. An independent panel will be formed if two or more independent persons accept the invitations, and councils should issue invitations in accordance with the following priority order:*

- an independent person who has been appointed by the council and who is a local government elector,*
- any other independent person who has been appointed by the council, and*
- an independent person who has been appointed by another council or councils. These requirements allow local people to be involved in the disciplinary process for senior officers and makes councils more accountable to their community.*

*7.6 The Regulations also make a provision limiting the remuneration that should be paid to independent persons on the panel to the level of the remuneration which they would normally receive as an independent person in the conduct regime. The conduct regime remuneration is a modest annual allowance or*

*small meeting fee, and this approach ensures that the new process will not involve high costs.*

*7.7 The Regulations provide for the new arrangements for taking disciplinary action against the most senior council staff to be given effect by councils modifying their standing orders. Provision is made for councils to make this modification no later than at the first ordinary council meeting held after the 7 May 2015 elections. To achieve this the Regulations come into force on 11 May 2015. ...*

## **8. Consultation outcome**

*8.1 In February 2013 we sought the views of the Local Government Association (LGA), Lawyers in Local Government (formerly Association of Council Secretaries and Solicitors), the Society of Local Authority Chief Executives (SOLACE), the Association of Local Authority Chief Executives (ALACE), the Taxpayers' Alliance, the Chartered Institute of Public Finance and Accountancy (CIPFA), the Centre for Public Scrutiny (CfPS), District Councils' Network, and the Association of Democratic Services Officers (ADSO), over four weeks. These are the main representative organisations of those involved in the local government sector. Their views were invited on draft amendment regulations that provided for the abolition of the DIP process and for any dismissal decision of top officers to be taken by full council. Responses were received from LGA, SOLACE, ALACE, CfPS, Lawyers in Local Government, ADSO, CIPFA and a number of other partners,*

*including councils. There was wide support for the abolition of the existing bureaucratic DIP process but none considered relying wholly on a full council decision would provide adequate safeguards for top staff against inappropriate dismissal. In May 2013, the Department officials met with officials from LGA to further discuss the Government proposals.*

*8.2 We sought the views of these partners in December 2013 for five weeks on revised draft regulations which provided that any decision to dismiss top staff must be taken by the full council, and that full council be required to consider any report about the proposed dismissal which a panel drawn from members of the council's independent remuneration panel (IRP) thought fit to put before the council. The Department received responses from most of these partners including the LGA, SOLACE and ALACE. Responses were also received from some councils and interested partners such as the Society of County Treasurers, the Association of Policing & Crime Chief Executives, and the Police and Crime Commissioners Treasurers' Society, all of which have been carefully considered before finalising the Regulations.*

*8.3 There was continuous support for the abolition of the existing DIP process, as well as general support for a panel to make a report to the full council before a dismissal decision is taken. However, concerns were raised about the skill set of the panel members, and the detailed prescription about how the panel might operate. A number of partners suggested that independent persons appointed*

*for the purpose of propriety and conduct under section 28(7) of the Localism Act 2011 would be better placed than members of the council's IRP to fulfil the role of the proposed new panel given that their role relates to the consideration of disciplinary matters.*

*8.4 The LGA, in their response, accepted that the existing DIP process has "undoubtedly created a process that is overly bureaucratic and time consuming". Whilst they support the removal of the existing bureaucratic statutory process, their preferred approach was to streamline the DIP process, requiring the appointment of DIPs from a list of qualified independent people that the LGA would keep. They believed that the list, which would operate as a "taxi rank" system, would remove the lengthy delays created by the current process and reduce costs by introducing fixed rate payments.*

*8.5 The Government accepts the view that independent persons appointed for the purposes of the members' conduct regime under section 28(7) of the Localism Act 2011 would be better placed for the role proposed. It also accepts that the proposed process should be simplified, leaving significantly greater flexibility for individual councils. However, the Government does not accept that the LGA's "taxi rank" approach would be suitable. Such an approach does not support the principles of localism and accountability that the new rules aim to achieve, in that dealing with disciplinary action against top officers would not be in the hands of the full council. This would also continue to put councils, as*

*the employer, at a disadvantage in comparison to the position of the employee. Given the extensive engagement the Government has had with partners since 2013, the Government does not consider that any further consultations are necessary and has proceeded to make and lay these Regulations on the basis outlined above.”*

### How the amended 2001 Regulations work

Accordingly, with effect from 11<sup>th</sup> May 2015, the amended 2001 Regulations have provided that authorities must adopt standing orders in Schedule 3, or like provisions in respect of disciplinary action against the head of paid service, monitoring officer, chief finance officer. Unlike the 2006 Regulations in Wales, the head of democratic services is not covered. “Disciplinary action” is given the same definition as in the 2006 Regulations.

Schedule 3 provides that a Senior Officer may not be dismissed by an authority unless the following procedure is complied with.

(1) The employing authority must invite “relevant independent persons” (“RIPs”) to be considered for appointment to “the Panel”, with a view to appointing at least two such persons to the Panel.

The Panel is a committee of the authority appointed for the purposes of advising it “on matters relating to the dismissal” of a Senior Officer.

An “independent person” is a person appointed under s 28(7) of the Localism Act 2011 i.e. in connection with the determination of allegations that a member has breached the members’ code of conduct. A detailed definition of when a person is not to be regarded as independent, and when they may not be appointed under s 28(7), is given in s 28(8). The key features are that an independent person cannot be a current member or have been a member in the past five years, or be a relative or close friend of such a member. An independent person cannot be appointed unless there has been an advertisement for the vacancy and the application has been approved by a majority of members.

A RIP under the amended 2001 Regulations is an independent person appointed by the authority if it has appointed two such persons, or, if it has not, such persons as have been appointed by another authority or authorities as the employing authority considers appropriate.

(2) The authority must appoint RIPs to the Panel in the following order of priority:-

- (a) a RIP who has been appointed by the authority and who is a local government elector;
- (b) any other RIP who has been appointed by the authority;
- (c) a RIP who has been appointed by another authority or authorities.

A RIP appointed to the Panel will receive remuneration and allowances not exceeding the level payable to that person in their role as independent person under the 2011 Act.

(3) The authority must arrange a meeting to consider whether or not to approve a proposal to dismiss a Senior Officer.

(4) Not less than 20 working days before the meeting, it must appoint the Panel.

(5) Before voting on whether to approve the dismissal, the authority must take into account:-

- (a) any advice, views or recommendations of the Panel;
- (b) the conclusions of any investigation into the proposed dismissal; and
- (c) any representations from the Relevant Officer.

### **The key differences between the Welsh and English statutory regimes**

The Welsh and English statutory regimes are therefore very different. As we describe below, the JNC terms for England have supplemented the terms of the amended 2001 Regulations very significantly, but it is worthwhile analysing where the statutory regimes differ.

The key differences are as follows.

### Stages of decision making process

The Welsh regime has a filter stage in the decision making process, with the IC deciding whether the allegation should be investigated further and go to a second stage.

The English regime does not, with the authority determining the allegation.

### Organs of the authority involved

As regards Wales, it is envisaged by paragraph 4 of Schedule 2 to the 2006 Regulations that disciplinary action may be taken by any organ of the authority which is duly authorised by the authority's constitution to do so.

The English regime appears to be drafted on the basis that full council decides whether to take disciplinary action<sup>4</sup>.

### Third party involvement

The English regime involves a third party, the Panel. Its report has to be taken into account, but does not constrain the outcome as the DIP's recommendations do.

### The ancillary powers of the DIP and the Panel

The DIP is given very extensive express ancillary powers.

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<sup>4</sup> The term used in Schedule 3 to the amended 2001 Regulations is "authority". This is not defined. Normally an authority may act by a committee or officer (s 101-102 of the Local Government Act 1972), and the 2001 Regulations do not expressly limit that power. However paragraph 7.4 of the Explanatory Memorandum to the 2015 Regulations refers to a decision being taken by "full council".

The Panel is given none. The drafter of Schedule 4 to the 2001 Regulations presumably proceeded on the basis that the Panel will receive such paperwork as has been collated and produced by authority officers, or others, concerning the allegations, on the basis of which the authority will decide whether to take disciplinary action. The law would no doubt imply powers to allow it to take further steps, probably quite modest, of its own e.g. to ask for clarification of such information where genuinely needed. These may be fleshed out in local policies. In any event, it is clear from the Explanatory Memorandum that the Panel is not meant to e.g. undertake investigations of its own.

### Timing

In neither the Welsh nor the English regimes is a time limit set by which the decision making process must be completed.

However, as noted above, the Welsh regime may involve the authority taking two decisions. It also involves other points which may be time consuming:

- the significant investigations which the IC may undertake in deciding whether a matter should be further investigated by a DIP, as envisaged by the extensive information gathering powers it is given;
- the need to attempt to agree who is to be the DIP, and failing that the making of a choice by Welsh Ministers;
- the DIP's extensive investigatory powers.

These steps may be supplemented, or mirrored, by the Senior Officer's terms of employment, both local and collective, and by associated non-contractual disciplinary procedures and policies.

In England, the authority takes only one decision. As to the process leading to this, Schedule 4 to the amended 2001 Regulations is not prescriptive about how an allegation against a Senior Officer will be investigated in practice. As in Wales, terms of employment and/or associated non-contractual procedures are likely to be relevant.

### **Contractual terms**

As stated above, the JNC terms for Local Authority Chief Officers, Part 3- Discipline, Capability and Redundancy, state:-

*“1.2 (England) Paragraph 13 and 13A and Appendix 5A of the Conditions of Service Handbook of the Joint Negotiating Committee for Local Authority Chief Executives, which give effect to these statutory requirements, can be used as a reference guide in circumstances where disciplinary action against the Monitoring Officer or s151 Officer is contemplated.”*

The Conditions of Service Handbook cross-referred to in this paragraph provides for the following disciplinary procedure:

(1) An investigating and disciplinary committee (“IDC”) is convened to consider the allegations. It may take no further action, give an informal oral warning if

there is “some minor fault” or decide that the matter needs further investigation. In that case an independent investigator (“II”) is appointed on the taxi rank basis from a list held by the Joint Secretaries.

(2) The II will either investigate or investigate and hear the case. In either situation, the II will prepare a report for the IDC.

(3) If the II has heard the case, the IDC will consider the II’s report though may call witnesses for clarification. If the II did not hear the case, the IDC will permit the Chief Officer the opportunity of a hearing to challenge the recommendations.

(4) The IDC may take no action, take action short of dismissal, or make a recommendation to dismiss. Such a recommendation is made to an Independent Panel (“IP”), which is a committee of the local authority and must comprise only independent persons appointed under s 28(7) of the Localism Act 2011. The IDC and Chief Officer are represented at the IP’s meeting. The IP prepares a report for Council, stating whether it agrees with the recommendation to dismiss.

(5) Full Council receives the II’s report, the IDC’s recommendation, and the IP’s report, and decides whether to confirm or reject the recommendation to dismiss.

Accordingly for those adopting these terms, there is a substantial filling in of the sparse statutory scheme in the amended 2001 Regulations

### **THE POSITION IN SCOTLAND**

In Scotland there is no statutory scheme for dealing with misconduct allegations against Senior Officers, and as far as we are aware there never has been. As we understand the position, the applicable procedures are the subject of agreement. The Scheme of Salaries & Conditions of Service for Chief Officials agreed by the Scottish JNC for Chief Officials states:-

#### *“DISCIPLINE AND CAPABILITY*

*12.1 It is recognised that discipline is essential for the proper and efficient conduct of a council’s affairs. It is also recognised that disciplinary action must be applied fairly and that employees should have the right of appeal against any disciplinary action taken against them.*

*12.2 While each council will have a locally determined disciplinary procedure for chief officers, where an allegation of misconduct is made against a chief executive, it is recognised that the procedure must reflect the seniority of this post as head of paid service. In this regard, councils will follow the disciplinary framework detailed in Appendix A. The framework meets legal requirements and is in line with the ACAS Code of Practice.*

*12.3 The Disciplinary Framework is designed to deal with any allegation of misconduct against a chief executive. Any question or complaint as to the capability of the chief executive to fulfil the duties and responsibilities of the post, including any alleged failure by the chief executive to establish and maintain a satisfactory working relationship with the council, is not a disciplinary matter. Appendix B provides a Capability Framework for councils to follow should any such complaint or question arise.”*

Paragraph 12.2 draws a distinction between the Chief Executive and other senior officers, the latter not being specifically provided for in the Scottish JNC terms. Appendix A sets out a “Chief Executive Disciplinary Framework”.

As regards the Chief Executive paragraph 12.3, in contrast to the 2006 Regulations as we interpret them, draws a clear distinction between issues of discipline and capability.

The Chief Executive Disciplinary Framework provides for the following:-

- (1) a politically balanced Assessment Group of members to assess whether allegations against the Chief Executive should be investigated.
- (2) If so, the identity of an independent Investigating Officer should be agreed by the authority and the Chief Executive, failing which the Joint Secretaries of the Scottish JNC will recommend someone.

(3) The Investigating Officer decides how best to investigate, and then reports to the Assessment Group, with recommendations as to whether there is sufficient ground to warrant a disciplinary hearing.

(4) The Assessment Group decides whether a disciplinary hearing should be convened.

(5) if they decide that it should, a politically balanced Hearing Committee of members is set up, excluding members of the Assessment Group.

(6) The Chief Executive is given at least 5 working days' notice of the hearing, and has the right to be represented. Both sides may call witnesses.

(7) The procedural steps in the hearing mirror those of a tribunal or court hearing. If the allegations are proven, the Hearing Committee takes such disciplinary action as is reasonable in the circumstances.

(8) The Chief Executive has the right of appeal to a politically balanced Appeal Committee of members excluding those on the Hearing Committee. The appeal is a re-hearing involving the same procedural steps as the hearing (but with the Chief Executive going first).

The Chief Executive Capability Framework mirrors the Disciplinary Framework.

If applied, this procedure is more complex, and offers more express protections to the Senior Officer in question, than the procedure in the 2006 Regulations.

## **THE POSITION IN NORTHERN IRELAND**

As enacted, s 41 of the Local Government Act (Northern Ireland) 1972 used to provide:-

### ***41 Appointment and qualification of officers.***

*(1) Every council shall appoint a clerk of the council and shall also appoint such other officers as the council thinks necessary for the efficient discharge of the functions of the council.*

*(3) A person shall not be appointed to—*

*(a) the office of clerk of a council; or*

*(b) such other office under a council as the Department may determine, unless he possesses such qualifications as the Department may determine.*

*(6) The remuneration, removal from office, suspension or re-instatement, or any withholding of the remuneration, of the clerk of a council and of any other officers for whom qualifications are prescribed under subsection (3) shall be subject to the approval of the Ministry.”*

Whilst “clerk” is not defined, the role of clerk is that of a chief officer<sup>6</sup>.

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<sup>6</sup> Hence s 142(c) provides that “any reference to the clerk of a council F150. . . included a reference to the chief officer of a joint committee”

However, subsection (6) was repealed in 1995.

The current “Joint Negotiating Committee for Chief Executives of Local Authorities in Northern Ireland: Model Disciplinary Procedure & Guidance to the Procedure” (“Model Procedure”) states that it follows best practice. It states that it is a model procedure and so local authorities have discretion as to how far to follow it.

It provides for

(1) an initial determination by an authority’s Investigating and Disciplinary Committee of whether there is an issue relating to the conduct or capability of the Chief Executive or some other substantial issue that requires investigation.

The Committee is intended to be a standing, politically balanced committee.

(2) If the Committee decides that there is such an issue, the matter will be referred to a DIP, whose identity must be agreed between the Committee and the Chief Executive. Failing agreement, the Labour Relations Agency will nominate a DIP.

(3) The DIP will investigate and make a report to the Committee. The Model Procedure envisages a “combination” of independent investigation by the DIP and a formal hearing. The DIP will report on whether and if so the extent to which the evidence supports the allegation of misconduct or incapability or a need for action for some other substantial reason, and will recommend any

disciplinary action (if any is appropriate) which appears to be appropriate for the authority to take against the Chief Executive.

(4) The Committee will “consider” the DIP’s report and give the Chief Executive an opportunity to state his/her case before a decision is made. The Committee may take no further action, recommend informal resolution or other appropriate procedures, refer the matter back to the DIP for further investigation and report, take disciplinary action short of dismissal, or decide to dismiss the Chief Executive. In the case of action short of dismissal, the Committee may take action “up to the maximum recommended by the DIP”. According to the Guidance section it may impose a lesser sanction. It appears from Annex B that it is intended that dismissal may only occur if the DIP recommends it.

(5) There is a right of appeal to full Council against action short of dismissal and dismissal.

The Model Procedure cross-refers to statutory disputes resolution procedures contained in the Employment (Northern Ireland) Order 2003 and the Employment (Northern Ireland) Order 2003 (Dispute Resolution) Regulations (Northern Ireland) 2004, about which we say no more.

We were informed that it was not known whether the Model Procedure was followed by local authorities, and indeed that there was no knowledge of any completed

disciplinary process against a Chief Executive since the creation of the current local authorities after local government reform in Northern Ireland taking effect in 2015.

### **PART 3: WHAT PEOPLE TOLD US ABOUT THE 2006 REGULATIONS AND THE AMENDED**

#### **2001 REGULATIONS**

##### **The interviews we undertook**

We undertook interviews with numerous people and organisations with expertise and knowledge of the 2006 Regulations and the 2001 Regulations both before and after the 2015 amendments. We also spoke to or had written input from people and organisations with knowledge of how allegations against senior local government officials are dealt with in other parts of the UK. We also received written material from them.

These included representatives from the Welsh Government, the Scottish Government, the Local Government Association, both in Wales and England, the Northern Irish Local Government Association, the Association of Local Authority Chief Executives (ALACE), the Society of Local Authority Chief Executives and Senior Managers (SOLACE), Caerphilly County Borough Council, DIPs under the 2006 Regulations, and under the 2001 Regulations prior to their amendment in 2015, and a solicitor in practice in Wales with experience in the field.

As we said above, we are most grateful to everyone we spoke to or who provided information to us. Everyone we dealt with was extremely informative and helpful.

The Minister's statement requesting us to report said that she expected that

*“any recommendation for change would be accompanied by a robust justification”.*

The information we received helped us to understand how the 2006 Regulations operate in practice and what those involved, in different ways, in their operation think about them. This allowed us to consider whether there was “robust justification” for change.

The following is a summary of what people told us. We divide the summary into topics, each with a heading. It is not a complete record of our interviews, but it covers what we believe to be the most significant points.

### **Protection of Senior Officers through the DIP procedure and member decision making**

The central issue discussed was the balance to be struck between protection for Senior Officers on the one hand, and the right of a democratically accountable authority to take decisions about the conduct of its Senior Officers.

Though there were different views about how the balance should be struck, there was a generally accepted concern that Senior Officers could be vulnerable to unfair

disciplinary complaints simply because their duties mean that they sometimes have to give members unwelcome news or advice, whether financial, legal or other.

We note that there were few specific examples given of the types of concerns set out above. Partly this may have been due to interviewees rightly being concerned not to breach confidentiality. Some of those interviewed were of the view that the vulnerability of Senior Officers was more hypothetical than real. We pressed interviewees on whether past experience had in fact demonstrated that Senior Officers could be and were subjected to inappropriate threats from members for simply doing their job (without asking for details of any particular case). A number of the responses we received to this question were not highly emphatic. It was also pointed out that such pressures were sometimes not obvious. But there was evidence from that this sort of pressure had happened in particular cases.

In any event, overall even those who were unaware of particular instances did not suggest that the protection was not needed or should be done away with.

The general view was that the current scope of the 2006 Regulations provided sufficient protection without fettering an authority's ability to deal with issues of Senior Officers' competence though there was a minority view that there was too much protection. The overlap between whistleblowing protection and the protection offered by the 2006 Regulations was noted. This is an issue which we discuss in Part 4.

Some evidence suggested that the pressures which Senior Officers face are not unique to local authorities in the public sector.

Some interviewees felt that the procedural complexity of the 2006 Regulations had caused authorities to think before instigating disciplinary proceedings. That in itself provided an element of protection for Senior Officers.

The evidence also suggested that there had been instances of Senior Officers whose behaviour had fallen below the expected standards but which had been dealt with locally without invoking the DIP procedure. Those instances had not involved the determination of disciplinary matters through the imposition of formal sanctions but rather by mutual agreement.

We were also told that very few allegations proceeded through the entire DIP procedure. We heard of only a handful of decisions on sanction being taken under the 2006 Regulations. The evidence as to numbers in England suggested around 3-4 investigations running their course since the 2015 reforms. The general explanation for the low number of procedures, once begun, running their course was a combination of commercial settlements and officers resigning during the process.

There was some evidence that there was a particular “Welsh” element to consider in the debate. It was suggested that the DIP procedure, and the independence it afforded, was particularly valuable given the relatively small size of the political and Senior Officer community in Wales.

Overall, it was clear that having the protection of the DIP in place was generally viewed as a good thing in principle with the majority seeing it as necessary.

However there were concerns about the operation of procedures in the 2006 Regulations and suggestions of how the DIP procedure might be improved. We turn to the principal concerns raised.

### **Principal concerns**

#### **Delay**

The main concern raised was that of delay. Perhaps unsurprisingly, we were told that delay also led to increased costs.

In particular we were told that disputes about appointment of a DIP or nomination by the Welsh Ministers gave rise to a risk of significant delay at the outset of the process.

Other delays arose for a number of reasons, we were told: some of those were thought to be avoidable and others unavoidable. There was support for the imposition, or an ability for the DIP to impose, stricter timetables. Indeed we were told that delaying tactics could be used opportunistically by Senior Officers or their representatives in some investigations. However, there was a concern that absolute deadlines might create a system which was bound to fail. There was an acceptance that there needed to be flexibility to deal with genuine issues which justified or necessitated delay.

The overall view was that there was a balance to be struck but that the DIP needed powers to enforce timetables.

What we were told also suggested that, in terms of the length of time an investigation took, there was not much difference between the 2006 Regulations in Wales and the amended 2001 Regulations in England as supplemented by agreed terms. We were told that the timetable can become elongated where there are issues about procedure, disputes over timetables or appointments, arguments over the law and evidence, or a need for members meetings to be arranged.

#### Who should be a DIP/costs

We were told that historically, DIPs had tended to be senior lawyers or former Chief Executives. Those appointments could lead to heightened expense, simply because of the market rate for hiring them, in particular for senior lawyers.

#### Delay in appointment of a DIP

We heard that the 2006 Regulations could lead to a protracted dispute about who should be appointed as DIP in a particular case.

The situation in England where there is a standing panel of independent investigators who would be nominated on a “cab rank” basis was said to work well.

#### Legal involvement

There was concern about the process being overly legal and involving legal professionals, leading in particular to spiralling costs. Frequently lawyers, often QCs, and former local authority Chief Executives were selected as DIPs. The general view

was that they brought the knowledge required to deal with such cases. There was a concern, however, that such appointments could be expensive.

We heard evidence that it would be unusual for an authority to use its “in-house” resources during the process by requesting existing HR staff to conduct an investigation, for example. This was explained as being based in part on a need to have clear independence and impartiality within the DIP process, and also a concern that there may be undue pressures where a more junior member of an authority’s staff was required to investigate the conduct of a Senior Officer.

As to representation of the parties in the DIP process, given the nature of the allegations made and the potential impact that they could have on Senior Officers, we were also told that there was a need to allow parties to have legal representation if they wished.

#### Local authority governance

We heard that sometimes local authorities have no IC in place and that the adoption of appropriate procedures gave rise to delay.

#### Training of local authority members and staff

We heard that sometimes members and officers lacked the training to understand their roles in the DIP procedure. There was evidence that, in some English authorities, there was regular training on the amended 2001 Regulations, which was felt to be beneficial.

### Interaction of 2006 Regulations with contractual rights and local procedures

We heard some evidence of conflict between officers' contractual rights, local authorities' standing orders and procedures, and the 2006 Regulations. There was evidence that these additions served to complicate matters and were likely to add to delay and expense.

The evidence relating to the system as it currently operates in England under the amended 2001 Regulations was that, even though the amended Regulations were very limited in the procedure required, the reality was that the adoption of the JNC terms had made the system not vastly different from the 2006 Regulations in terms of the detail prescribed.

### Investigation stage

On the issue of whether it was sensible for the 2006 Regulations to have an initial stage to investigate whether the complaint should proceed to the appointment of a DIP, we heard evidence that an initial screening investigation was an added form of protection against obviously weak allegations. It enabled such allegations to be dismissed quickly with minimal cost and reputational damage. However, we heard of concerns that the initial stage led to duplication of work and delay. That concern was particularly true in cases where the DIP felt that the evidence obtained during the initial investigation was not in a fit state to be properly admissible and that matters to which it related had to be considered afresh.

### Suspension

We were also told that powers relating to suspension were a potential source of confusion. That resulted in the potential for delay and resources being diverted to determining issues of suspension as opposed to concluding the investigation.

### Co-operation

We were told of some concerns about the DIP's powers to require individuals to co-operate with the DIP procedure. We were told that the issue rarely arose if individuals remained in the employment of the authority. However, the issue could arise where individuals had left or where the DIP wished to see documents held externally.

### Presentation of the DIP's report

We also heard that there was potential for confusion around the issue of who the report was compiled for. Was it a report to be disclosed to both parties? Or a recommendation for the members?

### External investigations

An issue which was viewed as potentially giving rise to difficulties was the interplay between internal and external processes, such as investigations by auditors or by the Police. The potential for delay, duplication of work and increased cost were highlighted.

## The amended 2001 Regulations

Though the amended 2001 Regulations impose very few procedural requirements, in practice this procedure has been very considerably supplemented by collective terms. The position in England was described as having a large amount of independent involvement though that was combined with member input. Removing the investigation from the hands of local authorities, as we are told happens in practice, was viewed as a key element of independence in the reformed English system, with member input on conclusions and sanctions being equally important in terms of local accountability.

There was a view that it would need to be a "brave" authority which chose to impose a greater penalty than that suggested by the outcome of an investigation involving independent persons, and that such an outcome was unlikely. There was said to be real protection from the recommendation on disciplinary action, in practice acting as a cap on sanction actually imposed by members.

There was particular praise for those appointed as investigators being individuals with knowledge and experience of local government, proper training, and an ability to operate effectively within that environment. The evidence suggested that the maintenance of a list of independent investigators in England was a more effective system than the provisions in the 2006 Regulations for the appointment of a DIP, which could be very drawn out.

#### **PART 4: OTHER EMPLOYMENT PROTECTIONS WHICH SENIOR OFFICERS HAVE**

A judgment about the continued appropriateness of the 2006 Regulations has to be made bearing in mind other legal protections which Senior Officers may have against dismissal or other disciplinary steps taken against them for unfair or inappropriate reasons.

We have therefore considered the nature of those protections, as follows.

##### **Contractual protections**

Employees frequently have the benefit of contractual procedures relating to disciplinary or performance matters. This is true of employees in Welsh local government, as we have stated, but at this point in the report we are considering not the detail of particular contractual procedures, but whether as a matter of legal principle contractual procedures can offer protections for employees similar to those in the 2006 Regulations.

Apart from the limited circumstances in which the Court has granted an injunction to enforce the terms of the employment contract (to which we refer in the next paragraph), the remedy for breach of contract is damages. In the case of dismissal these will generally be awarded only for the notice period if notice of termination is not given, or for the period over which a contractual disciplinary procedure would have lasted, if the procedure was not observed. In the case of dismissal, therefore, damages are unlikely to be compensation for the loss of ongoing future employment,

or for the reputational damage that can occur when an employee is dismissed for reasons relating to their conduct.

The Court will sometimes grant an injunction to prevent dismissal without observance of a contractual disciplinary procedure e.g. Robb v Hammersmith and Fulham London Borough Council [1991] ICR 514. However, the Court will not generally injunct a dismissal for any reason other than that there has been a failure to observe such a procedure. It will very rarely go into the merits of the reason for dismissal to determine whether the process should be injuncted. Consequently, it would be difficult for an employee to persuade the Court to grant an injunction to prevent their dismissal on the basis that, whilst the employer asserted that it was by reason of conduct, in truth it was politically motivated, or otherwise in bad faith. Furthermore, political motivation or bad faith are hard to prove.

It follows that contractual rights, by themselves, would provide limited protection against the financial and reputational damage suffered by a Senior Officer as a result of dismissal of this nature.

#### Other legislative protections

Employment legislation provides some protection from dismissal by reason of the mischief which the 2006 Regulations also target. In particular, where a Senior Officer qualifies for the right not to be unfairly dismissed, s/he will be able to contend that the dismissal is “ordinarily” unfair under Part X of the 1996 Act.

Dismissal by reason of a protected disclosure (e.g. the disclosure that a certain course of action has been or would be unlawful) may result in finding that the dismissal is “automatically” unfair (s 103A), but since the introduction of the requirement that a qualifying disclosure be “made in the public interest” (s 43(1) of the 1996 Act), such a contention may fail at that hurdle. The same is true of a contention that Senior Officer has suffered detriment short of dismissal by reason of a protected disclosure under s 47B of the 1996 Act.

Whilst an employee can claim the remedy of reinstatement or re-engagement in the event of an “ordinary” or “automatic” unfair dismissal, such orders are rarely made by employment tribunals, and in any event an employer is not bound to comply with the order if made, though it may be required to additional compensation if it does not.

The normal remedy for unfair dismissal is financial compensation. Compensation for “ordinary” unfair dismissal is limited to £86,444 (subject to the possibility of an uplift) and a basic award of very considerably less. Compensation for dismissal or protected disclosure is not limited.

In sum, other statutory employment law rights cannot be relied on to prevent a dismissal for inappropriate reasons. They are also a very doubtful means of obtaining compensation for the loss of ongoing future employment and reputational damage.

Accordingly the 2006 Regulations provide legal protections to Senior Officers which other employment rights, contractual or statutory, do not provide.

## Public law

It is conceivable that in certain cases Senior Officers might have rights in public law (i.e. other than as provided by the 2006 Regulations) enforceable by a judicial review claim in relation to the manner in which allegations are considered. This is because they hold offices recognised by statute. For instance it is possible that action in bad faith could be restrained as being in breach of the principles of natural justice or Wednesbury reasonableness. But this is doubtful since in the majority of cases involving employment, the Court will refuse a claim for judicial review on the basis that it is a matter of private law and/or that there are other legal remedies available. Or at least there is a very high risk that this is what will happen.

Therefore, the possibility of the existence of public law rights does not in our view substantially add to the debate.

For these reasons, the protections offered by the 2006 Regulations are in our view not replicated by other legal remedies.

## **PART 5: WHETHER THE 2006 REGULATIONS REMAIN APPROPRIATE**

As we have said, there was general agreement amongst those we spoke to that Senior Officers were potentially vulnerable as being bearers of politically unwelcome news, and that it was right that they should therefore have special protection against dismissal or other disciplinary action.

We also note that the English reforms of 2015 to an extent maintained special protections for Senior Officers, by incorporating an element of independence into the investigatory process through the use of RIPs. This was presumably because the UK government believed that the DIP procedure was too complex and did not strike the right balance between member decision making powers and employees' rights, but that there remained a need to offer Senior Officers a degree of protection because of their peculiarly vulnerable position.

We further note that the JNC terms for England elaborated upon the amended 2001 Regulations to provide greater procedural protection for Senior Officers after the introduction of the 2015 changes: again this joint position was presumably because the Joint Secretaries and those they represented believed that this was appropriate by reason of the role Senior Officers are charged to carry out.

As we have stated above, the Minister's written statement asking us to report said:-

*"I expect ... that any recommendation for change would be accompanied by a robust justification."*

On the basis of what we have heard, we do not find "robust justification" for removing a form of special protection for Senior Officers. We were repeatedly told that such protection was appropriate.

However, the question remains whether there is justification for changing the nature of that protection currently given by the 2006 Regulations.

We think that there are two type of protection that need to be considered.

The first is whether, even if members are bound to accept the DIP's opinion as to whether the Senior Officer has committed misconduct, they should nevertheless have the power to determine what sanction, if any, to impose, with the DIP's power to set the sanction being removed.

The second is whether the procedure for appointing the DIP, and/or the procedure which a DIP must adopt, should change.

#### **DIP's power to set the sanction or maximum sanction**

Since the 2015 reforms, English authorities have the power to determine sanction.

Should this be adopted in Wales?

One interviewee with experience of the English system before and after the 2015 changes said that they believed that the reforms, as supplemented by JNC terms, had made little difference in term of the balance between employee rights and the local authority's control of its own decisions. They felt that it would be unusual for members to depart from the recommendations of a Panel, which would include the voices of RIPs.

This may be right in practice, though we can certainly see the potential for members to reject Panel recommendations. Further, Panel recommendations may themselves depart from the RIPs' views.

We believe that the question of whether the DIP or members should have the right to decide whether any sanction should be imposed and to set that sanction is primarily one of policy. If Ministers believe that the principle of local democracy means that these issues should ultimately be for members, elected by and accountable to residents, then the policy case for change would be clear. That is a matter for Ministers, rather than ourselves. However, absent such a view, the case for change is far less clear. That is to say, we have not found the “robust evidence” referred to by the Minister to support the view that Senior Officers would remain adequately protected if members had freedom to determine the disciplinary sanction to be imposed.

That said, this is partly because we would be seeking counterfactual evidence: this is not how the current system works. We are also conscious that the Explanatory Memorandum to the 2015 Regulations states that there was widespread support for the changes they effected. Interviewees expressed themselves in measured terms, and it could not be said that overall the view was that the retention of the DIP’s powers to determine the charges and set sanctions was absolutely necessary. Nevertheless, the fact remains that it was a consistent theme that interviewees believed Senior Officers to be peculiarly at risk and overall what they told us does not in our view give robust support for such a change.

## The procedures in the 2006 Regulations

There a number of changes that we consider ought to be made to the 2006 Regulations.

First, two matters of clarification of statutory language.

### Clarification 1 - definition of “disciplinary action”

We have explained above that we believe the definition of “disciplinary action” is confusing. It is not clear whether it is meant to cover capability issues. We think that this could be usefully clarified. We are conscious, however, that the amended 2001 Regulations adopt the same definition and so discussion with Westminster officials may be in order if this change is to be considered.

### Clarification 2 - Sanction

We also think that there should be clarification of statutory language on the issue of whether authorities must either impose no sanction or the sanction set by the DIP, or whether they can impose a lesser sanction that than set by the DIP.

Now, we turn to substantive changes to the DIP procedure.

### Choosing a DIP

There is too much scope for disagreement and delay on this issue. We believe that there should be a panel or list of DIPs held centrally (by the JNC or Ministers, or some

other appropriate person or body) and that, save in the case of a conflict of interest, DIPs should be appointed automatically on a taxi rank basis.

As noted above (and referred to immediately below), there have been concerns about the cost of appointing legally qualified DIPs. That said, non-legally qualified DIPs may well need legal advice at certain points in the investigation process. A variant of the list proposal above which could be considered is to have two lists, one for legally qualified DIPs, and one for non-legally qualified DIPs, and for parties to seek to agree which list the DIP should be taken from, according to the complexity of the issues which the investigation is likely to involve. However, the choice of list could also be a point of disagreement, and in our view if this variant were adopted there should be a short period for the parties to agree which list applies, after which Ministers should swiftly determine the matter, having permitted a short time for the parties to make representations in writing on the issue.

#### Costs of appointing a DIP

Much of the cost of a DIP procedure can lie in the fact that the DIP is often a practising lawyer. We do not think that this should necessarily be the case (and in saying this we stress that of course we mean no disrespect whatsoever to any lawyer who has undertaken the DIP role in the past: they have been chosen by others to carry out this role). The vast majority of often complex personnel issues which arise in public sector organisations, including disciplinary issues, are dealt with by non-lawyers.

However, we accept that acting as a DIP poses particular challenges, given the statutory framework within which the DIP must act, and given also the complexity of the issues that may arise in considering Senior Officer conduct. We accept that a non-legally qualified DIP may well reasonably request legal advice at some point in the investigation process. We do not think that a request for legal advice in these circumstances could reasonably be refused. This would create legal costs additional to the appointment of the DIP. These costs would be unpredictable, though similarly the costs of appointing a legally qualified DIP are also unpredictable given that it is unclear at the start of an investigation how much time the process will take.

#### Legal representation

In the light of the suggestions that the process be “de-lawyered” we have considered whether Senior Officers, and other parties involved in the DIP procedure, should be prohibited from being legally represented at hearings or in other parts of the DIP procedure.

As a starting point, it is important to note that delay and expense were concerns raised by a number of interviewees, but were not thought to arise solely because of the involvement of legal representatives. We also bear in mind that the DIP procedure may determine a Senior Officer’s employment and possibly their career.

We also have a concern that the imposition of such a prohibition may, at least in some cases, amount to a breach of the Senior Officer’s right to a “fair trial” in the

determination of civil rights pursuant to Article 6 (1) of the European Convention of Human Rights<sup>7</sup>.

### IC's role

We have considered whether the procedure could be simplified by not having a preliminary stage currently undertaken by the IC.

We think that a preliminary stage should be retained. It is a commonplace in disciplinary procedures for there to be an assessment of whether an allegation needs to be the subject of further investigation at all. It would be unfair to Senior Officers to have to undergo a DIP procedure, and unnecessarily expensive for the local authority to have to appoint a DIP, if an allegation can be discarded at an earlier preliminary stage.

That said, we believe that there is scope for speeding up the first stage. The current terms of reg 9(3) are extremely open-ended and run the risk that the IC does considerably more than it needs to do to establish whether an allegation should be fully investigated. One way of doing this would be for the 2006 Regulations to state the test which the IC is to apply e.g. that there is substantial issue that requires investigation (to adopt words from the Northern Irish Model Procedure) or such like.

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<sup>7</sup> See R (G) v The Governors of X School [2011] UKSC 30

### Relationship of DIP's and IC's investigations

The DIP will often wish to obtain more evidence than that collected by the IC. However, consideration should be given to changes making it unnecessary for the DIP's investigations to duplicate work undertaken by the IC.

### DIP's power of direction and sanction

The 2006 Regulations give the DIP limited powers to take action to prevent delays in the investigatory process. Regs 9(7) and (8) say that the DIP should agree a timetable for the investigation, and failing agreement set one. However we believe that the 2006 Regulations should spell out that that the DIP has the power to take such steps as s/he thinks appropriate to keep the investigation progressing efficiently in the event of failure to comply with a timetable.

We believe that the DIP has such implied powers already, on the basis that, as a statutory person, s/he has the power to do things which are conducive or incidental to, or which facilitate, express duties: Attorney General v Great Eastern Railway Company (1880) 5 App Cas 473 at 478. But we think that making the power express will ensure that everyone involved in a DIP procedure understands that the DIP has powers to expedite the process, where appropriate, against the wishes of one or both of the parties. We believe that this would help to encourage all parties to bear in mind the need for the investigation to be conducted as briskly as is appropriate and reasonable.

### Interaction with contractual terms/policies

As discussed above, at least some local authorities have adopted terms of employment or policies which embellish the effect of the 2006 Regulations.

We believe that there is potential for this to lead to over-elaborate processes, difficulties in making the statutory and local processes mesh, and even to depart from the requirements of the 2006 Regulations. It could also lead to varying practice across Wales.

We believe that there is at least a case for the procedure in the 2006 Regulations to be expressed to be exclusive.

That said we are conscious of the difficulties that this step might entail. An obvious objection is that if the staff and employer sides have agreed, locally or more widely, to certain terms, and they do not conflict with the 2006 Regulations, it is inappropriate for such an agreement to be overridden.

Further, any change would probably have to be coupled with wider revisions to the 2006 Regulations to ensure that they set out a complete and appropriate code for the disciplinary process, and are compliant with all other employment law rights e.g. the right to representation. This would be a time consuming process. No doubt Ministers would also want to do this only after discussion and consultation with appropriate stakeholders.

## Interaction with external investigations

As we have mentioned, there has been concern that external investigations can delay DIP procedures. We expressly make no comment on any particular DIP procedure. Further we do not think that it is possible for the 2006 Regulations to provide for the myriad different situations to which external investigations may give rise, and how they may interact with the DIP procedure in any given case. Sometimes the authority, or the DIP once appointed, will have the discretion to continue with the procedure, notwithstanding that other agencies may be involved: see in the context of unfair dismissal law Harris (Ipswich) Ltd v Harrison [1978] ICR 1256 and Secretary of State for Justice v Mansfield UKEAT/0539/09. But it will depend on the particular facts. If the Police (or other body undertaking onerous public responsibilities) makes representations of substance that the DIP procedure should come to a halt for a while, it would be unusual for the DIP procedure to continue. We doubt that much can be done about this. The same would apply to any employment disciplinary situation.