

STANDARDS COMMITTEE

CONSULTATION ON CODE OF CONDUCT FOR LOCAL AUTHORITY MEMBERS 4th December 2008

Report of the Monitoring Officer

PURPOSE OF REPORT

To enable the Committee to consider a government consultation paper on proposed changes to the Members' Code of Conduct, and the response that should be submitted on behalf of the Council.

This report is public

RECOMMENDATIONS

- (1) **That the Committee consider the Consultation Paper, and authorise the Monitoring Officer to finalise the Council's written response in accordance with the Committee's views.**

1.0 Introduction

1.1 On the 1st October 2008, the Government published a consultation paper on Codes of Conduct for local authority members and employees. Chapter 3 of the consultation paper relates to the conduct of employees, and as any Code of Conduct would be incorporated into the contractual terms and conditions of employees, this falls within the remit of the Council's Personnel Committee. The Personnel Committee considered Chapter 3 at its meeting on the 10th November 2008, and requested the Head of Legal and Human Resources to finalise the Council's response based on the views expressed by the Committee.

1.2 Chapter 2 of the consultation paper relates to the Members' Code of Conduct, and considering the Council's response therefore falls within the terms of reference of this Committee. A copy of Chapter 2, together with the introduction to the consultation paper, the list of questions, and a copy of the current Model Code of Conduct are appended to this report.

2.0 Proposal Details

2.1 The main purpose of the consultation paper is to propose changes to the Code of Conduct which will result in the Code applying in some circumstances to the conduct of members outside their official capacity, and also to propose other minor revisions

to the Code based on experience of the practical operation of the current Code since its introduction in May 2007. The consultation paper asks a number of specific questions, and this report highlights the issues that Members may wish to consider in response to those questions.

- 2.2 On a more general point, the introduction to the consultation paper indicates that it is proposed that any changes to the Code would come into effect in line with the local government elections in 2009. The consultation paper does not set out the actual text of the proposed amended and re-formatted Code, and it is not clear whether there will be any subsequent consultation on that text. Past experience has been that following an initial general consultation, time constraints have meant that a Code has been produced by the government with little or no opportunity for further consultation, resulting in errors and inconsistencies, and Members may feel that it would be appropriate for the Council's response to request a realistic timetable for early consultation on an actual text, prior to implementation.
- 2.3 The government proposes that there should be a section of the Code covering the conduct of members in their non-official capacity which would provide that "Members must not bring their office or authority into disrepute by conduct which is a criminal offence". Members will recall that there is a similar provision within the current Code, but that there have been legal difficulties in implementing this, highlighted in the Livingstone case, as a result of which the Local Government Act 2000 was amended by the Local Government and Public Involvement in Health Act 2007. *Consultation Question 1 is "Do you agree that the members' code should apply to a member's conduct when acting in their non-official capacity?"* Members may wish to agree that some conduct in private life can reflect upon a member's role as such, and that the Code of Conduct should therefore apply to some conduct in a member's private life.
- 2.4 The government proposes that for the purposes of the Members' Code, the definition of criminal offence should be "any criminal offence for which the member has been convicted in a criminal court, but for which the member does not have the opportunity of paying a fixed penalty instead of facing a criminal conviction". *Consultation Question 2 is "Do you agree with this definition of "criminal offence" for the purpose of the members' code? If not, what other definition would you support, for instance should it include police cautions?"* Members may consider that the wording of the definition does not make it absolutely clear whether it is intended to refer to an offence for which a fixed penalty notice is not available, or to an offence for which the individual member was not given the option of a fixed penalty notice. A fixed penalty notice is sometimes available for relatively minor instances of what can be a serious offence. Members may feel that there may be circumstances where a fixed penalty notice is issued, but where the incident directly relates to a function of the Council and is relevant to the member's position as a member, and to which the Code of Conduct should be capable of applying. This is true likewise of police cautions, which may be administered for quite serious offences, to which the Code should perhaps be capable of applying. If all criminal offences, whether resulting in conviction, caution or fixed penalty, were included, the Assessment Sub-Committee would be able to take a view on the appropriate action, taking account of the relative seriousness of the matter.
- 2.5 The proposed definition of "criminal offence" relies on an actual conviction. This would appear to mean that there is no breach of the Code unless or until there is a conviction. This cross-references with Consultation Question 5 below. Members may wish to consider whether an actual conviction should form part of the definition, as the length of time that criminal proceedings may take may hamper the taking of action under the Code.

- 2.6 The government proposes that for the purposes of the Code, “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.” *Consultation Question 3 is “Do you agree with this definition of “official capacity” for the purpose of the members’ code? If not what other definition would you support?”* The definition would appear to be uncontroversial, but Members may wish to consider if they have any comments on it.
- 2.7 It is proposed that the Code will apply to a criminal conviction in a country abroad, where the offence was committed in that country, and would have been a criminal offence if committed in this country. *Consultation Question 4 is “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?”* This would appear to be uncontroversial. However, it is questionable why there should be a requirement for the offence and the conviction to have taken place in the same country.
- 2.8 *Consultation Question 5 is “Do you agree that an ethical investigation should not proceed until the criminal process has been completed?”* With the proposed definition of “criminal offence”, it would appear that a breach of the Code would only arise on conviction. Whilst it is recognised that it would be wrong to encourage a standards investigation which interfered with the criminal investigation, Members may feel that, with a different definition of “criminal offence”, it should be possible to take action against a member under the Code of Conduct without an actual conviction, where on the balance of probabilities there is evidence of criminal conduct. This will of course cross-reference with the answer to Consultation Question 2.
- 2.9 Other miscellaneous amendments to the Code of Conduct are proposed in the consultation paper, and *Consultation Question 6 is “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?”*
- 2.10 It is proposed that paragraph 12(2) of the Code should be made mandatory for parish councils. At present they have to make a positive decision if it is to apply. This would seem to be a sensible amendment, ensuring consistency between parish councils.
- 2.11 It is proposed that paragraph 8(1)(a)(i) and(ii) be amended to clarify that they refer to outside bodies and not the authority itself. The Monitoring Officer is not aware of any ambiguity here, but any clarification should be welcomed.
- 2.12 It is proposed that paragraph 8(1)(a) should be amended to clarify that a member is required to register a gift or hospitality with an estimated value of at least £25. Members may feel that the paragraph is currently unclear and suggests that the interests of the donor are required to be registered. It would be preferable if the paragraph made clear that the requirement is to register details of the gift or hospitality and its value, and the identity of the donor.
- 2.13 It is proposed to amend paragraph 10(2) to remove the double negative which can be confusing, and to clarify the meaning of “determining” in paragraph 10(2)(b). These proposals would seem uncontroversial.

- 2.14 It is proposed to amend paragraph 10(2)(c) to clarify that a member would not have a prejudicial interest in attending a standards committee hearing to give evidence. Again this would appear uncontroversial.
- 2.15 Members might wish to take this opportunity of repeating the suggestion that they have made in response to previous consultations, that the £25 threshold for gifts and hospitality should be increased to £100. £25 would barely cover a bouquet of flowers, and the threshold figure should perhaps be such an amount that might possibly influence a member's decision on a matter.
- 2.16 As currently worded, paragraph 11 precludes Cabinet members from attending Overview and Scrutiny meetings to answer questions about executive decisions they have made. The Standards Board has issued advice that the statutory power of Overview and Scrutiny to require the attendance of a member overrides this provision of the Code. However, Members may wish to suggest that the Code be amended to make this free from doubt, as it is unsatisfactory to rely on such advice when the Code clearly states the opposite.
- 2.17 *Consultation Questions 7 and 8 are "Are there any aspects of conduct currently included in the members' code that are not required, and are there any aspects of conduct in a member's official capacity not specified in the members' code that should be included?"*
- 2.18 The consultation paper indicates that the Code will be formatted in two parts, one for official capacity and one for non-official capacity. In addition to paragraph 5, the current Code contains two provisions, those relating to intimidation in respect of a standards investigation (paragraph 3(2)(c)) and using the position as member to confer an advantage or disadvantage (paragraph 6), which are covered by the Code even when the conduct is in non-official capacity, if it constitutes a criminal offence. It is not clear whether these provisions are intended to be replicated in the revised Code. The implication in the consultation paper is that conduct which could reasonably be regarded as bringing the office or authority into disrepute is the only category of conduct to which the Code will apply where the conduct is in a non-official capacity. Clarification of this should perhaps be sought.
- 2.19 Members are asked to identify any other aspects of conduct that they would wish to refer to in the Council's response to questions 7 and 8.
- 2.20 It is envisaged that once a revised Code is implemented, Members will be required to give an undertaking to observe the Code, notwithstanding that they have already given an undertaking in accordance with Section 52 of the Local Government Act 2000 to observe the authority's code "for the time being". *Consultation Question 9 is "Does the proposed timescale of two months, during which a member must give an undertaking to observe the members' code, starting from the date the authority adopts the code, provide members with sufficient time to undertake to observe the Code?"* The timescale would seem to be a reasonable one.
- 2.21 The government is proposing to amend the General Principles of conduct, which are established by Order and form a preamble to the Code, to make it clear that the ten existing Principles apply to conduct in official capacity, and to add a new principle which would apply to a member acting in a non-official capacity. This would be "Members should not engage in conduct which constitutes a criminal offence". *Consultation Question 10 is "Do you agree with the addition of this new general principle, applied specifically to conduct in a member's non-official capacity?"* Section 49(2A) of the Local Government Act 2000 requires that an Order specifying

the general principles must state that a principle applies to a person only when acting in an official capacity or that it applies to a person only when not acting in an official capacity. This appears to mean that one principle cannot apply to both official and non-official capacity. There is already a “Duty to Uphold the Law” in existing principle 8, and it does seem a little bizarre to have a new principle of a “Duty to abide by the law” which applies only to non-official capacity. The implication almost seems to be that there is no duty in official capacity not to engage in conduct which constitutes a criminal offence. Members may be of the view that it is not necessary to change the underlying general principles on which the Code is based.

2.22 Section 49 of the Local Government Act 2000 enables the Secretary of State to define what constitutes “criminal offence” and “official capacity” in the context of the General Principles Order. It is proposed that “criminal offence” will be defined as any conduct that has resulted in a criminal conviction. *Consultation Question 11 is “Do you agree with this broad definition of “criminal offence” for the purpose of the General Principle Order? Or do you consider that “criminal offence” should be defined differently?”* For the purposes of the General Principles Order, Members may feel that the definition should be restricted to criminal conduct “which compromises the reputation of the member’s office or authority, or their ability to perform their functions as a member”. There is also a dilemma as to whether the definition should be wide enough to cover criminal conduct which has resulted in a caution or fixed penalty notice.

2.23 It is proposed that the definition of “official capacity” for the purposes of the General Principles Order will be “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.” *Consultation Question 12 is “Do you agree with this definition of “official capacity” for the purpose of the General Principles Order?”* Members will note that this is the same proposed definition as for the Code of Conduct.

3.0 Details of Consultation

3.1 There has been no consultation on this report. The government has sent the consultation paper to all principal and parish councils giving them the opportunity to comment.

4.0 Options and Options Analysis (including risk assessment)

4.1 It is open to the Committee to decide not to respond to the consultation paper. However, if it wishes to respond, it may submit its views on any or all of the questions posed in the consultation paper. There are no specific options.

5.0 Conclusion

5.1 The Committee’s views are sought.

CONCLUSION OF IMPACT ASSESSMENT (including Diversity, Human Rights, Community Safety, Sustainability and Rural Proofing)

None arising from this report.

FINANCIAL IMPLICATIONS

There are no financial implications arising from this report.

SECTION 151 OFFICER'S COMMENTS

The Section 151 Officer has been consulted and has no further comments.

LEGAL IMPLICATIONS

Legal Services have been consulted and have no further comments.

MONITORING OFFICER'S COMMENTS

The report has been prepared by the Monitoring Officer in her role as adviser to the Standards Committee.

BACKGROUND PAPERS

None.

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