

REPORT FOR DECISION

Agenda Item	
----------------	--

MEETING: STANDARDS COMMITTEE
DATE: 15 FEBRUARY 2007
SUBJECT: REVISED MODEL CODE OF CONDUCT
REPORT FROM: MONITORING OFFICER
CONTACT OFFICER: JAYNE HAMMOND, DIRECTOR OF LEGAL AND DEMOCRATIC SERVICES

TYPE OF DECISION: COMMITTEE

FREEDOM OF INFORMATION/ STATUS: This paper is within the public domain

SUMMARY:

The report provides details of the proposed changes to the code of conduct for Councillors and recommends responses to the Government's consultation on the proposed changes.

OPTIONS AND RECOMMENDED OPTION (with reasons):

Members are invited to consider and comment on the contents of the report, the consultation paper and the proposed responses to the questions posed. Subject to further comments for Members, the Committee is invited:

1. To make a formal response to the consultation.
2. Note the timetable and potential implications for the Annual Council Meeting.

IMPLICATIONS -

Corporate Aims/Policy Framework:

Do the proposals accord with the Policy Framework? Yes No

Financial Implications and Risk Considerations

There are no such implications arising from this report.

Statement by Director of Finance and E-Government:

There are no financial implications arising from this report. (There will be future training requirements which will be dealt with within existing resources)

Equality/Diversity implications

The recommendations do not raise any proposal for new or changed policies that would impact on equality or diversity issues

Considered by Monitoring Officer: Yes

Are there any legal implications? Yes

Staffing/ICT/Property:

Wards Affected:

Scrutiny Interest:

TRACKING/PROCESS

DIRECTOR:

Chief Executive/ Management Board	Executive Member/ Chair	Ward Members	Partners
Scrutiny Commission	Executive	Committee	Council

1.0 BACKGROUND

- 1.1 The Department of Communities and Local Government (DCLG) published a consultation paper seeking views on the draft of a proposed new model code of conduct for local authority members on 22 January 2007. The closing date for responses is 9 March.
- 1.2 The Government's stated intention is "to put in place a clearer, simpler and more proportionate code of conduct for members of Local Authorities which includes changes to the rules on personal and prejudicial interests". The changes are long awaited and have been the subject of widespread interest.
- 1.3 The Local Government Act 2000 set the ethical framework for local government on a statutory basis. Section 50 of the Act enabled the Secretary of State to introduce a model Code of Conduct and subsequent sections required Councils to adopt their own code on the basis of the model. This Council formally adopted the model code of conduct at its meeting on 10 April 2002 and it is incorporated into the Council's Constitution. The provisions of the code do not appear to have raised any significant problems of compliance within the Council.

- 1.4 With the benefit of experience of the working of the code nationally since 2001, not least its enforcement by the Standards Board for England (SBE) and decisions made by the Adjudication Panel for England (APE) and the courts since, there has been considerable interest in proposals for changes to the code.
- 1.5 Although the Standards Board for England consulted on the principles for a revised code of conduct for Members, and the Government issued a discussion paper on the revision in 2005, neither of those papers contained a draft revised text for the code and the new draft text is not always in accordance with the previous consultations. However, on the basis that these are matters on which there has been previous consultation, the period for responses to the consultation has been reduced to just 6 weeks and it is clear that the Government intends to bring the amended code into force in time for Local Authorities to adopt it at their annual meetings in early May 2007, before the enactment of the Local Government and Public Involvement in Health Bill, probably in October 2007. The draft revised code appears to have been drafted to avoid the need for further revision when the provisions of the Local Government Public and Involvement in Health Bill are applied to extend the application of the code to conduct in Members' private lives. However, the timetable for adoption is tight and the potential for confusion and further amendment to the code remains.

2.0 DETAILS OF THE PROPOSALS

2.1 Circulated with this report are:

1. A copy of the consultation paper,
2. The draft model code of conduct Regulations (Annex A), and
3. The specific questions posed by the consultation paper (Annex B).

2.2 The draft Regulations involve the production of a single mandatory model code (rather than the 4 current models).

2.3 The scope of the proposed new code of conduct is broadly unchanged. However, the draft revised code seeks to

- Reflect the recommendations of the SBE following their review of the current code
- Reflect APE and High Court decisions on interpretation (discrimination, private capacity, disclosure in public interest)
- Modify the effect of the Richardson decision to allow a Member to make representations whilst having a prejudicial interest
- Improve the structure and drafting of the code.
- Be gender neutral
- Improve some definitions

2.5 The draft revised code provides a number of relaxations from the requirements of the current code. In particular it:

- removes the obligation to report allegations of failure to comply with the code (current para. 7) (*The deletion of the duty on Members to report breaches by other Member will be welcomed. It will not, of course, prevent Members from reporting such breaches, but takes away the obligation to do so.*)

- limits the obligation to disclose a personal interest of a family member, friend or person having close personal association to those that the Member is aware of, or ought reasonably to be aware of.
- creates a new category of public service interest as to membership of another relevant authority, public authority or body the Member is appointed to by the authority.
- provides for a Member, otherwise having a prejudicial interest, to attend a meeting for the purpose of making representations, answering questions, or giving evidence, provided the meeting agrees and subject to the Member withdrawing after so doing. (*This is not absolutely clear, but presumably a personal interest still needs to be disclosed by the Member. Meetings will require careful managing to ensure such Members are excluded from the decision making part of the meeting*).

2.6 The draft revised code also imposes additional obligations on Members such as:

- Not to bully any person
- Not to intimidate a person involved in proceedings under the code
- Extends the meaning of political purposes in the use of the Authority's resources provision to specifically include 'party political purposes'.
- Extends the provision on use of the authority's resources to include having regard to the Local Authority Code of Publicity
- An extended obligation to have regard to the advice of the Monitoring Officer and the Chief Finance Officer.

2.7 The new provisions on bullying follow a concern by the SBE at the level of bullying occurring within Councils. (The problem of bullying within Parish Councils has been described as endemic and the Society of Local Council Clerks has recently adopted an anti-bullying strategy). Clear guidance will be needed from the SBE, given that the code does not clearly define bullying, in order for Members to understand what types of behaviour are acceptable and what go beyond the bounds of acceptability.

2.8 The proposed main changes are summarised for ease of reference in Appendix 1. It is assumed that many of the changes, particularly the relaxations, will be welcomed by Members. The consultation questions and some suggested responses are set out in Appendix 2 for Members' consideration.

3.0 OMISSIONS

3.1 The draft Code does not, as predicted, include the ten "General Principles" of Local Government conduct as a preface, presumably because of legal difficulty in drafting, but it would be legitimate for local authorities to reflect this locally within their Constitutions, in order to identify the relationship between the General Principles and the Code in terms of the ethical framework.

- 3.2 The opportunity to bring the application of the code and the law of bias closer together has not been taken in the draft. It would be helpful if there was an express reference in paragraph 9 of the code under the heading “Prejudicial interests” to the fact that a Member should not participate in decision-making, notwithstanding that a prejudicial interest does not arise, if such participation is likely to give rise to a real possibility of bias. Such a provision would provide a direct link between the common law test of bias and the member code, reinforcing the principles which need to be applied by Members in determining whether to participate in decision making.
- 3.3 In practical terms there is generally a good understanding by Members of the code and a familiarity with its provisions. It is however regarded by some as an all-inclusive code governing the ability to participate in meetings and decision-making. Clearly, this is not the case since the law of bias also is a significant consideration in this area. Whilst the code cannot be expected necessarily to prescribe or proscribe in the area of bias, it would be useful for the code explicitly to recognise the existence of the bias provisions.
- 3.4 Whilst the inclusion of a definition of bias may be difficult to draft to reflect current law, it would be possible to refer to the law of bias. As it stands, unless bias amounts to disrepute (which is not clear cut), an act of bias by a Member that results in a local authority decision being annulled, is excluded from the enforcement part of the ethical framework. An additional clause in Para. 4(2) of the revised code could include a finding of bias against a Member as conduct amounting to disrepute. It would be sensible to add an additional exception in paragraph 9(2)(a) to public service interests that *would* be prejudicial, on the lines that participation in the matter would amount to bias or apparent bias.

Adding a short note e.g. to paragraph 11 along the lines: “(4) Notwithstanding the provisions of this paragraph a member should have regard to the implications of the law of bias, and any advice received in that respect, in considering his or her participation in a meeting” would strike a balance between alerting Members to the existence of another significant factor affecting their participation in meetings and preventing action being taken in that regard under the code itself. The Committee’s views on this issue are invited.

4.0 DRAFTING ASPECTS

- 4.1 Whilst the reconstruction of the interests’ part of the code (Part 2) helps to improve clarity, it would seem sensible to go one stage further and include all the parts dealing with ‘public service interests’ in a separate paragraph. Having different definitions for “public service interest” (in 8(7)(a) and 9(4)) is also confusing.
- 4.2 There are a number of new phrases in the draft Code of Conduct which now require definition, including –
- a. “Close personal association” – Paragraph 7(c)(i) -this clearly extends beyond mere friendship, but how far? Does “personal” in this context mean that it does not include work colleagues? Given that case law was beginning to build up on what constituted a “friend”, how useful is this addition?

- b. “Family” – Paragraph 7(c)(i) - the current Code uses the word “relative” and defines “relative”. The new Code uses “family”, but fails to define it. Is it the member’s household, irrespective of blood relationship? Or is it blood relatives even if living separately? What degree of separation takes an individual outside the scope of “family”?
- c. “Lobbying Organisation” – Paragraph 9(4)(b) - is it a lobbying organisation because it occasionally lobbies, or does it have to lobby Members or Local Authorities, or does it have to spend a specified proportion of its annual expenditure on seeking to influence public opinion?
- d. “Of a financial nature” – Paragraph 11(2) - what is it that makes an interest “of a financial nature”? Is it that the Member or a friend etc., or an associated body, stands to gain or lose financially in any way, or does the gain have to be primarily financial, or more directly to the Member him or herself?
- e. “Philanthropic Organisation” – Paragraph 9(4)(b) - Is this the same as “a body directed to charitable purposes”, or does “philanthropic” extend that?
- f. “Relates to” – This phrase is used repeatedly throughout the new code, in a number of different contexts and its widespread use may create real problems of interpretation for the future.

4.3 The effect of the dispensation in paragraph 8(2) generally is a concern. Members are now accustomed to disclosing interests at the beginning of the meeting. There does not seem to be any value gained by changing from disclosure at the beginning whether the Member speaks or not. Curiously, in the new draft, if the Member does not speak, there is no requirement to declare the public service interest. This seems bizarre; it may seem very odd to a member of the public for one Member to disclose an interest and another not (because s/he did not speak) when both take part in the decision by voting. From an evidential aspect, in a subsequent investigation, the question of whether a Member spoke or not will be more difficult to investigate, than whether the interest was declared or not.

5.0 CONCLUSION

- 5.1 The draft revised Code of Conduct appears to be a conscientious attempt to improve the present code and to resolve some of the issues which have arisen with it. However, there are other issues and unresolved problem areas, not covered by the consultation questions, which also require comment.
- 5.2 It is assumed that the new code will be introduced by regulations in April. There are no other scheduled meetings of this Committee before the Annual Meeting. The timetable is tight and it is still debatable whether the new code will be in place in time. Certainly there will be little or no time for training or familiarisation with it prior to annual meetings.

6.0 RECOMMENDATIONS

6.1 This report provides an overview of the new provisions, and time has not allowed for more detailed analysis. Members are invited to consider and comment on the contents of the report, the consultation paper and the proposed responses to the questions posed. Subject to further comments from members, the Committee is invited to:

1. make a formal response to the consultation on the lines set out, and
2. note the timetable and potential implications for the Annual Meeting.

List of Background Papers:-

Consultation on Amendments to the Model Code of Conduct for Local Authority Members.

Contact Details:-

Jayne Hammond, Council Solicitor and Director of Legal and Democratic Services,
Town Hall, Bury BL9 OSW.

Telephone No: 0161 253 5002

THE PROPOSED MAIN CHANGES TO THE CODE ARE TO:

1. Have one consolidated code covering all authorities (to replace the 4 codes currently in existence).
2. Remove the proscription on unlawful discrimination (on the grounds that the APE cannot make a determination on that).
3. Specifically proscribe bullying – about which the SBE has been concerned for some time.
4. Allow for the disclosure of confidential information where it is in the public interest to do so.
5. Require a Member not to bring the authority into disrepute. Offending conduct would extend to that performed in the Member's private capacity provided that:
 - a) the conduct has been subject to a successful prosecution; and
 - b) the current Local Government & Health Bill amends sections 49 and 52 of the Local Government Act 2000. (This effectively overturns the Ken Livingstone decision).
6. Require regard to be paid to the Government's local authority publicity code.
7. Delete the requirement to report suspected breaches of the code by other Members.
8. Require gifts and hospitality of over £25 in value to be registered in the register of members' interests. (Currently there is a separate register for such matters).
9. Require the disclosure of such gifts or hospitality at a meeting within five years of such registration.
10. Define personal interests as including the well-being or financial position of the Member, family, friend or 'any person with whom the member has a close personal association' (This covers a range of personal, business and professional associates. A close personal association is not defined. Is a friend a different relationship now?)
11. Define a personal interest as one affecting the Member to a greater extent than the majority of his or her ward residents (and thereby reduce the likelihood of there being a declarable interest).
12. Create a 'public service interest', defined as membership of another local authority or a management or control position of a public authority or with reference to a body to which the Member is appointed by the Council. (A public service interest is a personal interest declarable if the Member speaks on an item in committee).

13. Provide that a public service interest would not be a prejudicial interest barring participation in debate, unless it affects the financial affairs of the body concerned or it relates to an approval, consent, licence, permission or registration of that body.
14. Provide that a Member with a prejudicial interest may, with the consent of the meeting, attend a meeting for the purpose of making representations, answering questions or giving evidence but must then withdraw from the room. (As noted in the covering report, this will require careful management of the meeting).
15. Proscribe the intimidation of complainants and witnesses in cases of complaint to the SBE or Monitoring Officer.
16. Extend the exemptions where Members should not regard themselves as having prejudicial interests to include:
 - a) where indemnities are being considered;
 - b) the setting of council tax;
 - c) where the Member is being considered for the honorary award of Freeman.
17. Provide that Members are excluded from scrutiny committees where decisions are being considered of a body in which he or she took part.
18. Enable a member to apply to the Monitoring Officer to obviate the need to register 'sensitive information' (e.g. employment in certain types of scientific research), where it is perceived that there is a serious risk that the Member or a person who lives with him or her, may be subjected to violence or intimidation.
19. Enable a Member not to disclose the details of that 'sensitive information' when declaring an interest in committee, (although there would still be a need to disclose that there is a personal interest).

SUGGESTED RESPONSES TO THE SPECIFIC QUESTIONS

1. Does the proposed text on the disclosure of confidential information strike an appropriate balance between the need to treat certain information as confidential, but to allow some information to be made public in defined circumstances when to do so would be in the public interest?

The proposed amendment incorporates the requirements of Article 10(1) of the European Convention on Human Rights (freedom of expression). In practice it will be extremely difficult for a Member to weigh up the balance of competing interests of preserving confidentiality on the one hand and the restricted number of cases where it would be defensible to disclose that information on the other e.g. to make known the occurrence of a criminal offence. It would be difficult to determine when disclosure will be “reasonable and in the public interest”, given that this is the test which local authorities are themselves applying when deciding whether or not information should be within the public domain or should remain exempt.

As currently drafted, the code does not make it clear whether it is a two part test, namely that the disclosure must be reasonable and in the public interest and made in good faith, or whether there is a defence if either of these tests can be satisfied.

The paragraph also requires clarification so that the proscription applies solely to those areas where the Member received the information in his or her official capacity and not as a private individual or in any other capacity.

2. Subject to powers being available to us to refer in the code to actions by members in their private capacity beyond actions which are directly relevant to the office of the Member, is the proposed text which limits the proscription of activities in a Member’s private capacity to those activities which have already been found to be unlawful by the courts, appropriate?

This suggests that the code only applies to activities in a Member’s private capacity, which have already been found to be unlawful by the courts. However, the reading of paragraph 4 of the Schedule may be wider than this and, whilst it may include criminal offences, might also include other conduct, which constitutes disrepute.

There is a range of conduct which could arguably be said to bring a Member’s office into disrepute which falls short of conduct capable of founding a criminal conviction e.g. anti-social behaviour. However by referring to a criminal offence in paragraph 4 it suggests that there is a high threshold of behaviour which could be countenanced before action under this paragraph of the code would be contemplated.

Note: The Livingstone Case has currently limited the scope of the code of conduct in a Member’s private capacity only to conduct where it can be established that there is a direct link with the Member’s office. However, there is a provision contained in the Local Government and Public Involvement in Health Bill, which if enacted, will make it clear that behaviour in a private capacity can be included within the remit of the code.

3. Is the Code of Recommended Practice on Local Authority Publicity serving a useful purpose? If the Publicity Code is abolished, do consultees think some

or all of its provisions should be promulgated in a different way, eg via guidance issues by local government representative bodies, or should authorities be left to make their own decisions in this area without any central guidance? Should authorities not currently subject to the Publicity Code be required to follow it., or should the current position with regard to them be maintained?

In practice the Publicity Code is a useful tool which assists Local Authorities and Members in addressing sensitive issues at sensitive times e.g. in the run up to elections. Whilst the provisions of the publicity code need to be reviewed, such a review could consider how best to assist authorities currently not subject to its remit.

4. Does the proposed text with regard to gifts and hospitality adequately combine the need for transparency as well as proportionality in making public information with regard to personal interests?

The provisions regarding gifts and hospitality seem excessive. In practice most authorities maintain a separate gift and hospitality register, which is not open to public inspection. To translate gifts and hospitality of a value of £25 into interests requiring registration and declaration seems unnecessarily bureaucratic and burdensome, particularly when a bunch of flowers, which are arguably a token of appreciation rather than an imputation of ulterior motive, can cost £25 nowadays. Furthermore, the requirement for disclosure of such an interest for a period of 5 years after registration also seems excessive (not least for Members in remembering that they had received such gifts or hospitality). The £25 should be increased and the period reduced to, say, £50 and 2 years.

There should also be clarification in respect of gifts and hospitality received by the Chairman of the Council in his/her capacity as Civic Head. Most Local Authorities adopt a very sensible approach in that such gifts and hospitality are not declared under the code where they are received as a direct consequence of the office, but it would be preferable if this could be clarified beyond doubt, if not within the code itself, then by express guidance from the Standards Board. In any event most gifts (beyond flowers and chocolates) received by the Chairman are invariably regarded as gifts to the Council not the individual concerned.

5. Does the proposed text relating to friends, family and those with a close personal association adequately cover the breadth of relationships which ought to be covered, to identify the most likely people who might benefit from decisions made by a Member, including family, friends, business associates and personal acquaintances?

There has been difficulty in the existing code in Members determining who constitutes a friend. This will be compounded by the new requirement to consider not only friendship but also close personal associations. This will be particularly difficult in the context of some areas where most people in the community know each other. Very clear guidance will be required from the Standards Board on this, ideally with a clear test which Members will find easy to apply.

It is always going to be difficult to describe adequately the concept that it is the close association between a Member and other people involved in an issue under debate which will give rise to the perception by onlookers of

inappropriate dealing. In that respect it is not clear what is added by the word 'personal' in the phrase 'close personal association'.

6. Would it be appropriate for new exceptions to be included in the text as additions to the list of items which are not to be regarded as prejudicial?

Note: Three new items have been added. These seem sensible and to be welcomed.

Exemptions could be extended usefully in at least two respects.

1. to expand para. 9 (2)(b)(i) and provide that a Member who is a tenant, lessee or licensee generally would not have a prejudicial interest, save where the debate specifically relates to his or her property. This would cover e.g. allotments and garages and grazing licences which can be problematic in some authorities.
 2. to extend para 9(2)(b)(vi) in respect of bestowing the title of Freeman not only on a member, but on a spouse, friend or close associate. In practice the candidates for such an award are likely, by virtue of the service they have provided to the community, to have come into close association with Members.
7. Is the proposed text relaxing the rules to allow increased representation at meetings, including where Members attend to make representations, answer questions, or give evidence, appropriate?

It is illogical to make the intended exemption in the way proposed. Merely because the Member is answering questions or making representations cannot logically affect whether or not he or she has a prejudicial interest within the definition of that phrase in paragraph 9(i). What is needed is a recognition that, despite the prejudicial interest, the Member is not disbarred from answering questions and making representations. In that respect the Member's position is different from the instances cited in para 9(2)(a) and (b). So, drafting that says "notwithstanding their prejudicial interest, a Member may attend a meeting to make representation, answer questions and give evidence" would be more helpful.

In practical terms the provision is likely to give rise to the need for very clear procedures to be adopted by the meeting to ensure that the Member does withdraw from the room at a particular point. It would be useful to clarify that withdrawal should have taken place prior to a decision being reached. It is not clear whether the Member may stay for the debate.

8. Is there a better, more user-friendly way of ensuring the text is gender-neutral, for example, would consultees consider that amending the wording to say 'you' instead of 'he or she' or 'him or her' would result in a clearer and more accessible code for Members?

The draft code is written in language that is intended to be user friendly. It is clearer and more understandable although the lack of definitions creates ambiguity in many places.

Achieving gender neutral language is ideal, but the proposal to refer to the second person ("you") is likely to cause ambiguity. 'He/she', 'his/her' could simply be replaced by 'a/the Member' 'a/the Member's'.