**Report No.** **01/12**

Standards Committee

REPORT OF MONITORING OFFICER

**SUBJECT: PRE-DETERMINATION BY MEMBERS**

**BACKGROUND**

Section 25 of the Localism Act 2011 came into force on 15 January 2012. The following information seeks to explain the provision and its possible implications. The intention of the government in passing this section is to “make it clear that it is proper for Councillors to play an active role in local discussions and that they should not be liable to legal challenge as a result”. For Councillors in this context one should read members.

This report is intended to provide a broad over view of the provision and its implications.

Specific legal advice will be needed on the implications of Section 25 in particular circumstances.

**What Does Section 25 say?**

S 25(2) sets out the following:

A decision maker is not to be taken to have had, or appeared to have had, a closed mind when making a decision just because:

1. the decision maker has previously done anything that directly or indirectly indicated the view the decision maker took, or would or might take, in relation to a matter and
2. the matter was relevant to the decision

It applies to actions (generally court proceedings, in particular Judicial review) which challenge the validity of an Authority’s decision on the basis of bias or pre-determination or otherwise.

Where such a case relies to any extent on proving that the decision maker had a closed mind, the person bringing the case cannot rely on anything previously done or said which related to the decision as evidence of a closed mind on the part of a decision maker or makers. This will include statements at public meetings, comments in the press or participation in Community Council meetings or County Council meetings.

Clearly the Section will make a challenge which relies on establishing bias or predetermination by reference to prior comment or statements very difficult to prove.

**Where does this leave Pre-Determination and Bias?**

Public Law Requirements

In reaching a decision members are subject to wider legal requirements than bias and predetermination.

Members are required to take into account all relevant factors and disregard that which is irrelevant. These issues will vary from decision to decision but, for example, a clearly stated intention to come to a particular decision irrespective of key issues might still form the basis for a challenge of the decision on grounds that relevant considerations were ignored e.g. a statement such as ‘I will vote against this irrespective of the comments made in the public consultation ’ would give rise to a challenge based on improper consultation where the consultees can argue that their views were not taken into account because of a statement by a member that he was not interested in what they said. Members will still need to be aware of these wider legal requirements. Members Code of Conduct Paragraph 8 of the Members Model Code of Conduct requires Members to reach decisions on the merits of the circumstances involved and in the public interest, having regard to any advice provided by officers. The Guidance from the Ombudsman identifies predetermination and bias as relevant evidence relating to this provision and compliance.

However, Section 25, because it is only relevant to situations where the validity of a decision is challenged, does not affect this requirement and members will still have to ensure that they take decisions in a way which complies with this paragraph.

**How does this affect Members**

The primary concern of Legal Officers in advising on bias or pre-determination or similar grounds was the management of the risk of legal challenge to the Authority’s decisions.

Although there are issues of interpretation around the Section, generally it means that the risk of a successful legal challenge to a decision on this basis has been reduced. However there can be no blanket assurance that whatever members say in advance of a decision will not matter at all and, as ever, much will depend on how the courts view any challenges based on a prior expression of views.

**RECOMMENDATION**

**To note the contents of the report.**

(For further information, please contact John Parsons, Monitoring Officer)