

## ACSeS response to: Standards Board for England Consultation on the Review of the Code of Conduct for Members

### Introductory comments:

The Association of Council Secretaries and Solicitors are pleased to submit this response to the Standards Board for England on its Review of the Code of Conduct for Members.

Should you require any clarification, please do not hesitate to contact me at Royal Borough of Kensington and Chelsea or Mirza Ahmad, Chief Legal Officer, Birmingham City Council on 0121 303 9991, who is the Association's lead officer on the Ethical framework.

This paper follows the order of questions raised by the Consultation Paper and the Association uses the opportunity to raise some other comments at the end of this paper. The Association is happy with its response being published.

### The General Principles

#### **Q1. Should the ten General Principles be incorporated as a preamble to the Code of Conduct?**

A1 Yes, as a useful preamble, with 'leadership' being the first principle. A failure of the preamble should not, however, be considered a breach of the Code of Conduct for Members. The ten General Principles should also be extended to any legal, voluntary or community organisation / public body dealing with or having any engagement or involvement with a local authority.

The General Principles should also be strengthened, as per recommendations of the Graham Committee's research findings re 'Honesty & Integrity', and to impose a legal requirement on such bodies to review on a periodic basis – say, three-yearly – their corporate and ethical framework governance arrangements so as to ensure compliance with best practice and Members / Officers remain in touch with best practice. If a public body finds this not to be the case, there should then be a positive obligation on the same to insist relevant Members / Officers attend compulsory training and development.

#### **Q2 Are there any other principles which should be included in the Code of Conduct?**

A2 The recent research by the Graham Committee concluded that the definition of "honesty" should be strengthened. Furthermore, see the details set out in A1.

## Disrespect and freedom of speech

**Q3 Is it appropriate to have a broad test for disrespect or should we seek to have a more defined statement?**

A3 In light of case law, we are sure it would be possible to define a broad test for disrespect which would then be clear to all, as opposed to simply relying upon a lawyer's awareness / interpretation of case law and the current 'thinking' of The Standard Board for England's practice in such matters.

It is, however, recognised that a definition might be difficult to devise that would cover all conceivable circumstances. Alternatively, therefore, the SBE might wish to consider giving appropriate examples in any further guidance that it might issue to support any revised Code of Conduct for Members - especially in the area of 'disrespect and freedom of speech'; or put in another way: the link between robust political debate and personal rancour and opprobrium.

The Revised Code should, of course, avoid 'local' culture / values of local authorities and retain a 'national' perspective and application of the Code. This does, not, however, mean that the current centralised approach should be retained. As per the Graham Committee's recommendations, our Association, on balance, believes that where Standards Committees and Monitoring Officers require it, they should be the first point of complaint handling and matters should not be referred automatically to the Standards Board for England for consideration and possible referral by it to local Standards Committees.

**Q4 Should the Code of Conduct include a specific provision on bullying? If so, is the ACAS definition of bullying quoted in the full consultation paper appropriate for this?**

A4 Most good local authority Protocols on Member / Officer Relations already include provisions relating to bullying, harassment, victimisation etc by Members. Local Standards Committees will, therefore, be best placed to deal with local issues and to refer "appropriate / serious cases" (to be determined) against leading and other members to The Standards Board for England. An appropriate definition for 'bullying' might also be worth considering, if a corporate standard of acceptable behaviour across England is considered achievable. The 'Bullying Taskforce' might suggest a common definition for such purpose and separate definitions on the same point should be resisted, if at all possible.

The ACAS definition of bullying is too narrow and should not be restricted to a pattern of behaviour, but should include single incidents. The absence of a pattern is an issue in mitigations - i.e. the fact that a member may not have a particular disposition towards bullying behaviour should not mean that they are not in breach of the Code.

## Confidential Information

**Q5 Should the Code of Conduct contain an explicit public interest defence for members who believe they have acted in the public interest by disclosing confidential information?**

A5 No. However, if it is to be used it must correlate to the FOIA, where the Monitoring Officer / Head of Paid Service would have allowed disclosure in the public interest. Some correlation with / link to the Freedom of Information requirements may, of course, strengthen the Code of Conduct for Members and be of benefit in progressing this matter. However, if a member wishes to question / challenge the appropriateness of any 'confidential label' attached to a committee report or any other information, it should be done through established local authority procedures / Courts and not a 'free for all' approach. Some guidance to accompany the Revised Code might, therefore, be of some assistance to reinforce the need for confidentiality and to act within established internal procedures of the local authority.

To do so otherwise, might mean that the conduct of local government will become unworkable if elected members believe that they have the 'right' to disclose confidential information which, in their opinion, should not have been labelled as being confidential and where disclosure might be appropriate on public interest grounds. To do so otherwise might also give rise to difficulties of enforcement re the Freedom of Information Act exemptions by the local authority and it seems totally disproportionate to apply a further 'public interest test' in the Code of Conduct for Members.

**Q6 Do you think the Code of Conduct should cover only information which is in law "exempt" or "confidential", to make it clear that it would not be a breach to disclose any information that an authority had withheld unlawfully?**

A6 Interpretation of information "withheld unlawfully" will be a difficult one to monitor / enforce, as some councillors, for personal or party political reasons, may, intentionally or inadvertently ignore the law / case judgements, with a view to gaining publicity / electoral advantage or to test the limits of the law and practice in such areas. Furthermore, it is wrong for a councillor to form the view that a local authority had acted "unlawfully" as it is a matter for the courts and not dependent on the opinion of "non-lawyers".

Furthermore, a 'drift' into this area for the SBE might place it in a position of the Courts in having to 'define' what was or was not 'confidential information' under the Local Government Act 1972 – i.e. exempt or confidential information. This seems to be a significant departure in terms of the role of the SBE from their focus on dealing with the conduct of elected members.

The current position of the Monitoring Officer deciding, subject to any Overview & scrutiny challenge and/or application for a Judicial Review challenge and /or challenge by way of an appeal under FOIA to the Information Commissioner / High Court are already sufficient safeguards for members and the public. Additional safeguards from the SBE are not considered appropriate or desirable and will, invariably, lead to confusion in

processes and dual tracking by those who wish to adopt a scatter gun approach to litigation an/or gain publicity for the cause.

## **Disrepute and private conduct**

**Q7 Should the provision relating to disrepute be limited to activities undertaken in a member's official capacity or should it continue to apply to certain activities in a member's private life?**

A7 Disrepute should be limited to official capacities; although it is clear that a member's conduct in private life "may" have a direct impact and effect on his official capacity. If the impact is, on balance, that a reasonable member (knowing all the relevant facts and being of ordinary sensibilities) should have known / been mindful of at the time of committing the private life action, s/he should be held to be accountable / responsible for the same and that should then be the trigger for bringing such matters, objectively, within the official capacity behaviour.

This objective 'reasonable member' test will provide some safeguards and protection under the Code to allegations of any breaches under the Human Rights Act and/or European Convention on Human Rights and Fundamental Freedoms.

**Q8 If the latter, should it continue to be a broad provision or would you restrict it solely to criminal convictions and situations where criminal conduct has been acknowledged?**

A8 The objective 'reasonable member of ordinary sensibilities' test, set out in A7, should suffice as the matter under consideration may extend beyond criminal activities or actual convictions – which, of course, may take years to conclude. Allegations against members of criminal activity, of course, have no merit unless and until determined by the Courts.

In answer to questions 7 and 8, the Code should continue to apply to certain activities in a member's private life, where the member's conduct is likely to materially affect public confidence in that member to carry out his or her role and a reasonable member of the public of ordinary sensibilities would think that a member's conduct is likely to bring the authority into disrepute.

This is a narrower test than the conduct being "likely to compromise the reputation of the authority" which, arguably, could be affected by any misconduct in the private life of its elected members. This narrower test would include more than just criminal convictions, but would produce different results, for example, according to the particular member's responsibilities within the council – for example a serious traffic offence might affect public confidence in the member's ability to carry out executive functions relating to road safety and highways.

A presumption in the Revised Code, and / or accompanying Guidance to it, might be helpful in making it clear that what members do in their private lives will not be taken into account, unless and until the issues in their private lives are found to be so closely related to their official duties / conduct that reasonable members of the public, knowing all the facts and being of ordinary

sensibilities, would regard such private behaviour / conduct as bringing the Council into disrepute.

There is also an inherent contradiction between the Local Government Act 1972 and the Code of Conduct, in that a member may be disqualified under the Local Government Act at the point of nomination, but they may receive a criminal conviction during their term of office and still remain as a member whilst they are being investigated by the SBE or Adjudication Panel.

## **Misuse of Resources**

**Q9 We believe that the Code should prohibit breaches of the publicity code, breaches of any local protocols, and misuse of resources for inappropriate political purposes. Do you agree?**

A9 No. There should be no backdoor to 'automatic incorporation' of local Protocols into the National Code of Conduct for Members, as this will give rise to different / various standards and consistency (or perceived consistency of SBE/APE decisions). ACSeS does not, therefore, recommend the automatic incorporation of the same or see any need to incorporate the publicity code into the Revised Code. Similarly, ACSeS does not feel any need to define 'inappropriate political purposes', as the SBE should continue to apply the same as a 'filtering' mechanism and not as a 'breach of the code' trigger.

**Q10 If so, how could we define "inappropriate political purposes"?**

A10 No, as per the reasons set out in Answer 9.

**Q11 Is the Code of Conduct right not to distinguish between physical and electronic resources?**

A11 Yes. All resources, no matter how created or stored should be covered.

## **Duty to report breaches**

**Q12 Should the provision of the Code of Conduct that requires members to report breaches of the Code by fellow members be retained in full, removed altogether, or somehow narrowed?**

A12 This has been a particularly onerous and unrealistic provision for elected members. Members should, therefore, be in the same position as ordinary members of the public - or others who are subject to professional Codes of Conduct - who are not legally required to report matters to the relevant authorities.

Alternatively, the provisions could be amended to enable any complaint to be first reported to the Chairman of the local Standards Committee and/or the Monitoring Officer, so as to allow for some form of 'filtering' or the adoption of a relatively 'reasonable explanation' route. ACSeS favours, therefore, alternative dispute resolution procedures, such as mediation and conciliation.

Such procedures should be at the discretion of local Standards Committees / Monitoring Officers and not to be relied upon only in those circumstances where the SBE have 'directed' the same to be considered or used.

The SBE is encouraged, therefore, to reiterate its support for the Monitoring Officers resolving disputes before formal complaints are submitted to the SBE, where this can be done to the satisfaction of the complainant and the member who is the subject of the complaint.

The argument that paragraph 7 of the Code of Conduct for Members is needed to protect whistleblowers is unsustainable. An explicit protection could be drafted for whistleblowers without a positive duty on members to report possible breaches. Such a positive duty is disproportionate.

Paragraph 7 of the Code, therefore, should be removed altogether, or at most replaced by advice to members that if they are concerned about a possible breach, they MAY report the matter to their Monitoring Officer or Chairman of the Standards Committee and Group Leader.

There should be an explicit protection to those who raise complaints, protecting them from any action within their group or within the Council as a result of their raising the complaint, unless the complaint is malicious.

The exclusion of protection (under the Revised Code or through Guidance) for "politically motivated allegations" may, of course, act as a deterrent for members to raise issues of concern to them. Statutory protection is, however, sufficiently available for a bona fide whistleblower under the Public Interest Disclosure Act and 'double protection' is not considered appropriate or desirable.

**Q13 If you believe the provision should be narrowed, how would you define it? For example, should it apply only to misconduct in a member's public capacity, or only to significant breaches of the Code?**

Q13 Further to A12, the obligation could be "narrowed" to matters that a particular member has personal knowledge of and if the matter is of a particularly "serious" nature.

**Q14 Should there be a further provision about making false, malicious or politically-motivated allegations?**

A14 No. ACSeS believes that no provisions are necessary in the Revised Code for false, malicious or politically-motivated allegations. The SBE should, however, announce its clear commitment and intent to use the same to filter out such complaints.

**Q15 Does the Code of Conduct need to provide effective protection for complainants against intimidation, or do existing sections of the Code of Conduct and other current legislation already cover this area adequately?**

A15 The current provisions have not, to our knowledge, caused any difficulties for complainants; even though, Heads of Paid Service and Monitoring Officers have - based on evidence appearing in newspapers and Courts - come under

personal pressure from members when official complaints have been made against members.

It may be that there is more of a case for protecting existing officer and councillor complainants by making it clear in the Code of Conduct that it will be a breach of the Code of Conduct for any member to interfere, harass, victimise, bully or in any other way influence or adversely effect the complainants with regard to any complaints brought against the member.

## Personal Interests

### **Q16 Do you think the term 'friend' requires further definition in the Code of Conduct?**

A16 The Standards Board for England's Guidance on "friend" has stood the test of time and it could now be incorporated into the Code of Conduct for Members if felt to be really essential / necessary. We are not convinced the definition is essential / necessary to be incorporated, at this stage, in the development of the Code of Conduct for Members.

It might be helpful, however, if paragraph 8.1 of the Code could be amended to make it clear that declarations can only relate to interests of a relative or friend where the member is aware of such an interest or should reasonably have been aware.

### **Q17 Should the personal interest test be narrowed so that members do not have to declare interests shared by a substantial number of other inhabitants in an authority's area?**

A17 Open and transparent local governance is essential for a healthy democracy. We are not convinced, therefore, that the personal interest test is causing any major difficulties in the principal local authorities or that it needs to be narrowed. The same, however, is not the case for "prejudicial interests" for which further amendments are needed and comments made later in this submission. On a practical point, however, members are aware that they need to declare their interests, but do not give – as required by the Code – the nature of their interests. The interest can not, therefore, be properly recorded and, as such, might disadvantage the member/local authority in the future. The paragraph wording should be revisited to ensure the nature of the interest is 'recorded'.

Paragraph 8.1 of the Code requires clarification on the relationship between the requirement to declare registered interests and an interest which affects the member more than anyone else. Firstly, the paragraph should be drafted more clearly to differentiate between the two types of personal interest (registered interests and others). It should also be made absolutely clear to which category of interest the test applies.

Further, in the drafting of the test at present, it is not clear whether the reference in paragraph 8.1 of the Code of Conduct to "...a decision upon it might reasonably be regarded as affecting to a greater extent than other council tax payers etc..." only applies where the member's interest is greater than all the inhabitants of the authority's area; if that is the proper interpretation

of paragraph 8.1, then in practice, members would be able to avoid declarations which reasonable people would think they would have to make. It would be better, therefore, as suggested in paragraph 5.1.7 of the consultation document, to amend the Code to require a declaration if the member's interest is greater than those of a substantial number of people (i.e. a Ward) rather than of the people in the area of the whole of the local authority.

**Q18 Should a new category of "public service interests" be created, relating to service on other public bodies and which is subject to different rules of conduct?**

A18 No. ACSes is not convinced a new category of 'public service interest' is needed.

There should, however, be a provision in the Revised Code to the effect that the member must abide by any rulings of the Monitoring Officer on law (including the Common Law) and best practice guidance on the ethical framework. The presumption of a fair trial, with no degree of bias or predetermination of decision should, therefore, be inserted into the Revised Code so as to ease understanding by all. Their clear 'absence' from the Code has led some members to unnecessarily question and challenge whether the lawyer is 'making things up'. It follows that a failure to abide with the Monitoring Officer's advice will be a breach of the Code.

Such provisions are, in particular, difficult to accept by those in executive or special responsibility positions as lawyers are then perceived as 'stopping' the same from carrying out what they regard as being their 'roles and responsibilities'. Their incorporation will also make the Revised Code a 'whole system', instead of the current 'partial system'.

In practical terms, it would also be useful to change the system so that already registered interests of members, which are on the website, need not be declared each time and the Monitoring Officer should have the power to 'add' any member's appointments, if made by the local authority, into the members register as a matter of record. This will ease the administrative burden on members.

**Q19 If so, do you think public service interests which are not prejudicial and which appear in the public register of interest should have to be declared at meetings?**

A19 In light of our Answer to Q18, this question is no longer applicable.

**Q20 Do you think paragraph 10 (2)(a-c), which provides limited exemption from the prejudicial interest rules for some members in certain circumstances, should be removed from the Code of Conduct?**

A20 No, if our Answer to Q18 is incorporated into the Revised Code.

**Q21 Do you think less stringent rules should apply to prejudicial interests which arise through public service and membership of charities and lobby groups?**

A21 In light of our Answer to Q18, this question is no longer applicable.

As respects lobby groups, these should be treated with caution as they have the greatest potential to cause conflict issues and confusion in the minds of the electorate / citizens of an area and the relevant member concerned in terms of ensuring clarity of roles and purpose. The recent SBE guide on lobby / pressure groups is particularly helpful and should be incorporated into the Revised Code to make it more a 'whole system' approach. Currently, members become agitated when lawyers introduce Common Law principles to exclude member involvement.

## Prejudicial Interests

**Q22 Should members with a prejudicial interest in a matter under discussion be allowed to address the meeting before withdrawing?**

A22 There are finely balanced legal and policy arguments on this matter. On the one hand the powerful argument in the Richardson case about public perception is sound. However, another school of thought is that by requiring Members to withdraw from quasi-judicial hearings such as licensing and planning matters means they are disenfranchised and their human right to a fair hearing is denied.

The Code needs to take into consideration these two finely balanced arguments.

**Q23 Do you think members with prejudicial public service interests should be allowed to contribute to the debate before withdrawing from the vote?**

A23 As per answer to Q22 – No!

## Registration of Interests

**Q24 Should members employed in areas of sensitive employment such as the security services, need to declare their occupation in the public register of interests?**

A24 On balance, members should be given some latitude and flexibility in this area by allowing to withhold "some" information – on the grounds of proven / legitimate security concerns – not just general concerns to retain information as 'confidential' from the public - but would still be required to make known such information to the Monitoring Officer.

**Q25 Should members be required to register membership of private clubs and organisations? And if so, should it be limited to organisations within or near an authority's area?**

A25 No. Paragraph 5.3.7 of the consultation document suggests that public perception is that relationships and interests arising through common membership of clubs **could** represent a significant body of influence. The SBE also argues in paragraph 5.1.3 of the consultation that mutual membership of the same body does not imply mutual friendship. It is difficult to see, therefore,

why common membership would represent significant threat to the reputation of local government. If, nevertheless, the other member is a personal friend, then other provisions of the Code should apply.

ACSeS recognises, however, that some local authorities may wish to add to their local codes and the current flexibility for doing so should be retained.

## **Gifts and Hospitality**

**Q26 Should the Code of Conduct require that the register of gifts and hospitality be made publicly available?**

A26 Yes. Some local authorities already make their Registers of Gifts and Hospitality available through their websites, along with their Registers of Members Interests.

**Q27 Should members also need to declare offers of gifts and hospitality that are declined?**

A27 There is a mixed view, based on local practice, and as such it should be left to local authorities to determine, as necessary, and not for national prescription.

**Q28 Should members need to declare a series of gifts from the same source, even if these gifts do not individually meet the threshold for declaration? How could we define this?**

A28 Yes, as the cumulative effect of a series of gifts may go over the £25 limit. Furthermore, some greater flexibility is necessary in this area as it is evidently clear - from three years of monitoring requirements - that not many members are offered or receive gifts / hospitality over £25.

**Q29 Is £25 an appropriate threshold for the declaration of gifts and hospitality?**

A29 As Monitoring Officers, we believe the limit is appropriate and reasonable; although we are aware that some authorities would appreciate a much higher limit of, say, £100. In addition, the Revised Code ought to make it clear that the gifts and hospitality must be in relation to 'official duties' and not purely private or non-council business matters - e.g. birthdays, anniversaries etc.

## **Concluding and related remarks**

ACSeS also takes the opportunity to reinforce the following comments:-

- (i) We do not support the current highly centralised approach adopted by the legislation and the SBE. As the Graham Committee makes clear, the Government and the SBE need to address this to the satisfaction of those who prefer a first point of complaint to the local Standards Committees;
- (ii) The SBE, like the Local Government Ombudsman, should be a strategic regulator and an investigator of last, not first, resort;

- (iii) It follows from the last two comments, that local Standards Committees should be permitted to review, say on a two yearly basis, and be permitted to make changes to 'their' and the national Code of Conduct. Local authorities should not have to wait for a national review / implementation of changes to improve the Code of Conduct for Members. The inherent delays can not be good for local governance;
- (iv) Statutory protection to Deputy Monitoring Officers should be considered as recommended by the Teesside University Research on Supporting Monitoring Officers. ACSeS accepts that this is really a matter for the Government, but the SBE's proactive support will be most helpful in delivering on the change;
- (v) By equal merit, SBE and the Government is encouraged to make a changes in the law requiring local authorities to comply with best practice and recognise the important role of Monitoring Officers by ensuring Monitoring Officers become, as of right, members of the local authority's Corporate Management Teams; and
- (vi) ACSeS would encourage the Government and the SBE to pass some of their revenue savings to local authorities for dealing with referrals from the Standards Board for England.

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