
MEETING: STANDARDS COMMITTEE

DATE: 17 NOVEMBER 2008

SUBJECT: CONSULTATION ON THE CODES OF CONDUCT FOR LOCAL AUTHORITY MEMBERS AND OFFICERS

REPORT FROM: MONITORING OFFICER

CONTACT OFFICER: JAYNE HAMMOND, DIRECTOR OF LEGAL AND DEMOCRATIC SERVICES

TYPE OF DECISION: COMMITTEE

FREEDOM OF INFORMATION/STATUS: OPEN

SUMMARY:

This report sets out a proposed response to the Consultation by the Government on the Codes of Conduct for Members and Officers

OPTIONS AND RECOMMENDED OPTIONS (with reasons):

To consider and comment on the proposed response to the consultation questions.

IMPLICATIONS -

Corporate Aims/Policy Framework:

Do the proposals accord with the Policy Framework? Yes No

Financial Implications and Risk Considerations

The proposals outlined in the report are consistent with the Council's approach to risk management.

Statement by Director of Finance

and E-Government:

Equality/Diversity implications Not applicable

Considered by Monitoring Officer: Yes

Are there any legal implications? Yes No

Staffing/ICT/Property: Not applicable

Wards Affected: All

Scrutiny Interest: Not applicable

TRACKING/PROCESS

DIRECTOR: JAYNE HAMMOND, DIRECTOR OF LEGAL AND DEMOCRATIC SERVICES

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

1. INTRODUCTION

The Department for Communities and Local Government (CLG) has issued a consultation paper, seeking views on 21 specific issues relating to amendments to the Code of Conduct for Members and the introduction of a Code of Conduct for Employees. Views are sought by 24 December 2008, with a view to implementation in time for the local elections in May 2009.

2. THE NATURE OF THE CONSULTATION

CLG has consulted on specific questions, but has not provided proposed amended text for the Members' Code.

In the previous consultations in 2007 on revisions to the Code of Conduct for Members and on the implementation of local initial assessment of standards complaints, the result was that the final regulations varied substantially from the consultation drafts. These also contained a number of new matters on which no consultation had occurred. With that experience, we can perhaps expect CLG to set a realistic timetable for consultation and to consult early on an actual text, rather than on selected questions.

This report sets out a suggested response by the Council to the specific questions posed by CLG and Members views are sought on this.

It is recommended that –

- 1. The Standards Committee adopts this report and makes representations to CLG accordingly, and**
- 2. The Standards Committee refers the issues relating to the draft Employees' Code to the Human Resources and Appeals Panel for comment.**

Codes of Conduct for Local Authority Members and Officers

A Response to Consultation

1 Code of Conduct for Members

Responses to the specific questions:

1.1 Q1 – Do you agree that the Members’ Code should apply to a member’s conduct when acting in their non-official capacity?

It is clear that some conduct in private life can reflect upon a member’s suitability to continue as a member and that leaving a member in place until their next election can seriously damage the reputation of an authority and of local government in general. It is therefore important that the Code of Conduct for Members should apply to at least some conduct in a member’s private life.

However, the Consultation Paper makes no mention of Section 183 of the 2007 Act (new Section 49(2B) of the LGA 2000). This section provides that the Principles, and therefore the Code, can apply to conduct which “would constitute a criminal offence.” Criminal conduct can be a criminal offence whether or not it is prosecuted. Accordingly the Council considers that amendment of the primary legislation is required before the Code can actually be applied to criminal conduct in private life.

1.2 Q2 – Do you agree with the definition of “criminal offence” for the purpose of the Members’ Code? If not, what other definition would you support? Please give details.

By excluding criminal offences which result in a fixed penalty notice, the intention seems to be that application of the Code should be limited to the more serious offences; and also avoid the confusion as to which fixed penalty notices constitute a criminal conviction, which are civil matters, and which are an alternative to prosecution. However, the proposed wording could be interpreted as offences for which a fixed penalty notice is not available, or as an offence in connection with which the individual member was not been given the option of a fixed penalty notice.

Further, a fixed penalty notice is sometimes available for relatively minor instances of what can be a serious offence, such as unauthorised tipping of waste materials. Failure by a member to comply with a regulatory regime which that member is responsible for enforcing can reflect very seriously on the credibility of that member, of the Council and of the regulatory regime.

Even if the specific incident was at a level appropriate for a fixed penalty notice for fly-tipping, the offence would so directly relate to the member’s responsibilities within the Council that it would be directly relevant to their credibility and that of their authority. Accordingly the

Code of Conduct should be capable of responding to that event. Where the offence is minor, or is not directly relevant to their work as a member, there remains the option for the Standards Committee (Assessment Sub-Committee) to resolve not to take any action in respect of it. Accordingly, there is no loss and considerable advantage in including all criminal offences, whether they result in actual prosecution or a fixed penalty notice.

Despite the provisions of the Local Government and Public Involvement in Housing Act 2007, there remains a valid issue as to whether the Code's application to private life should be limited to criminal conduct. Thus, many disclosures of confidential information occur in a member's private life. They are still disclosures of confidential information which the member has received in his/her capacity as a member and they are just as damaging to the authority and to the credibility and reputation of members, but they may occur in the pub or another context outside official activities, rather than in the course of a Council debate. Such disclosures should be equally covered by the Code of Conduct?

1.3 Q3 – Do you agree with this definition of “official capacity” for the purposes of the Members’ Code? If not, what other definition would you support? Please give details.

The basic general conduct provisions of the Code apply only when a member is acting in an official capacity. CLG proposes that “official capacity” should be defined as “being engaged in the business of your authority, including the business of the office to which you are elected or appointed, or acting, claiming to act or giving the impression that you are acting as a representative of your authority.”

A particular issue arises from the reference to acting as a “representative” of a local authority, as the word “representative” is not defined in the Act or the Code. Paragraph 2(5) clearly envisages that a member can be acting as a representative of the authority even where he/she is acting on behalf of another body. This illustrates the scope for confusion. As the word “representative” is no longer used in the exceptions to prejudicial interests, a more precise definition should be used, such as that the member was “engaged in the business of a body to which he/she has been appointed by, on the nomination of, or with the approval of the authority.”

1.4 Q4 – Do you agree that the members’ code should only apply where a criminal offence and conviction abroad would have been a criminal offence if committed in the UK?

The basic proposition is acceptable, but the Consultation Paper goes on to provide that the Code would only apply if the member was convicted in the country in which the offence was committed. However, there may be circumstances conviction occurs in a different country. For example, an Internet child pornography offence may well justify action under the Code of Conduct, but may be prosecuted in the USA

under current law where the activity occurred in the UK but the images passed through a US computer server. Accordingly the Council does not support the proposal that the conviction must arise in the same country as the offence was committed.

1.5 Q5 – Do you agree that an ethical investigation should not proceed until the criminal process has been completed?

On occasions there can be a long interval between the events and the conviction. In a serious fraud case, this can be up to six years. For example, in the case of Lincolnshire County Council, Councillor J .Speechley’s prosecution for misconduct in public office, it was three years before the trial and a further year before his appeal against conviction was rejected as wholly unmeritorious. It would risk bringing the process into serious disrepute if no complaint can even be entered until so long after the events. Accordingly, there should not be any limit on making a complaint before conviction. The Council recognises that it would be wrong to encourage a standards investigation which interfered with the criminal investigation. But where there is a long gap between the events and a conviction it discredits the standards system if no action can be taken, especially where the member’s guilt may be very evident, or he/she may even have admitted guilt. Accordingly, there should be no bar on standards investigations and proceedings in advance of conviction.

1.6 Q6 – Do you think that the amendments to the Members’ Code suggested in this chapter are required? Are there any other drafting amendments which would be helpful? If so, please could you provide details of your suggested amendments?

1.6.1 Membership of other bodies

It is suggested that Paragraphs 8(1)(a)(i) and (ii) be amended to make it clear that this refers to another body of which you are a member, or which exercise functions of a public nature. The Council is not aware of any ambiguity or confusion here, but if there is a problem we would support clarification.

1.6.2 Registration of Gifts and Hospitality

It is suggested that Paragraph 8(1)(a)(vii) might usefully be amended to clarify that a member is required to register any gift or hospitality with an estimated value of at least £25. The current drafting of Paragraph 8(1)(a)(vii) is different from that of other such outside interests, as it refers to “the interests” of the donor or hospitality provider, rather than referring to the donor or hospitality provider itself. In terms of prejudicial interests, Paragraph 10 (1) and (2) could be clarified and re-drafted to avoid the current double-negative. An amplification of the meaning of “determination” would be helpful. The disapplication of Paragraph 10(2)(c) to giving evidence

before a Standards Committee would be also be welcome.

1.6.3 Additional Suggested Amendment - Application to suspended Members

The majority of the Code as currently drafted does not apply to a member when he/she is suspended. The Council suggests an amendment to Paragraph 2(2) to provide that a member's conduct in relation to his/her authority shall be treated as being in an official capacity notwithstanding that the member was suspended at the time of the conduct

1.6.4 Additional Suggested Amendment – Gifts and Hospitality

With the passage of some seven years since the Code was introduced, the £25 threshold for declaration of gifts and hospitality has diminished by some 20% in real value. With the additional requirement to declare relevant gifts and hospitality at meetings, it is now appropriate at least to restore the original real value of the threshold in Paragraph 8(1)(a)(viii) and perhaps to set the value at a level such as £100 at which members would only have to declare and register really significant gifts and hospitality, of such a size that they might possibly influence the member's decision on a matter.

1.6.5 Additional Suggested Amendment – Close Association

Whilst the Council understands the intention of the 2007 Code amendment to extend beyond "friends" to business colleagues etcetera, the phrase "person with whom you have a close association" is extremely vague. Whether in the Code or in supporting Guidance it is necessary to make it clear that this provision only covers people with whom the member has such a close continuing relationship that a member of the public might reasonably conclude that it is likely to influence the member's perception of the public interest on matters which affect that individual.

1.6.6 Additional Suggested Amendment – the majority of council tax payers, ratepayer or inhabitants of the electoral division or ward affected by the decision.

The present Paragraph 8(1)(b) is unclear as to whether the comparator in any particular case is **either** council tax payers, ratepayers or inhabitant, **or** the aggregate of all three categories. In practice, it must be the category which the member comes within for this purpose. The Council suggests that Paragraph 8(1)(b) be amended.

1.7 **Q7 – Are there any aspects of conduct currently included in the Members' Code of Conduct that are not required? If so, please**

could you specify which aspects and the reasons why you hold this view?

1.7.1 Additional Suggested Amendment – Overview and Scrutiny Committees

Paragraph 11 provides that a member of the authority's executive will have a prejudicial interest in the matter when he/she is interviewed by the authority's Scrutiny Committee in respect of an executive decision which he/she has made. Accordingly, in line with the suggested amendment for members giving evidence before Standards Committees, the Council would suggest that the exception in Paragraph 12(2) be extended to provide that attendance to give evidence at the request of the Scrutiny Committee should not be a breach of the Code of Conduct.

1.8 **Q8 – Are there any aspects of conduct in a member's official capacity not specified in the Members' Code of Conduct that should be included? Please give details.**

1.8.1 Additional Suggested Amendment – Application to informal meetings, Site Visits and Correspondence

The definition of "meetings" in Paragraph 1(4) is currently very limited. There is public concern at the possible undue influence applied by members in informal meetings and correspondence, for which there is no public access. (The Welsh Code for Members has addressed this by extending the definition of "meetings" to include "informal meetings between a member and one or more other members or officers of the authority, other than group meetings", and by requiring members to disclose that they are members in any correspondence with the authority, even if that correspondence is in a private capacity).

1.8.2 Additional Suggested Amendment – Private Representations

A dilemma arises where a member wishes to make representations to his/her own authority in a private capacity, for example as a householder in respect of a neighbouring planning application. On the one hand, disclosing in the representation the fact that he/she is a member risks an accusation of improper use of the member's position to influence the decision. On the other hand, as the officers are probably well aware of the identity of the correspondent, failing to disclose this fact can risk an opposite accusation that the member is acting in an underhand manner. (The Welsh Members' Code has taken a robust approach and simply provided that a

member must disclose the existence and nature of their personal interest when he/she makes representations to the authority on a matter in which he/she has a personal interest and, if the representations are made verbally, must then confirm that interest in writing within 14 days).

1.9 Q10 – Do you agree with the addition of a new General Principle, applied specifically to conduct in a member’s non-official capacity, to the effect that a member should not engage in conduct which constitutes a criminal offence?

This is much wider than the Members’ Code of Conduct, which is supposedly limited to criminal conduct which relates in some manner to the member’s position as a member. In addition, the core principle is already substantially covered by General Principles 2 (Honesty and Integrity) and 8 (Duty to uphold the Law). Accordingly the Council is of the view that adding a general and unrestricted Principle of not engaging in criminal conduct is unnecessary.

1.10 Do you agree with the broad definition of “criminal offence” for the purpose of the General Principles Order? Or do you consider that criminal offence should be defined differently?

As set out above, the Council does not consider that it is necessary or helpful to change the General Principles for this purpose. However, if a change is to be made it should be limited to criminal conduct “which compromises the reputation of the member’s office or authority, or their ability to perform their functions as a member”.

1.11 Do you agree with this definition of “official capacity” for the purpose of the General Principles Order?

The Consultation Paper suggests that this new General Principle should be limited to conduct when “you are engaged in the business of your authority, including the business of the office to which you are elected or appointed, or acting, claiming to act or giving the impression that you are acting as a representative of your authority.”

This is completely at odds with the intention as set out above to implement the provisions of the Local Government and Public Involvement in Housing Act 2007 in order to apply the Code of Conduct to criminal conduct in private life. If implemented as suggested, it would mean that the General Principles were narrower than the Code of Conduct which is supposed to give effect to them.

2 Code of Conduct for Employees

2.1 Q13 – Do you agree that a mandatory code of conduct for local government employees, which would be incorporated into employees’ terms and conditions of employment, is needed?

The Council considers that a Code of Conduct going beyond the normal provisions of standard terms and conditions of employment may be useful at least for senior officers; that it is sensible to incorporate it in contracts of employment by operation of law and that the disciplinary process of the employing authority is the appropriate means of enforcement.

2.2 Q14 – Should we apply the Employees’ Code to fire-fighters, teachers, community support officers and solicitors?

The Consultation Paper suggests that it may be unnecessary or inappropriate to apply the Employees’ Code of Conduct to employees in professions that are already covered by their own Code.

The purpose of most professional codes of conduct is to secure the reputation of the profession, not to protect the integrity and governance of the employer. They may overlap in some aspects, but they are directed to different ends. Accordingly, it may be appropriate to provide that where an employee is subject to a Code of Conduct which is a precondition of the employee performing the functions of the post, the Employees’ Code of Conduct shall not apply in so far as it is incompatible with that other code.

2.3 Q15 – Are there any other categories of employee in respect of whom it is not necessary to apply the Code?

In general terms, if relevant employees are excused provisions of the Code which are incompatible with professional codes, there is much less need to exclude specific categories of employee from the Code.

2.4 Q16 – Does the employees’ code for all employees reflect the core values that should be enshrined in the code? If not, what has been included that should be omitted, or what has been omitted that should be included?

2.4.1 Application to private life

As drafted, the Employees’ Code applies in an employee’s private life, prohibiting an employee from having personal interest which conflict with their professional duties, requiring political neutrality even in private life, and requiring the disclosure of personal information to the employer. Following the determination that the provisions of the Local Government Act 2000 in respect of the Members’ Code did not apply in a member’s private life in the absence of an express statement to that effect in the legislation the Council would query whether the Local Government Act 2000 provides a sufficient basis for an Employees’ Code to be prescribed which would apply to employees’ private life?

2.4.2 The Consultation Paper fails to ask whether consultees consider that it is appropriate to have a two-tier code, with core rules applied to all relevant employees, and additional provisions which apply only to senior employees.

The Council considers that the main public interest would be satisfied by a Code of Conduct which applied just to senior employees. The proposed core rules are already covered to a greater or lesser extent by standard terms and conditions of employment.

2.4.3 Comparison with the Members' Code of Conduct

There would be considerable advantages in having commonality of language between the Members' and the Employees' Codes.

2.4.4 Political neutrality

On the basis that the additional rules will apply to all politically restricted post-holders, the provision on political neutrality (which applies only to officers who hold politically restricted posts) is redundant in the core rules. Further, if the Employees' Code is to be kept to a minimum, it should avoid provisions which are simply a repetition of existing legal requirements. Accordingly, this provision should be deleted.

2.4.5 Relations with members, the public and other employees

Whilst it would be nice if employees dealt sympathetically with members and others, it is unreasonable to suggest that employees should always have sympathy with those persons with whom they have to deal in the course of their employment. The requirement in the Members' Code to treat others with respect is much more appropriate and unnecessary differences between the Members' and Employees' Codes should be avoided.

2.4.6 Equality

The entirety of this provision is simply a duplication of the requirements to act lawfully and within the policies of the authority, and so should be deleted.

2.4.7 Stewardship

The rest of the Employees' Code refers to "employees". This provision refers to "employees of relevant

authorities.” Consistent language should be used throughout the Code.

2.4.8 Personal interests

The requirement not to allow personal interests and beliefs to conflict with professional duties is not matched in the Members’ Code of conduct.

The phrase “personal interests” here is used in a very different manner from the use of the same phrase in the Members’ Code. This will cause confusion and should be avoided.

2.4.9 Gifts and hospitality

The Employees’ Code should make it clear that it only applies to gifts and hospitality which the employee receives by reason of their employment.

2.4.10 Whistle-blowing

The inclusion of a requirement to inform the employer of a failure by another employee to comply with the Employees’ Code is in stark contrast to the removal of the similar provision from the Members’ Code in the 2007 amendments. The Council has no difficulty in a duty to report illegality or failure to comply with the policies of the authority, but we consider that this requirement goes too far.

2.4.11 Investigations by the Monitoring Officer

Whilst Monitoring Officer investigations are important, it would be equally important to secure the employee’s co-operation with any statutory investigation, including the authority’s external auditors and the Police.

2.5 **Q17 – Should the selection of “qualifying employees” be made on the basis of a political restriction style model or should qualifying employees be selected using the delegation model?**

Strictly all local authority employees act only under powers delegated to them by the authority. In fact, the only exception to this is the personal statutory duties of the three statutory officers, the Head of Paid Service, Chief Finance Officer and Monitoring Officer, who should most certainly come within any definition of “qualifying employees”. Further, the manner in which schemes of delegations to officers are drafted is markedly different in different authorities. Some detail specific statutory powers for relatively junior officers. At the other end of the spectrum, some give broad generic delegations to the Chief

Executive, and then enable the Chief Executive to sub-delegate those powers to other officers.

On the other hand, the category of “politically restricted posts” provides a convenient and precise definition of the most senior employees and those who are most closely associated with the formal member-level decision-making processes.

2.6 Q18 – Should the code contain a requirement for qualifying employees to publicly register any interests?

2.6.1 Is it appropriate that senior employees should be required to register outside interests?

Whilst a requirement to register outside interests is a requirement to disclose personal information, the Council believes that there is a justifiable case for requiring senior employees to disclose private interests.

2.6.2 Should there be a public right of access to the register of employees’ interests?

The matters which an employee will be required to register are matters in their private life. The requirement to register these interests with their employer is therefore likely to be an infringement of Article 8 of the Human Rights Act (Respect for private life, etc.) and potentially of the Data Protection Act 1998. Any public right of access to this personal information would be much more serious infringement of those rights of protection of private life and personal information (and should therefore only be granted if it is necessary for the protection of the rights and freedoms of others and the maintenance of public morals).

Since the Employees’ Code is imported into employees’ terms and conditions of employment and enforced through the employers’ disciplinary process, it must be questioned what wider public interest would be served by the publication of such information, especially if the categories of registered information were widened, as suggested below. It should also be noted that JNC terms and conditions of employment currently prohibit the employing authority from disclosing personal information about an employee without his/her consent. On that basis, the Council considers that the register of employee’s outside interests should not be open to public inspection.

A further question arises as to whether it should be open to inspection by all members of the employing authority. In the absence of express legislative provision, the view

is taken that members would not have any automatic right of access to the register, but might make a specific enquiry in respect of a named officer where they were able to demonstrate that they had a real need to know that information in order to discharge their functions as a member. Otherwise access would be limited to named employees in respect of only those employees for whom they had direct responsibility.

2.6.3 If the right of access to the register of employees' interests were limited in such a manner, there would be no need for a category of "sensitive information" to be disclosed but then omitted from the register.

2.7 **Q19 – Do the criteria of what should be registered contain any categories which should be omitted, or omit any categories which should be included?** The consultation paper contains no justification for omitting from the requirement to register under the Employees' Code particular categories of interest which are registrable under the Members' Code. Other employment or business, membership of pressure groups, the holding of other remunerated employment in the gift of the authority, and the receipt of gifts and hospitality by reason of your employment would appear to be of real interest and should most certainly be included in the list of registrable interests.

2.8 **Q20 – Does the section of the employees' code which will apply to qualifying employees capture all pertinent aspects of the members' code? Have any been omitted?**

2.8.1 The omission of any class of "personal interests" requiring disclosure to the authority, whether or not some of them require registration, means that the Employees' Code is not only seriously out of line with the Members' Code, but also means that it fails to recognise the provisions of Section 117 of the Local Government Act 1972. Accordingly, employees will need not just to refer to the Employees' Code, but also to Section 117. This confusion can be avoided by including in the Employees' Code a requirement to notify the authority of any "personal interest", defining "personal interest" in such a manner that it includes not only "registrable interests", but also any interests which must be disclosed under Section 117, and in the process removing the difficulty caused by the repeal of the definition of "pecuniary interest".

2.8.2 The suggestion that officers with a prejudicial interest should "wherever possible ... take steps to avoid influential involvement in the matter" is completely at odds with the strict prohibition on member participation in a matter in which they have a prejudicial interest.

2.9 **Q21 – Does the section of the employees' code which will apply to qualifying employees place too many restrictions on**

qualifying employees? Are there any sections of the code that are not necessary?

2.9.1 The proposed requirement for employees to consider advice provided to them and giving reasons is unnecessary.

2.9.2 The requirement to register interests with the authority's Monitoring Officer is at odds with the standard practice of authorities, where the register is normally held by the Head of HR. At the very least, the provision should require registration with "the Monitoring Officer or such other officer as he/she may designate for this purpose".

2.10 Should authorities be required to incorporate the exact words of the employees' code into contracts of employment?

[The Council has already included in its standard terms and conditions of employment particular terms and conditions which cover some or all of the points contained in the draft Employees' Code, and in some cases actually go rather further. Many of those provisions are drafted in a manner different from the draft Employees' Code, and simply grafting the exact wording of the Employees' Code into such terms and conditions will produce contradictions and confusion.] Accordingly, any statutory instrument prescribing the Employees' Code should provide that all relevant authorities must incorporate into their terms and conditions of employment provisions of no less effect than the Employees' Code, rather than necessarily the exact words and nothing more than the exact words of the Employees' Code.