

CHESHIRE EAST COUNCIL

Constitution Committee

Date of Meeting:	13 th February 2017
Report of:	Deputy Monitoring Officer
Portfolio Holder:	Councillor Paul Findlow – Corporate Policy & Legal Services
Subject/Title:	New JNC Handbook for Chief Executives and Consequential Amendments to the Constitution

1.0 Report Summary

- 1.1 The report explains the changes made in the new (October 2016) JNC handbook for Chief Executives which reflect changes made to the statutory employment protections for the Head of Paid Service, Chief Finance Officer (the Section 151 Officer) and Monitoring Officer who, together, are referred to as the “Protected Officers”. The report also recommends changes to the Constitution to comply with the new requirements.

2.0 Recommendations

- 2.1 That the Constitution Committee recommend to Council that:-
- a) The Staff Employment Procedure Rules be amended as set out in **Appendix 2**.
 - b) The Terms of Reference of the Staffing Committee be amended as set out in **Appendix 3**.
 - c) An Investigation and Disciplinary Committee (comprising 7 elected Members) be established with the terms of reference set out in **Appendix 4**
 - d) A Disciplinary Appeals Committee (comprising 7 elected Members) be established with terms of reference as set out in **Appendix 5**.
 - e) An Independent Persons Panel be established with the terms of reference set out in **Appendix 6**
 - f) The Director of Legal Services and Monitoring Officer be authorised to invite the Council’s current Independent Persons (being those persons appointed to advise on member conduct complaints under the

Localism Act 2011) and if necessary one or more of the Independent Persons of neighbouring authorities (following consultation with the Monitoring Officers of those authorities), to be considered for appointment to the Independent Persons Panel.

- g) The Constitution Committee be authorised to confirm appointments to the Independent Persons Panel.
- h) The Constitution Committee be authorised to approve the payment of a reasonable and proper allowance/expenses for the work undertaken by those Independent Persons appointed to the Independent Persons Panel.
- i) The Director of Legal Services be authorised to make any further consequential amendments to the Constitution to ensure consistency with the above changes.

3.0 Reasons for the Recommendation

- 3.1 To comply with the Local Authorities (Standing Orders) (England) (Amendment) Regulations 2015; and to ensure that the Council's constitution and procedures are consistent with the revised JNC handbook for Chief Executives (October 2016).

4.0 Wards Affected

- 4.1 All wards are affected.

5.0 Local Ward Members

- 5.1 Not applicable.

6.0 Policy Implications

- 6.1 None Identified.

7.0 Financial Implications

- 7.1 The administrative and legal costs of making the changes are limited and can be contained within existing budgets.
- 7.2 The cost of any committee/panel meetings will only arise if disciplinary proceedings are taken against a Protected Officer. Any such costs are likely to be met from existing budgets.

8.0 Legal implications

- 8.1 The changes are required to comply with the Local Authorities (Standing Orders) (England) (Amendment) Regulations 2015 and to ensure consistency with the revised JNC handbook for Chief Executives (October

2016) and the Council's contractual obligations. External solicitors have advised on the constitutional and employment law issues, and have contributed to this report.

9.0 Risk Management

- 9.1 Failure to make the changes could leave the Council vulnerable to claims if its processes do not fully comply with the legislation and its contractual obligations.
- 9.2 These procedures are relatively new and untested. Issues may emerge in the context of national debate and negotiations or as individual cases come forward. It will be possible for changes to be made at a future date if necessary and any matters requiring attention will be reported to the Staffing Committee and/or to the Constitution Committee and/or Council.

10.0 Background and Options

Background

- 10.1 The Local Government Act 1972, the Local Government Finance Act 1988 and the Local Government and Housing Act 1989 require local authorities to designate officers as the “head of paid service”, the “monitoring officer” and the officer “responsible for the administration of the authority’s financial affairs” (called the “chief finance officer” or “section 151 officer”), each of whom has a personal statutory duty to report to Cabinet or Full Council in certain circumstances. Their duties are, in very broad terms, to prevent or highlight organisational, legal or financial problems. This Council has designated the Chief Executive, the Director of Legal Services and the Chief Operating Officer to these respective roles.
- 10.2 As a result of the personal duties upon them, the post holders have a degree of statutory protection from dismissal or other disciplinary action. Section 8 of the Local Government and Housing Act 1989 requires that local authorities must make the standing orders relating to staff that are specified in Regulations. Regulations were made in 1993 about the appointment of chief officers, and in 2001 about the appointment, discipline and dismissal of certain senior officers. Under the Local Authorities (Standing Orders) (England) Regulations 2001/3384, as amended, local authorities were required to adopt standing orders to provide that, beyond suspension on full pay for no more than two months, disciplinary action could not be taken in relation to the Head of Paid Service, the Chief Finance Officer, or the Monitoring Officer, unless it was recommended by a Designated Independent Person (“DIP”) appointed to carry out an investigation.
- 10.3 The Local Authorities (Standing Orders) (England) (Amendment) Regulations 2015/881 changed that protection. These regulations came into force in May 2015.

- 10.4 The Council's Staff Employment Procedure Rules have already been revised and are compliant with the 2015 Regulations. The current Staff Employment Procedure Rules are attached as **Appendix 1**.
- 10.5 Whilst the Staff Employment Procedure Rules already contain the information required by the Regulations, they do not yet specify the procedure which the Council will adopt if disciplinary action is to be taken against one of the Protected Officers. Nor does the constitution currently contain the "machinery" required to operate the new procedures. This is because there has been uncertainty as to how the legislation ought to be applied in practice.
- 10.6 The uncertainty that has existed, since the legislation changed in May 2015, over how the legislation will apply in practice stems from the fact that the previous DIP process was embedded within the terms and conditions for Chief Executives as set out in the JNC handbook. The JNC handbook has contractual effect where an authority has agreed to be bound by JNC terms and conditions. Thus there was, until recently, a scenario where the contractual obligations owed under JNC terms required different steps to be taken to those set out in the new regulations.
- 10.7 The JNC issued a revised handbook in October 2016 to resolve this ambiguity. The main purpose of the revised handbook is to reflect the changes in the law. Now that ambiguity has been resolved, the Council needs to adopt new processes in the light of the revised handbook.

The New Process - Dismissal

- 10.8 The 2015 Regulations replaced the previous DIP arrangements with a new system. There is now no requirement to appoint a DIP where disciplinary action against a Protected Officer is being considered. The law now requires that full Council must approve the dismissal of any of the Protected Officers (previously this had only applied to the head of paid service). So, Council must now approve a decision to dismiss any of the Protected Officers before notice of dismissal can be given.
- 10.9 The following procedure must be followed before a Protected Officer can be dismissed. The Council must invite a number of the independent persons appointed to advise on member conduct complaints under the Localism Act 2011 ("IPs") to be appointed to a Panel. If the Council has fewer than two IPs, it must extend the invitation to one or more IPs from another authority. If more accept the invitation than are needed, the appointments must give priority to IPs of the Council who are on the Council's electoral roll, then to IPs of the Council who are not, then to other authorities' IPs. At least two of those who have accepted must be appointed, but there is no upper limit. They can be paid an allowance or expenses, but no more than they would receive for their Localism Act work. The appointment must be made at least 20 days before Council takes a decision to approve the dismissal of a Protected Officer. At the full Council meeting, the authority must take into account any advice,

views or recommendations of the Panel as well as the conclusions of any investigation and any representations made by the officer concerned.

- 10.10 The JNC has sought clarification from DCLG on whether the Independent Persons Panel should be comprised solely of IPs or whether it can or should also include elected members. DCLG has indicated that the intention is that the Independent Persons Panel should consist solely of IPs. The proposal is to follow that approach.
- 10.11 This procedure only applies to dismissal on disciplinary grounds. Disciplinary action other than dismissal is not now covered by the Regulations.

The Model Disciplinary Procedure

- 10.13 The October 2016 handbook also contains a model disciplinary procedure. Whilst strictly speaking the procedure only applies to the head of paid service, best practice advice received from external solicitors is to apply the procedure to the other Protected Officers too (i.e. to the monitoring officer and Section 151 officer). That is reflected in the 13 October 2016 JNC Circular introducing the revised handbook. That is what this report proposes.
- 10.14 The main features of the model procedure are:
- a) That there should be a standing Investigation and Disciplinary Committee which oversees any disciplinary process and determines the outcome.
 - b) That any disciplinary investigation should be carried out by an Independent Investigator.
 - c) That there should be a Disciplinary Appeals Committee to consider any appeal against a decision of the Investigation and Disciplinary Committee to take any disciplinary action short of dismissal.
- 10.15 The model procedure suggests that any decision to suspend the head of paid service should be made by the Investigation and Disciplinary Committee, but that the power to make such a decision in urgent circumstances should be delegated. The model procedure suggests that the power should be delegated to the Chair of the Investigation and Disciplinary Committee. However, this is a council-side (as opposed to an Executive) function and thus may only be exercised by the full Council, a committee, sub-committee, or an officer (Local Government Act 1972, section 101). It cannot lawfully be delegated to a single Member.
- 10.16 Whilst a number of options have been considered as to where an urgency power might rest, the view is taken that in practice the difficulties in convening a quorate meeting of the Investigation and Disciplinary Committee to take an urgent decision on whether or not to suspend would

not be so insurmountable such that there arises a compelling case that there is in fact a need to delegate an urgency power to any other committee, sub-committee or an officer.

- 10.16 Where a decision to suspend has to be taken in respect of one of the other Protected Officers, in officer structure hierarchical terms it would not be extraordinary for that power to rest with the head of paid service. However, in keeping with the principle of a consistent application of the protections to all of the Protected Officers, it is proposed that the Investigation and Disciplinary Committee also be responsible for deciding whether or not to suspend the monitoring officer or the S151 officer. For the reasons set out above, it is also considered that there is no compelling case to delegate a power to suspend in urgent circumstances.
- 10.17 The model procedure suggests that any suspension of the head of paid service (and so, by extension, the monitoring officer and S151 officer) is reviewed after a period of two months by the Investigation and Disciplinary Committee. In doing so it should consult with the Independent Investigator and consider any representations from the officer concerned.
- 10.15 It is proposed that amendments are made to the Employment Procedure Rules to reflect the model procedure. The proposed amended Rules attached as **Appendix 2**.

The Investigation and Disciplinary Committee

- 10.16 It is proposed that an Investigation and Disciplinary Committee be established. This will determine any suspension of any of the Protected Officers. It will also determine whether any allegation against any of the Protected Officers warrants investigation. The Investigation and Disciplinary Committee may, if it considers it appropriate, appoint an Independent Investigator. The Committee will consider any report of the Independent Investigator and, if appropriate conduct a hearing. The Investigation and Disciplinary Committee may determine that no action should be taken, that some action short of dismissal should be taken, or that the officer should be dismissed. If the action is short of dismissal the officer may appeal to the Disciplinary Appeals Committee. If the action proposed is dismissal then the matter must be considered by the Independent Persons Panel, prior to consideration by full council.
- 10.17 If the Investigation and Disciplinary Committees decides that the officer should be dismissed it must ascertain if any cabinet member(s) object. The Committee will forward its proposal and the necessary information to the Independent Persons Panel. The Panel will consider the proposal and the necessary particulars and decide what advice, views or recommendations, if any, to make to full Council. Full Council will decide whether or not to dismiss the officer, having regard to any advice, views or recommendations of the Panel, the conclusions of any investigation, and any representations from the officer.

The Independent Persons Panel

- 10.18 It is recommended that a standing Independent Persons Panel should be established, comprising two IPs and a substitute IP, appointed in priority order in accordance with the Regulations. The substitute would take the place of any IP who was unable to participate because he or she was not available at the time, or had a personal conflict of interest. The Council currently has three IPs who it is recommended are invited to be considered for appointment. It is recommended that the Director of Legal Services is authorised to make that invitation, and to collaborate through consultation with the Monitoring Officers of neighbouring authorities (if needs be) from time to time in the event that a need is identified to appoint to the Panel a neighbouring authority's IP(s). It is recommended that the Constitution Committee is authorised to confirm such appointments.
- 10.18 The authority to deal with dismissal of chief officers is currently delegated to Staffing Committee. It is proposed that its terms of reference are amended to remove that power in relation to the Protected Officers and, instead, delegate it to the newly established Investigation and Disciplinary Committee, in accordance with the model procedure. The proposed Terms of Reference of the Staffing Committee are attached at **Appendix 3**. It is proposed that these are amended by removing paragraph 4. The proposed Terms of Reference for the Investigation and Disciplinary Committee, the Disciplinary Appeals Committee and the Independent Persons Panel are attached at **Appendices 4, 5 and 6 respectively**.
- 10.19 It is recommended, in accordance with the model procedure, that the Investigation and Disciplinary Committee will be comprised of 7 members on a politically proportionate basis. In line with the model procedure, at least one of the members of the committee shall be a member of the cabinet.
- 10.20 It is recommended the Council also established a Disciplinary Appeals Committee to consider any appeals against any decision by the Investigation and Disciplinary Committee to take action short of dismissal. The Disciplinary Appeals Committee will be comprised of 7 members, who were not members of the Investigation and Disciplinary Committee which made the decision being appealed, on a politically proportionate basis. In line with the model procedure, at least one of the members of the committee shall be a member of the cabinet.
- 10.22 The alternative to what is proposed would be for the Council to keep its current arrangements, but these do not set out how any disciplinary process against a Protected Officer will operate in practice. This could lead to difficulties should action be needed and may increase the risk of claims. The Council could seek local agreement to adopt a different process. However, the model procedure adopts a balanced approach to disciplinary process, adoption of which will ensure that the Council has a fair process which is unlikely to be susceptible to successful challenge. It

has taken over a year for the JNC to reach agreement on this process, any attempt to seek local agreement to a different process is likely to cause further delay and it may be difficult to reach agreement. Any alternative process would have to be fair and comply with employment law, so it would be unlikely to be radically different from the model procedure.

For further information:

Officer: Daniel Dickinson – Legal Team Manager Corporate & Regulatory and Deputy Monitoring Officer

Tel No: 01270 685814

Email: daniel.dickinson@cheshireeast.gov.uk