

Joint Negotiating Committee for Chief Executives of Local Authorities

To: Chief Executives in England (copies for the Finance Director and HR Director)
(Wales and N Ireland for information only)
Regional Directors
Members of the Joint Negotiating Committee

5 May 2016

Dear Chief Executive,

CHIEF EXECUTIVES' HANDBOOK

You will be aware that The Local Authorities (Standing Orders) (England) (Amendment) Regulations 2015 replaced the statutory Designated Independent Person (DIP) provisions with an Independent Panel process.

The JNC has been working over recent months to update the Chief Executives' Handbook so that it reflects the new statutory process and we hope to issue the revised version in the coming weeks.

In the meantime, we wish to bring to your attention one key change that will be a feature of any joint agreement and therefore you should consider reflecting this in your Council's Standing Orders / Constitution (as appropriate). The Regulations provide that where there is a proposal to dismiss the Head of Paid Service, Monitoring Officer or Finance Officer the authority must appoint a Panel, and take into account any advice, views or recommendations of that Panel. The Panel should be a committee of the Council, appointed under section 102(4) of the Local Government Act 1972 and should contain at least two independent persons appointed under s.28(7) of the Localism Act 2011.

There has been some uncertainty as to whether this requirement incorporated the need to maintain political balance in this committee, ie. that the requisite number of councillors should also be appointed. Having consulted DCLG the JNC has accepted that it is possible that the Panel can comprise only independent persons provided that is what the authority resolves and therefore in the national model process the Independent Panel shall comprise only independent persons (at least two) appointed under S28(7) of the Localism Act 2011. In other words, no elected members should sit on the Panel.

Employers' Secretary:

Sarah Messenger
Local Government Association
Local Government House
Smith Square
London SW1P 3HZ
info@local.gov.uk

Officers' Secretary:

Amar Dave
Hon Secretary
ALACE

daveamar@aol.com

If, following a disciplinary investigation, there is a recommendation to dismiss the Chief Executive, the reports of the Investigating & Disciplinary Committee and the Independent Investigator should then be sent to the Independent Panel for its consideration prior to advising the Council.

We are aware that many councils will shortly be convening an Annual General Meeting of the full Council so you may wish to use that opportunity to update the Council's Standing Orders / Constitution accordingly. However, should a disciplinary process be underway before then you should continue to use your current procedures.

Yours faithfully,

Sarah Messenger
Amar Dave

Joint Secretaries

Employers' Secretary: Sarah Messenger Local Government Association Local Government House Smith Square London SW1P 3HZ info@local.gov.uk	Officers' Secretary: Amar Dave Hon Secretary ALACE daveamar@aol.com
--	--

Further guidance on process applying to both procedures is expressed in flow diagram format which is provided as **Appendices 5a, W5a, 5b and 5c.**

A. THE MODEL DISCIPLINARY PROCEDURE AND GUIDANCE – ENGLAND

1. *Issues requiring investigation – (procedure)*

Where an allegation is made relating to the conduct or capability of the chief executive or there is some other substantial issue that requires investigation, the matter will be considered by the Investigating & Disciplinary Committee (IDC).

This Committee will be a standing committee appointed by the council. Arrangements for flexibility are recommended in the event that a member of the standing committee has a conflict of interest.

Other structures are necessary to manage the whole process, including an Independent Panel should there be a proposal for the dismissal of the chief executive. This will be comprised of independent persons, appointed in accordance with ***The Local Authorities (Standing Orders) (England) Regulations 2001*** as amended.

1. *Issues requiring investigation – (guidance)*

1.1 *The Local Authorities (Standing Orders) (England) Regulations 2001 as amended*

1.1.1. The Local Authorities (Standing Orders) (England) Regulations 2001 (the Regulations) (as amended by the Local Authorities (Standing Orders) (England) (Amendment) Regulations 2015) provide that the dismissal of a chief executive in cases of disciplinary action (as defined in the Regulations) may only take place if the proposal to dismiss is approved by way of a vote at a meeting of the authority, after they have taken into account:

- any advice, views or recommendations of a panel (the Independent Panel)
- the conclusions of any investigation into the proposed dismissal and
- any representations from the protected officer concerned

1.1.2 **Disciplinary action:** in relation to a member of staff of a local authority is defined in the Regulations as “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 authority has undertaken to renew such a contract”.

The definition of disciplinary action would therefore include other reasons for dismissal such as capability or some other substantial reason including a

breakdown in trust and confidence between the chief executive and the authority.

- 1.1.4 The attached **Appendix 5d** (potential reasons for termination table) sets out those circumstances that could potentially result in dismissal and whether or not they are covered by this procedure.

1.2 Structures to manage the procedure

- 1.2.1 A key feature of the model procedure is the specific roles envisaged by the Investigating and Disciplinary Committee (IDC), the Appeals Committee, the Independent Panel and the council. Authorities will need to consider a number of important issues around the composition of committees and the delegation of appropriate powers. In particular, it must be borne in mind that staffing issues are a non-executive function and so these bodies have to be put in place by the council not the Leader / Mayor or executive.
- 1.2.2 The IDC must be a politically balanced committee comprising, it is suggested, five members. Where authorities operate a leader / cabinet or mayor / cabinet executive structure, this must include at least one member of the executive. This Committee may need to be in a position to take decisions and appropriate actions as a matter of urgency. It may need to meet at very short notice to consider allegations and decide whether there is a case to answer and to consider whether suspension of the chief executive might be appropriate. It is also possible that in some circumstances members of the IDC may find themselves in a position where they have a conflict of interest. It is therefore recommended that authorities take this into account when constructing the committee and its powers, including the quorum and substitutes. The IDC also has an important role in considering the report of an Independent Investigator. The role of the IDC is explained further at appropriate stages in the guidance. (The Committee that performs this function may locally be known by a different name although its role and responsibilities will be that outlined throughout this document and referred to herein as the IDC. This Committee may also fulfil other functions).
- 1.2.3 The Appeals Committee must be a politically balanced committee of, it is suggested, five members who are not members of the IDC. Where authorities operate an executive structure this must include at least one member of the executive. The Appeals Committee will have a more limited role. Its purpose will be to hear appeals against action taken short of dismissal and to take a decision either to confirm the action or to impose no sanction or a lesser sanction.
- 1.2.4 The JNC has agreed that the Independent Panel should comprise of independent persons (at least two in number) who have been appointed by the council, or by another council, for the purposes of the council members' conduct regime under section 28(7) of the Localism Act 2011. Councils are required to issue invitations for membership of the Panel in accordance with the following priority order:

- (a) an independent person who has been appointed by the council and who is a local government elector in the authority's area
- (b) any other independent person who has been appointed by the council and
- (c) an independent person who has been appointed by another council or councils

1.2.5 Appropriate training should be provided for Independent Panel members.

1.2.6 It should be noted that any remuneration paid to members of an Independent Panel may not exceed that payable in respect of their role under the Localism Act.

1.2.7 A requirement for any disciplinary process is to carry out an investigation of the allegations to establish the facts of the case and to collate evidence for use in the disciplinary hearing. In the case of a chief executive, it will normally be necessary to engage an independent person for this purpose, and this person is referred to here as the Independent Investigator. Arrangements have been agreed to enable the speedy appointment of a competent and experienced person to perform this role, with the assistance of the Joint Secretaries.

1.3 Managing access to the procedure (See also Para 5 of this guidance) – considering the allegations or other issues under investigation

1.3.1 The procedure itself does not require that every single issue which implies some fault or potential error on the part of the chief executive be investigated using this process. It is for the authority to decide the issues that will engage the formal process.

1.3.2 Authorities will therefore need to consider what constitutes an 'allegation' made relating to the conduct or capability of the chief executive and what it considers are other substantial issues requiring investigation. Clearly the route for complaints against the council and the chief executive and for issues that might be substantial and require some form of investigation, and possibly formal resolution, is varied. Ideally, procedures need to be in place which can filter out and deal with 'allegations' against the chief executive which are clearly unfounded, or trivial or can best be dealt with under some other procedure.

1.3.3 For example, allegations and complaints that are directed at the chief executive, but are actually complaints about a particular service, should be dealt with through the council's general complaints procedure. If the matter is a grievance from a member of staff directed against the chief executive, it may be appropriate to first deal with it through the council's grievance procedure. Of course if the matter were a serious complaint against the chief executive's personal behaviour such as sexual or racial harassment, the matter would be one that would be suitable for an investigation under the disciplinary procedure.

- 1.3.4 An authority will need to put into place arrangements that can manage the process. In particular - that records are kept of allegations and investigations and that there is a clear route into the disciplinary procedure. It could be, for example, that in the case of allegations against the chief executive, the monitoring officer and the Chair of the IDC would oversee referrals to that Committee.
- 1.3.5 Where the issue to be investigated is related to the sickness absence or capability of the chief executive in terms of performance, there is likely to be a link with the authority's sickness procedure or appraisal / performance management procedure.
- 1.3.6 Where management action is required in respect of the normal sickness of the chief executive, the authority needs to be clear about who takes appropriate actions. Initially, it could be the Director of HR (according to local procedures) who will follow the authority's normal sickness absence procedures. Whoever is responsible will report to the IDC as appropriate to the matter being investigated – in particular where procedures have been followed to the point where dismissal appears to be a possibility (see flow diagrams **Appendices 5a, 5b & 5c** for reference).
- 1.3.6 Any shortcomings in a chief executive's performance can be better identified, and therefore remedied, at an early stage if there is an objective performance appraisal system in place as required by the JNC agreement (see **Appendix 2**).
- 1.3.7 For a chief executive the system is likely to be linked to objectives in the authority's community plan and the performance objectives should be specific, measurable, achievable, realistic and time-related. It may, but will not necessarily, be the system against which pay progression is measured (see flow diagram **Appendix 5c**).

2. Timescales – (procedure)

It is in the interests of all parties that proceedings be conducted expeditiously.

It is recognised that it would be inappropriate to impose timescales that could in practical terms be difficult to achieve.

2. Timescales – (guidance)

- 2.1 An important principle when taking disciplinary action is that the process should be conducted expeditiously but fairly. There is, therefore, a need to conduct investigations with appropriate thoroughness, to arrange hearings and allow for representation. It is not in the interests of the council, or the chief executive, that proceedings are allowed to drag on without making progress towards a conclusion.

2.2 Statutory and indicative timescales

2.2.1 The procedure does not set out explicit timescales except the specific requirement in the Local Authority (Standing Orders) (England) Regulations 2001 for the appointment of the Independent Panel at least 20 working days before the meeting of the council at which consideration as to whether to approve a proposal to dismiss is to be given. In this guidance we make reference to other statutory timescales and restrictions which are applicable to disciplinary procedures more generally, such as those contained in the Employment Relations Act 1999 (in connection with the right to be accompanied).

2.3 Avoiding delays in the procedure

One cause of delay in the procedure is the availability of the key people necessary to manage and control the process.

2.3.1 Availability of Independent Investigator

An Independent Investigator should only be formally appointed once the IDC has determined that there is a case that requires further investigation. However to minimise delays in any potential investigation, steps should be taken to identify a shortlist of three potential Independent Investigators from the list held by the JNC Joint Secretaries (see paras 6.3 and 6.4) concurrently with arrangements for the initial meeting of the IDC. This is not pre-judging whether an investigator will be needed, but a practical step to assist in minimising any delays.

2.3.2 Availability of the chief executive in case of sickness

- (a) It is possible that the sickness of the chief executive could impact on the ability to follow the disciplinary procedure. This may be because:
- the issue under investigation is the chief executive's sickness in itself (ie. a capability issue); or alternatively,
 - while during an investigation for another reason such as allegations about the chief executive's conduct, the chief executive commences sickness absence during the disciplinary process.
- (b) In principle, the sickness of the chief executive will invoke the local authority's normal sickness procedures. The nature of the investigation and facts surrounding the sickness will dictate the appropriate way of dealing with the issue.
- (c) If the investigation is about the long-term sickness or frequent ill-health problems experienced by the chief executive the authority should have already obtained appropriate medical information and advice by following its local processes. This would normally include referral to the authority's occupational health adviser who would examine the chief executive and / or seek further medical information from the chief executive's GP or any specialist dealing

with the case. However, the IDC or Independent Investigator may feel the need for further or more up-to-date advice and again they should use the authority's normal processes and procedures to obtain this. If the chief executive's absence or problems at work are as a result of a disability which places him / her at a substantial disadvantage compared to others without the disability, then the authority must consider and undertake reasonable adjustments in order to remove the disadvantage. The IDC must satisfy itself that this has been fully considered and that no further reasonable adjustments could be made which would remedy the situation.

- (d) Where the issue under investigation is not health-related and is, for example, the conduct of the chief executive and he / she then commences sickness absence then the approach will depend on the type and length of the illness and exactly when it occurs during the process.
- (e) A short period of illness should not normally create a major problem although the timing of the illness can create difficulties if it coincides with scheduled meetings for investigating or hearing aspects of the case. If this occurs then reasonable efforts should be made to rearrange the meeting. However, if the sickness becomes more persistent or is likely to become longer term then the authority will take steps to identify whether the chief executive, although possibly not fit to perform the full range of duties, is fit enough to take part in the investigation or disciplinary hearing.
- (f) If it appears that there will be a long period of ill health which will prevent the chief executive taking part in the process, the authority and possibly the Independent Investigator will have to make a judgement as to how long to wait before proceeding. In some cases it may be appropriate to wait a little longer where a prognosis indicates a likely return within a reasonable timescale.
- (g) However, where this is not the case, the authority will in most cases need to press ahead given the importance of resolving issues which can have a significant impact on both parties due to the nature and high profile of the role of chief executive. If this is the case the authority should ensure that the chief executive is given the opportunity to attend any meetings or hearings. However, the chief executive should be informed that if they cannot attend the meetings or hearings then they would proceed without them. If this is the case the chief executive may make written submissions to be considered and may also send their representative to speak on their behalf before a decision is taken.

2.3.3 Availability of representative

The availability of the chief executive's representative can also be a possible cause of delay. Reasonable account should be taken of the availability of all relevant parties when setting dates and times of meetings. Where it is simply not possible to agree dates to suit everybody the authority needs to be aware of the statutory right to be accompanied at disciplinary hearings and to take this into account when setting dates (see **Paragraph 4**).

2.3.4 Availability of witnesses

If the Independent Investigator or the IDC allows either party to call witnesses and the witnesses are unable to attend, their evidence should not be discounted and should still be considered. Alternatives may include written statements or minutes / records where individuals have been interviewed as part of the investigation. However, such evidence may not carry the same weight as evidence that can be subjected to cross-examination.

2.3.5 Availability of committee members

- (a) It is recommended that, in establishing the IDC and the Appeals Committee, authorities take availability issues into account and any operational quorum when considering the numbers of members to serve on these committees.
- (b) It should be particularly borne in mind that the IDC might need to be able to meet at short notice to consider serious allegations against the chief executive.

2.3.6 Availability of Independent Panel members

The Independent Panel must be appointed at least 20 days before the council meeting at which consideration whether or not to approve a proposal to dismiss is to be given. The appointment of Independent Panel members should, therefore, take into account their availability to undertake their role within that timescale.

3. *Suspension – (procedure)*

Suspension will not always be appropriate as there may be alternative ways of managing the investigation.

However, the IDC will need to consider whether it is appropriate to suspend the chief executive. This may be necessary if an allegation is such that if proven it would amount to gross misconduct. It may also be necessary in other cases if the continuing presence at work of the chief executive might compromise the investigation or impair the efficient exercise of the council's functions.

In any case, the chief executive shall be informed of the reason for the proposed suspension and have the right to present information before such a decision is taken.

An elected member should hold the delegated power to suspend the chief executive immediately in an emergency if an exceptional situation arises whereby allegations of misconduct by the chief executive are such that his / her remaining presence at work poses a serious risk to the health and safety of others or the resources, information or reputation of the authority. It is suggested that this power might be held by the Chair of the IDC or the Chair of the Urgency Committee.

The continuance of a suspension should be reviewed after it has been in place for two months.

3. *Suspension – (guidance)*

3.1 Although suspension in order to investigate an allegation or a serious issue is not disciplinary action in itself, it is a serious step in the process that should be managed well. Unlike with most other posts, the suspension of the chief executive may come immediately to the attention of the local and perhaps national media with potentially damaging consequences for the reputation of the chief executive and the authority.

3.2 Where a chief executive is suspended and facing allegations this is potentially stressful for the individual and disruptive to the council. It is therefore in the interests of all parties that such cases are dealt with as expeditiously as possible.

3.3 *Alternatives to suspension*

Suspension will not be appropriate in every case, as this will depend on the nature of the allegation or seriousness of the issue. Before suspending the chief executive, careful consideration should be given to whether it is necessary and whether there are any other suitable alternative ways of managing the situation, for example by agreeing particular working arrangements such as working from home for a period or working in some

other way that protects the chief executive and authority from further allegations of a similar nature.

3.4 Power to suspend

- (a) The chief executive is the head of paid service and normally bears the delegated responsibility for implementing council policy on staffing matters. However, when it is the chief executive who is the subject of an allegation or investigation, the authority will need to be clear about who has the power to suspend the chief executive and in what circumstances.
- (b) The point at which it may become clear that suspension is an appropriate action is likely to be at the stage where the IDC has conducted its initial assessment. The model procedure therefore envisages that the IDC should have the power to suspend the chief executive.

3.5 Short notice suspension

- (a) The procedure also recognises that in exceptional circumstances it may be necessary to suspend at very short notice and before the IDC can meet, e.g. because the remaining presence of the chief executive could be a serious danger to the health and safety of others, or a serious risk to the resources, information or reputation of the authority. An elected member should hold the delegated power to suspend in an emergency. It is suggested that this power might be held by the Chair of the IDC or the Chair of the Urgency Committee.

3.6 Suspension protocols

If suspension were deemed appropriate, the IDC (or in exceptional circumstances, the chair) would also be the appropriate body to agree or authorise any protocols which are necessary to manage the suspension and the investigation. For example, the chief executive might request access to workplace materials and even witnesses. Arrangements should be made to manage such requests and facilitate appropriate access. Another general principle would be that whilst suspended, the chief executive would remain available to participate in the investigation and to attend any necessary meetings. Therefore other important issues would include communication channels for day-to-day communication and any stipulations for reporting any scheduled or unscheduled absence from the area, e.g. pre-arranged holiday.

3.7 Review of suspension

Where the chief executive is suspended, the suspension should be reviewed after two months, and only continued following consultation with the Independent Investigator and after taking into account any representations made by the chief executive.

4. *Right to be accompanied – (procedure)*

Other than in circumstances where there is an urgent requirement to suspend the chief executive, he or she will be entitled to be accompanied at all stages.

4. *Right to be accompanied – (guidance)*

- 4.1 Although the statutory right to be accompanied applies only at a disciplinary hearing, the JNC procedure provides the opportunity for the chief executive to be accompanied at all stages by their trade union representative or some other person of their choice, at their own cost.
- 4.2 The procedure recognises that there may be, in exceptional circumstances, a need to suspend the chief executive at short notice, when it is not possible to arrange for their trade union representative to be present. These circumstances might include for example where there is a serious risk to the health and safety of others or serious risk to the resources, information, or reputation of the authority.
- 4.3 Although it would be beneficial to agree dates for the necessary meetings required, the procedure cannot be allowed to be delayed owing to the unavailability of a representative. The statutory right to be accompanied in a disciplinary hearing contained in s.10 of the Employment Relations Act 1999 applies only to hearings where disciplinary action might be taken or be confirmed, that is to say when a decision may be taken on the sanction, or a decision may be confirmed during an appeal. In this model procedure the statutory entitlement to be accompanied would arise:
- where the IDC considers the report of the Independent Investigator and provides the chief executive with the opportunity to state their case before making its decision.
 - during any appeal against the decision taken by the IDC.
 - at a council meeting considering a proposal for dismissal and also fulfilling the requirement relating to a right of appeal
- 4.4 At these important stages (IDC receiving the report of the Independent Investigator and any appeal against the decision taken by the IDC), if the chief executive's trade union representative is unavailable for the date set then the chief executive will have the right under the provisions of the Employment Relations Act 1999, to postpone the meeting for a period of up to one week.
- 4.5 If the representative is unable to attend within that period the authority will have the right to go ahead with the hearing without further delay, although reasonable consideration should be given to arranging an alternative date.

5. *Considering the allegations or other issues under investigation – (procedure)*

The IDC will, as soon as is practicable inform the chief executive in writing of the allegations or other issues under investigation and provide him / her with any evidence that the Committee is to consider, and of his / her right to present oral evidence.

The chief executive will be invited to put forward written representations and any evidence including written evidence from witnesses he / she wishes the Committee to consider. The Committee will also provide the opportunity for the chief executive to make oral representations. At this initial consideration of the need to investigate further, it is not anticipated that witnesses will be called. The discretion to call witnesses lies solely with the IDC.

The IDC will give careful consideration to the allegations or other issues, supporting evidence and the case put forward by the chief executive before taking further action.

The IDC shall decide whether:

- the issue requires no further formal action under this procedure or
- the issue should be referred to an Independent Investigator

The IDC shall inform the chief executive of its decision without delay.

5. *Considering the allegations or other issues under investigation – (guidance)*

- 5.1 The range of issues and to some extent the seriousness of the issues, which come before the IDC, will depend on the filter that the council adopts. Issues such as those relating to sickness absence and performance are likely to arise at the IDC having followed the authority's sickness absence or performance management / appraisal procedures (see **Paragraph 1.3**).
- 5.2 It is possible in some cases that with some minimal investigation the IDC can dismiss the allegation without even the need to meet with the chief executive. However, this procedure is aimed at dealing with situations where the matter is not so easily disposed of. It therefore provides a process whereby the chief executive is made aware of the allegations and provided with the opportunity to challenge the allegations or to make their response.
- 5.3 When an issue comes before the IDC it needs to make a judgement (see **paragraph 5.4.1**) as to whether the allegation can be dismissed or whether it requires more detailed investigation, in which case this will be undertaken by an Independent Investigator. If the IDC is of the opinion that the allegations do not warrant an investigation, this should be immediately notified to the chief executive without delay, and, if necessary, the complainant informed accordingly. If the IDC is of the opinion that the matter is not serious but there

is some minor fault or error, then it can issue an unrecorded oral warning in accordance with its standard procedures.

- 5.4 The appointment of an Independent Investigator is a serious step but does not mean that the chief executive is guilty of some misdemeanour. In some cases the eventual result of the investigation will be to absolve the chief executive of any fault or wrongdoing. The appointment of an Independent Investigator operates so that both the authority and the chief executive can see that matters are dealt with fairly and openly. However, the matter still needs to be handled carefully in public relations terms due to the potential damage to the reputation of the chief executive or the local authority.

5.4.1 Threshold test for the appointment of an Independent Investigator

Cases will vary in complexity but the threshold test for the IDC in deciding whether to appoint an Independent Investigator is to consider the allegation or matter and assess whether:

- if it were to be proved, it would be such as to lead to the dismissal or other action which would be recorded on the chief executive's personal file and
- there is evidence in support of the allegation sufficient to require further investigation

5.4.2 Conducting the initial IDC investigation

- (a) It is intended that this stage is conducted as expeditiously as possible with due regard to the facts of the case. At this stage it is not necessarily a fully detailed investigation of every aspect of the case as that will be the responsibility of the Independent Investigator (if appointed). In order to avoid delay the IDC will want to explore the availability of potential Independent Investigators on the list maintained by the JNC Joint Secretaries at an early stage (see paras 6.3 and 6.4). However, it is important that before any decision is taken to formally appoint an Independent Investigator, the chief executive is aware of the allegations that have been made against him / her (or the issue to be addressed) and given the opportunity to respond.
- (b) This will be achieved by:
- The IDC writing to the chief executive setting out the allegations / issues and providing any evidence to be considered
 - Providing the opportunity for the chief executive to respond to the allegations in writing and to provide personal evidence or witness statements. The calling of witnesses at this stage is at the discretion of the IDC
 - Providing the opportunity for the chief executive to appear before the IDC
- (c) Fair notice should be given to enable the chief executive adequate time to prepare a response to the allegations or issues under investigation. During the initial hearing by the Committee, the chief executive is entitled to attend and

can be accompanied by a representative (subject to **paragraph 2.3.3** and **paragraph 4**).

5.4.3 Treatment of witness evidence

In general, if the authority has witness evidence relating to an allegation this should be presented in written form to the chief executive, although in exceptional cases it might be appropriate to anonymise the evidence in order to protect the identity of a witness. However, it remains important that the detail of the allegation is put to the chief executive in order that he / she understands the case against him / her.

5.4.4 Conflicts of interest

- (a) The model procedure envisages, and it is strongly recommended that the authority take steps to establish, a standing IDC. **Paragraph 1.2** indicates the basic rules concerning its membership. However, because a standing committee will comprise named councillors, there may be occasions when this presents problems of conflict of interest, for example where a member of the committee is a witness to an alleged event, or is the person who makes the original complaint or allegation. Councillors in this position should take no part in the role of the Committee, although they will of course be able to give evidence, if required. The authority should attempt to construct its Committees, and establish quorums and substitution rules in order to minimise the likelihood of an individual conflict of interest delaying the procedure. Where a number of members find themselves in a prejudiced position, there may be no alternative but for the council to establish a new Committee to perform the function of the IDC.
- (b) Declarations of interest are matters for individual councillors who are required to follow their authority's code of conduct for elected members and can seek advice from their Monitoring Officer. Problems could follow for the speed at which the case is conducted if the chief executive considers there are valid grounds for making a formal complaint to the council about the involvement of a councillor in a case.

5.4.5 Maintaining the fairness and integrity of the procedure

Where there is a matter that requires investigation it is important that a fair and correct procedure is followed. Allegations against the chief executive or serious issues that require resolution should follow this procedure. It is important that councillors do not undermine the fairness of the procedure by for example putting motions to full council about the case as there is a serious risk that it could prejudice the disciplinary procedure. Additionally, such actions will not only create adverse publicity for the authority and the chief executive but may create conflicts of interest and could limit the role that those councillors can then take as the case progresses.

5.4.6 Other appropriate actions

- (a) It could be that when faced with an issue, whether it be an allegation of misconduct, or connected with the capability of the chief executive, or some other substantial issue, the IDC might be in a position to consider alternatives to immediately moving to the appointment of an Independent Investigator or alternatively to dismiss the allegation or issue.
- (b) Clearly this will depend on the facts of the matters being investigated. It could be that the authority has another more appropriate policy or procedure to follow. Alternatively, it could be that the issue is one which might benefit from some mediation or attempts to resolve the particular issue in dispute prior to moving formally to appointing an Independent Investigator.
- (c) It is possible at any stage to consider the mutual termination of the contract and sometimes this will be a suitable alternative for all concerned. This might particularly be the case where relationships are breaking down but there is no evidence of misconduct attached to the chief executive. The Joint Secretaries could be available to assist (see **Appendix 4**).
- (d) If any financial settlements are considered, it is important that such an arrangement:
 - Falls within the authority's discretions under The Local Government (Early Termination of Employment) (Discretionary Compensation) (England and Wales) Regulations 2006, or
 - Is a payment in consideration of an agreement that compromises a genuine legal claim that the chief executive might have at a Court or Employment Tribunal

In both cases the settlement must also comply with any other restrictions on exit payments, such as the £95,000 cap on such payments, including the circumstances in which the council may exercise powers to waive the cap.

- (e) The Local Government (Early Termination of Employment) (Discretionary Compensation) (England and Wales) Regulations 2006 are designed to enable a local authority to compensate employees whose employment terminates on grounds of redundancy or in the interests of the efficient exercise of the authority's functions. It is therefore possible that a payment will be legitimate in certain circumstances. However, where there is an obvious case requiring disciplinary action and the allegation is such that dismissal is a likely outcome, it is not likely that an external auditor will sanction a deal under the current regulations.
- (f) The authority must take appropriate legal advice when attempting to reach a financial settlement to ensure that any payment is justified and lawful. Relevant considerations will include the likelihood of the claim succeeding and the amount of compensation that could be awarded by a Court or an Employment Tribunal.

5.4.7 Power to agree financial settlements

When considering its delegation of power the authority must include consideration of which Committee or Officeholder has the authority to negotiate a settlement and also a process by which any settlement would be sanctioned including liaison with the external auditor.

5.4.8 Access to appropriate professional / independent advice

- (a) Conducting an investigation into allegations or serious issues involving the chief executive can be demanding on the individuals involved. The IDC (and the Appeal Committee and council) will have access to the local authority's officers, but given the closeness of relationships between the chief executive and the other senior officers this can be a difficult time for those required to advise the Committee, to conduct investigations internally, or to source advice from outside the authority.
- (b) The authority should provide that the IDC has powers to appoint external advisers as appropriate. Useful sources of general advice on the operation of the procedure and assistance with conducting investigations include the Local Government Association by contacting the Employers' Secretary or from the appropriate Regional Employers' Organisation or ALACE.

In addition to this general advice and assistance, given the potential complexity of the issue, authorities might also require access to their own legal advice.

5.4.9 Ill-health - medical advice

In cases of capability related to sickness or where during the course of any other investigation, the ill-health of the chief executive results in their unavailability it will be important that the IDC has access to appropriate medical advice from the council's Occupational Health provider (see **paragraph 2.3.2**).

5.4.10 Performance

- (a) Where the issue is one of capability in terms of performance or competence, other than ill-health, the council will need to be in a position to establish or demonstrate the nature of the concerns. Evidence will be necessary in order to justify a further investigation.
- (b) This might come from a variety of sources, e.g. performance appraisal records, inspection reports, etc. Where the council follows an established appraisal / performance management process, this can also provide an appropriate route to establishing issues suitable for referral to the IDC (see **Appendix 2**).
- (c) Where the issue is breakdown of trust and confidence, the council will need to be able to establish that the fault for the breakdown could reasonably be regarded as resting solely or substantially with the chief executive.

6. *Appointment of an Independent Investigator - (procedure)*

The IDC will be responsible for appointing an Independent Investigator, providing the necessary facilities, paying the remuneration and providing all available information about the allegations.

The Independent Investigator should be selected from the list maintained by the National Joint Secretaries.

6. *Appointment of an Independent Investigator - (guidance)*

- 6.1 Where a decision has been taken to appoint an Independent Investigator, it is important that the council moves quickly to take this forward. This is particularly important if the chief executive has been suspended. This can be assisted if the availability of potential Independent Investigators is explored at an early stage.
- 6.2 This will require that the council is clear as to who has the power to appoint the Independent Investigator and to agree the terms of remuneration and working methods. The model procedure envisages that this will be the responsibility of the IDC.
- 6.3 It is in the interests of the council and the chief executive that both sides should have confidence in the independence and relevant competence of the Independent Investigator, not least to avoid, or at least minimise, argument later in the process about the quality or credibility of the investigation. To this end, it has been agreed that the Joint Secretaries will maintain a list of potential Independent Investigators, who have been selected for their suitability and experience for this work. Independent Investigators on that list will be offered on a 'taxi-rank' basis subject to their availability within the desired timescales, and no material connections with the council or the chief executive nor any connection to the allegations.
- 6.4 The Council will approach the National Joint Secretaries and will be supplied with the top three names from the list (if in exceptional circumstances three names are not available, both local parties will agree to choose from a shorter list). If these are acceptable to the council, the chief executive will be invited to select one of the names. The only acceptable reason for not selecting from the names supplied being conflict of interest. If an appointment is not agreed by the chief executive within 14 days of the date of the names being supplied, the council will be at liberty to select an Investigator from the names supplied.
- 6.5 Terms of reference – allegations or issues to be investigated**
- (a) When appointing an Independent Investigator it is important that they are provided with terms of reference. The Investigator will need to be:
- aware of the precise allegation(s) or issue(s) to be investigated

- provided with access to sources of information and people identified as relevant to the case
 - aware of expectations regarding timescales and any known factors which could hinder their investigation, e.g. the availability of key people
- (b) The IDC will be responsible for providing this information. It will also be in a position to discuss timescales for the investigation.

6.6 Remuneration

Remuneration for the Independent Investigator will be set at the Local Government Association's normal consultancy rate for external consultancy work.

7. *The Independent investigation – (procedure)*

The **ACAS Code of Practice on Discipline and Grievance** requires there to be an investigation to establish the facts of the case before proceeding to the disciplinary hearing. The JNC believes that, for chief executives, this should be carried out by an Independent Investigator. He / she should determine the procedure for the investigation, either operating on the basis of an independent investigation using his / her powers to access information, or a formal hearing, at which the allegations and supporting evidence including evidence provided by witnesses are presented by the authority's representative and the chief executive or his / her representative is able to present his / her case. While the recommended procedure allows for either option, on balance the JNC's preference is for the 'investigation' model, but the decision on this remains with the Independent Investigator.

Once appointed it will be the responsibility of the Independent Investigator to investigate the issue / allegation and to prepare a report stating in his/her opinion whether (and, if so, the extent to which) the evidence he / she has obtained supports any allegation of misconduct or incapability or supports a need for action under this procedure for some other substantial reason; and recommending any disciplinary action (if any is appropriate) or range of actions which appear to him / her to be appropriate for the authority to take against the chief executive.

7. *The Independent investigation – (guidance)*

7.1 Resources

- 7.1.1 The amount of time required to be spent on the investigation will depend on the case. Due to the demands on their time, the Independent Investigator could decide to delegate some of the investigation work to an assistant. This should be agreed with the IDC and the chief executive should be informed. If the work is delegated to someone else outside of the authority this might also

require further discussion on any difference in the terms of remuneration for the assistant to the Independent Investigator

7.2 Working arrangements

7.2.1 Once appointed it will be the responsibility of the Independent Investigator to investigate the issue / allegation and to prepare a report:

- stating in his / her opinion whether (and, if so, the extent to which) the evidence he / she has obtained supports any allegation of misconduct or other issue under investigation; and
- to recommend any disciplinary action (if any is appropriate) or range of actions which appear to him / her to be appropriate for the authority to take against the chief executive.

7.2.2 The methodology adopted by the Investigator should be confirmed with the parties. However, the JNC believes that the Independent Investigator should operate on the basis either of a process of evidence gathering, hearing submissions etc or a formal hearing, at which both parties will have the usual opportunities to present evidence, cross-examine witnesses etc. Both parties can be represented by an individual of their choice (the chief executive's representation should be obtained at his / her own expense). While the recommended procedure allows for either option, on balance the JNC's preference is for the 'investigation' model, but the decision on this remains with the Independent Investigator.

7.3 Suspension

7.3.1 The Independent Investigator does not have the power to suspend the chief executive, but if the chief executive has been suspended for two months, the IDC is required to review the suspension (see **paragraph 3.2.5**).

7.4 Confidential contact at authority

7.4.1 Although the Independent Investigator has a degree of independence, it is advisable to agree some protocols for his / her investigation in order that disruption to the council's work is kept to a minimum at what can be a difficult time. The Independent Investigator will also require agreed contact and reporting arrangements with the parties. It is recommended therefore that the council designates an officer to administer the arrangements.

7.4.2 During the investigation the Independent Investigator will as a matter of principle, make every attempt to ensure the appropriate confidentiality of any information obtained and discussed.

8. Receipt and consideration of the Independent Investigator's report by the IDC – (procedure)

The IDC will consider the report of the Independent Investigator, and also give the chief executive the opportunity to state his / her case and, to question witnesses, where relevant, before making a decision.

Having considered any other associated factors the IDC may:

- Take no further action
- Recommend informal resolution or other appropriate procedures
- Refer back to the Independent Investigator for further investigation and report
- Take disciplinary action against the chief executive short of dismissal
- Propose dismissal of the chief executive to the Council

8. Receipt and consideration of Independent Investigator's report by the IDC - (guidance)

8.1 Report of the Independent Investigator

8.1.1 The report of the Independent Investigator is made to the IDC which will have delegated powers from the authority to receive the report and take a decision on the outcome. Unless the chief executive is exonerated by the report then at this stage the chief executive should be given the opportunity to state his/her case before the committee makes its decision.

8.1.2 This may be done in one of two ways, according to the process followed by the Independent Investigator:

- If the Independent Investigator has proceeded by way of an evidence-gathering process, the Committee should hold a hearing, giving both the Independent Investigator and the chief executive the right to call and question each other's witnesses
- If the Independent Investigator has held a full hearing, the Committee may choose to limit their meeting to a consideration of the Independent Investigator's report. However, the Committee will need to consider whether to call witnesses for clarification, bearing in mind the ACAS Code of Practice requirement that the employee should be given a reasonable opportunity to call relevant witnesses. The Independent Investigator and the chief executive should both attend the meeting and be given an opportunity to summarise their case.

Under both options the IDC hearing should be conducted in accordance with the ACAS Code of Practice.

8.2 New material evidence

8.2.1 Where there is, at this stage, new evidence produced which is material to the allegation / issue and may alter the outcome, the IDC may:

- take this into account in making their decision or
- request that the Independent Investigator undertake some further investigation and incorporate the impact of the new evidence into an amended report

8.3 Recommendations by the Independent Investigator – outcomes or options

8.3.1 The Independent Investigator is expected to recommend any disciplinary action that appears to be appropriate. At this stage clarity is to be welcomed and a clear reasoned recommendation should be given. However, it could be that there is not one obvious action and it may be that the Independent Investigator recommends a range of alternative actions.

8.3.2 Whilst the Independent Investigator's role is to make recommendations on disciplinary action, he / she may wish to comment on potential options for the way forward following the investigation process.

8.4 Decision by the IDC

8.4.1 The IDC should take its decision on the basis of the Independent Investigator's report, and its own findings. It is open to the Committee to impose a lesser or greater sanction than that recommended and it is obviously important for later stages of the procedure that the reasons for doing so are recorded.

9. *Action short of dismissal – (procedure)*

The IDC may agree to impose no sanction, or to take action short of dismissal, in which case the Committee will impose an appropriate penalty / take other appropriate action.

9. *Action short of dismissal – (guidance)*

9.1 Where the chief executive is found to have no case to answer, appropriate communication should be prepared with the chief executive to ensure as far as possible that there is no damage to the chief executive's reputation.

9.2 Where the decision taken by the IDC is action short of dismissal, the action will be taken by the Committee itself. There is no requirement to seek confirmation by the council (or in authorities operating Mayor and cabinet or leader and cabinet executives, checking to see whether there are any objections raised by members of the executive). The constitution of the IDC will need to include the delegated power to take disciplinary action in these circumstances.

- 9.3 The chief executive has a right of appeal against the decision (see **paragraph 11**).

10. Where dismissal is proposed – (procedure)

Proposal to dismiss on the grounds of misconduct and for other reasons such as capability or some other substantial reason

Executive constitutions only

In Mayor / cabinet and leader / cabinet **executive constitutions only**. The IDC will inform the Proper Officer that it is proposing to the council that the chief executive be dismissed and that the executive objections procedure should commence.

Executive objections procedure

The Proper Officer will notify all members of the executive of:

- The fact that the IDC is proposing to the council that it dismisses the chief executive
- Any other particulars relevant to the dismissal
- The period by which any objection to the dismissal is to be made by the leader / elected mayor on behalf of the executive, to the Proper Officer

At the end of this period the Proper Officer will inform the IDC either:

- that the leader / elected mayor has notified him / her that neither he / she nor any member of the executive has any objection to the dismissal
- that no objections have been received from the leader / elected mayor in the period or
- that an objection or objections have been received and provide details of the objections

The IDC will consider any objections and satisfy itself as to whether any of the objections are both material and well founded. If they are, then the Committee will act accordingly, i.e. it will consider the impact of the executive objections on its proposal for dismissal, commission further investigation by the Independent Investigator and report if required, etc.

Having satisfied itself that there are no material and well-founded objections to the proposal to dismiss, the IDC will inform the chief executive of the decision and put that proposal to the Independent Panel along with the Independent Investigator's report and any other necessary material.

Non-executive administration

In local authorities with no executive and therefore operating a committee system, the IDC will inform the chief executive of the decision and put that

proposal to the Independent Panel along with the Independent Investigator's report and any other necessary material. This is not a full re-hearing and will not involve the calling of witnesses

The role of the Independent Panel

Where the IDC is proposing dismissal, this proposal needs to go before the Independent Panel.

Both parties should be present or represented (the IDC might be represented by its Chair or other nominated person at the meeting). The Panel should receive any oral representations from the Chief Executive, in which case it should invite any response on behalf of the IDC to the points made, and may ask questions of either party. The Independent Panel should review the decision and prepare a report for Council. This report should contain a clear rationale if the Panel disagrees with the recommendation to dismiss.

The role of the Council

The council will consider the proposal that the chief executive should be dismissed, and must take into account:

- Any advice, views or recommendations of the Independent Panel
- The conclusions of the investigations into the proposed dismissal
- Any representations from the chief executive

The chief executive will have the opportunity to appear before the council and put his or her case to the council before a decision is taken.

Redundancy, Permanent Ill-Health and the expiry of Fixed Term Contracts

Proposed dismissals on the grounds of redundancy, permanent ill-health and the expiry of a fixed term contract where there has been no commitment to renew it, do not require the involvement of an Independent Investigator or Independent Panel.

However, the authority should follow appropriate and fair procedures in these cases and have mechanisms in place, including appropriate delegated authorities, to manage such eventualities. In addition, dismissals for all reasons including those set out in this paragraph must be approved by the Council itself.

10. Where the IDC proposes dismissal – (guidance)

- 10.1 Where the Committee proposes dismissal, the Regulations require that the council must approve the dismissal before notice of dismissal is issued. Additionally, in councils that operate with either a Mayor and cabinet executive or a leader and cabinet executive, notice of dismissal must not be issued until

an opportunity has been given to members of the executive to object to the dismissal.

10.2 Executive objections procedure

10.2.1 The executive objections procedure set out in the model procedure reflects the requirements of the Standing Orders Regulations (see Schedule 1, Part 1 (Mayor and cabinet executive), Paragraph 6 and Part 2 (leader and cabinet executive), Paragraph 6).

10.2.2 It is important that the authority identify The 'Proper Officer' to undertake the role specified in the Regulations, i.e. notifying members of the executive of the proposal to dismiss, providing relevant information and the timescale during which any material and well-founded objections should be made.

10.2.3 It will also be appropriate to explain that in order for an objection to be considered material and well-founded, the objection would need to be not only based on evidence (well-founded) but must also be relevant to the case (material).

10.2.4 Given the procedure followed it would be unusual for a member of the executive to be in a position to raise an objection that would be sufficient to change the outcome significantly. However, this may be the case.

10.2.5 It is for the IDC to decide whether any objections put forward by members of the executive are material and well-founded. If they are, then the Committee will need to consider the effect of the objection and act accordingly. For example, this may require further investigation.

10.3 The role of the Independent Panel

10.3.1 The Independent Panel must be appointed at least 20 days before the meeting of the council at which the recommendation for dismissal is to be considered.

10.3.2 It is likely that Independent Panel members will be unfamiliar with their role under the Regulations and with matters relating to the working environment of chief executives. Accordingly, it is important for Panel members to be offered appropriate training for the role the Panel is to fulfil.

10.3.3 The role of the Panel is to offer any advice, views or recommendations it may have to the council on the proposal for dismissal. The Panel will receive the IDC proposal and the reasons in support of the proposal, the report of the Independent Investigator and any oral and / or written representations from the chief executive. The Independent Investigator may be invited to attend to provide clarification if required. The Panel will be at liberty to ask questions of either party.

10.3.4 The Panel should then formulate any advice, views or recommendations it wishes to present to the council. If the Panel is recommending any course of

action other than that the council should approve the dismissal, then it should give clear reasons for its point of view.

10.4 The role of the Council

10.4.1 The Regulations require that in all constitutions, where there is a proposal to dismiss the chief executive, the council must approve the dismissal before notice of dismissal is issued. The council must therefore consider the proposal and reach a decision before the chief executive can be dismissed.

10.4.2 Given the thoroughness and independence of the previous stages, in particular, the investigation of the Independent Investigator (where applicable), it will not be appropriate to undertake a full re-hearing of the case. Instead, consideration by the council will take the form of a review of the case and the proposal to dismiss, and any advice, views or recommendations of the Independent Panel.

10.4.3 The chief executive will have the opportunity to attend and be accompanied by their representative and to put forward his / her case before a decision is reached.

10.4.4 The Council is at liberty to reject the proposal to dismiss. It can then decide on the appropriate course of action which could include substituting a lesser sanction or, in a case of misconduct or other reasons such as capability or some other substantial reason, referring it back to the IDC to determine that sanction.

11. Appeals – (procedure)

Appeals against dismissal

Where the IDC has made a proposal to dismiss; the hearing by the council will also fulfil the appeal function.

Appeals against action short of dismissal

If the IDC takes action short of dismissal, the chief executive may appeal to the Appeals Committee. The Appeals Committee will consider the report of the Independent Investigator and any other relevant information considered by the IDC, e.g. new information, executive objections (if relevant), outcome of any further investigation, etc. The chief executive will have the opportunity to appear at the meeting and state his / her case.

The Appeals Committee will give careful consideration to these matters and conduct any further investigation it considers necessary to reach a decision.

The decision of the Appeals Committee will be final.

11. Appeals – (guidance)

11.1 Appeals against dismissal

11.1.1 Discipline and Grievance – ACAS Code of Practice requires that an employee who has been dismissed is provided the opportunity to appeal against the decision.

11.1.2 As the Standing Orders Regulations require that the council approves the dismissal before notice of dismissal is issued, there might be some concerns about the ability to offer a fair appeal if the whole council was already familiar with the issues and had already taken the decision to dismiss. The model procedure therefore envisages that the council meeting fulfils the requirement for an appeal. Before the council takes a decision on the recommendation to dismiss the chief executive it will take representations from the chief executive. Those representations will constitute the appeals process.

11.2 Appeals against action short of dismissal

11.2.1 Appeals against actions short of dismissal will be heard by the Appeals Committee. The appeal hearing will take the form of a review of the case and the decision that was taken by the IDC.

11.2.2 This process should follow the procedure that the local authority applies generally to its other employees.

