

**CONSULTATION ON THE CODE OF CONDUCT FOR LOCAL AUTHORITY MEMBERS**

**REPORT OF THE CITY SOLICITOR**

**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**

2.1 CLG has consulted on specific questions, but has not provided the proposed amended text for the Members' Code. The questions on which views are sought are far from comprehensive (the previous consultation on a Code of Conduct for Officers listed 16 questions as against the ten posed in the current consultation) and there are a significant number of further issues which need to be addressed in relation to both Codes. As a result, CLG will receive a considerable number of other suggestions, which will then be incorporated into draft Codes on which very little further consultation can occur, because of the timetable for implementation by May 2009.

2.3 In respect of the previous consultations on the 2007 revisions to the Code of Conduct for Members and on the implementation of local initial assessment of standards complaints, the final regulations varied substantially from the consultation drafts, and contained a number of new matters on which no consultation had occurred, as well as a number of errors. With that experience, it would have been preferable for CLG to set a realistic timetable for consultation and to consult early on an actual text, rather than merely on selected questions.

2.3 This report sets out a suggested response by the Council to the specific questions posed by CLG and a more general commentary on the consultation paper, the relevant extracts of which are attached.

2.4 The issues relating to the draft Employees' Code will be considered separately by the Personnel Committee.

**3. Code of Conduct for Members - Responses to the specific questions:**

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

3.1.1 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 the next elections

may 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.

Having regard to the actual wording of the legislation it is arguable that an amendment of the primary legislation is required before the Code can actually be applied to criminal conduct in private life.

**3.2 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.**

3.2.1 CLG's intention is that, by excluding criminal offences which result in a fixed penalty notice, the application of the Code should be limited to the more serious offences. However, the proposed wording is insufficiently precise, as it can 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 given the option of a fixed penalty notice.

3.2.2 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. Thus, in the case of a member caught fly-tipping toxic chemicals, the availability of a fixed penalty notice for the offence of fly-tipping could take the offence outside the scope of the Code. Thus it is suggested that the exclusion of fixed penalty offences is not appropriate.

Where an 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.

**3.3 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.**

3.3.1 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 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.”

3.4 **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?**

3.4.1 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. No explanation for this proposal is provided. Any criminal conviction should be within the scope of the code of conduct, if it reflects so directly on the suitability of the member to continue to act as a member of a local authority.

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

There are three aspects to this question:

3.5.1 Should the breach of the code arise when the criminal conduct occurs, or only when a conviction has resulted? In other words, should it be possible to make a complaint about criminal conduct in advance of an actual conviction?

On occasions the fact of guilt is very evident long before the actual prosecution or conviction, but there can be a long interval between the events and the conviction. 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.

3.5.2 Should the actual investigation be held over until a criminal conviction has occurred?

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 absolute bar on standards investigations and proceedings in advance of a conviction.

3.5.3 Should the actual conviction before a criminal court be the only admissible evidence of criminal conduct?

If a complaint is to be admissible before conviction, it follows that conviction cannot be the only admissible evidence of the criminal offence.

Standards proceedings are civil proceedings. They determine matters on the balance of the evidence before them. An actual conviction in a criminal court is the most cogent evidence of guilt, but it is not a comprehensive test. Thus, the member may have admitted guilt, or civil proceedings may have resulted in an injunction against the member for harassment, but there may either be no prosecution or the prosecution may not have been completed. Not all criminal offences result in a prosecution, so a member might have been sued successfully for fraud, which

reflects very badly upon their suitability to be in control of public funds, but the CPS may have decided that despite evident guilt no public interest would be served by an actual prosecution.

Accordingly, evidence of criminal conduct other than a conviction by a criminal court should be admissible as evidence of criminal conduct. Otherwise much of the force of this provision will be lost, and complaints will be seriously delayed, discrediting the process.

**3.6 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?**

**3.6.1 Make Paragraph 12(2) mandatory rather than adoptive for Parish Councils**

At present, Paragraph 12(2), allowing a member who has a prejudicial interest to make representations as a member of the public but not take part in the decision itself, is a mandatory provision for most authorities, but only applies to Parish Councils if positively adopted so that there is consistency. It is considered that it would be sensible to make this mandatory for Parish Councils. Hetton Town Council has adopted it.

**3.6.2 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 would support clarification.

**3.6.3 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 of hospitality provider, rather than referring to the donor or hospitality provider itself. This does not fit with the registration requirement in Paragraph 13, as taken literally it requires the member to register “the interests of” the donor or hospitality provider. Accordingly, Paragraph 8(1)(a)(vii) should be amended by the deletion of the words “the interests of”, and Paragraph 13 should be amended by the addition of a new Paragraph 13(3) as follows – “(3) In respect of a personal interest arising under Paragraph 8(1)(a)(vii), you must register both the identity of the person from whom you have received the gift or hospitality and provide details of the gift or hospitality and its estimated value.”

#### 3.6.4 Prejudicial Interests

Paragraph 10 (1) and (2) could certainly be clarified if they were re-drafted to avoid the current double-negative. An amplification of the meaning of “determination” would be helpful. However, this paragraph would still remain flawed because of the lack of clarity as to when the determination of an approval, consent, licence, permission is “in relation to” the member. It is suggested that this be changed to say “determination of an application for approval..... made by you or on your behalf.”

The express disapplication of Paragraph 10(2)(c) to giving evidence before a Standards Committee would be welcome.

#### 3.6.5 Registration of Interests

It is proposed that existing registrations of interests should carry forward when the revised Code is introduced.

This is a sensible suggestion which would reduce the administrative burden for members and myself.

#### 3.6.6 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 perhaps appropriate to restore the original real value of the threshold in Paragraph 8(1)(a)(viii) or perhaps to set the value at a higher level so that 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.

#### 3.6.7 Additional suggested amendment – “close associate”

Whilst the intention of the 2007 Code amendment to extend beyond “friends” to business colleagues and enemies, the phrase “person with whom you have a close association” is extremely vague. The Standards Board for England’s description of the phrase is of little assistance: “A person with whom you have a close association is someone that you are in either regular or irregular contact with over a period of time who is more than an acquaintance. It is someone a reasonable member of the public might think you would be prepared to favour or disadvantage when discussing a matter that affects them. It may be a friend, a colleague, a business associate or someone whom you know through general social contacts.”

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.

3.6.8 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, otherwise the relatively higher numbers of “inhabitants” would always dominate and make the mention of the other categories redundant. It is suggested that Paragraph 8(1)(b) be amended to read “.... Than the majority of either the council tax payer, ratepayers or inhabitants of the ..... , in any case being a category of which you or the relevant person is a member.”

3.7 **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?**

3.7.1 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. The Standards Board for England’s advice has been that the power of the Scrutiny Committee to require the attendance of the member overrides the Code, but the Code should be amended expressly to reflect this.

3.8 **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.**

3.8.1 Additional Suggested Amendment – Application to informal meetings and Site Visits

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. This makes the position absolutely clear. It can readily be checked by inspection of correspondence and of officers’ notes of meetings.

3.8.2 Additional Suggested Amendment – Application to Ward Councillor Decision-Making

Section 236 of the Local Government and Public Involvement in Health Act 2007 enabled local authorities to arrange for the discharge of functions by a ward Councillor within that ward. It made no provision for the application of the Members’ Code to the discharge of such functions. The normal rules on disclosure of personal

and prejudicial interests do not apply in this case as there is no “meeting”, yet the potential for conflicts of interest are greatly increased where a Councillor is possibly taking decisions in the area in which he/she lives, where his/her family go to school and have their friends, or where he/she has his/her business. The obvious amendment would be to apply Paragraphs 9(6) and 12(1)(b) and (c) to any decision-making under Section 236, and require the recording of any personal interest in the record of the decision.

### 3.8.3 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 the 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. This satisfactorily resolves this dilemma, enabling the fact of the member’s interest to be recorded in the correspondence.

The situation where a member wishes to make oral representations is already satisfactorily addressed by paragraph 12(2) of the Code and the protocols the Council has approved in respect of development control and licensing matters.

### 3.8.4 Additional Suggested Amendment – Acting in the Public Interest and having regard to Officers’ Advice

The current Code contains no requirement to act in the public interest, as this fundamental requirement is relegated to the General Principles. Equally, the requirement in Paragraph 7(1) to have regard to officer advice is limited to the statutory reports of the Chief Finance Officer and the Monitoring Officer. These provisions are much better covered in the current Welsh Code of Conduct, which includes the advice by other officers of the Authority.

### 3.9 **Q9 – Does the proposed timescale of two month, during which a member must give an undertaking to observe the Members’ Code of Conduct, starting from the date on which the authority adopts the Code, provide members with sufficient time to undertake to observe the Code?**

3.9.1 It is appropriate to require members to give a fresh undertaking to observe the revised Code of Conduct following its adoption by the authority of which they are a member. The two month period is considered reasonable.

**3.10 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?**

3.10.1 The core principle is already substantially covered by General Principles 2 (Honesty and Integrity) and 8 (Duty to uphold the Law). Accordingly it is considered that adding a general and unrestricted principle of not engaging in criminal conduct is unnecessary.

**3.10.2 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?**

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”.

**3.10.3 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. Accordingly, it is considered that the new General Principle, if adopted, should apply to criminal conduct “which compromises the reputation of the member’s office or authority, or their ability to perform their functions as a member”.

#### **4. Conclusions**

Members are asked to consider the proposed responses to the consultation paper and to determine whether to endorse them and/or to make any additional comments.

#### **Background Papers**

- CLG “Communities in Control: Real People, Real Power – Codes of Conduct for Local Authority members and employees.
- ACSes paper – P Keith-Lucas