

## **THE LOCALISM ACT 2011 - A NEW ETHICAL FRAMEWORK**

*Reporting Officers: Raj Alagh, Borough Secretary and Monitoring Officer and Lloyd White, Head of Democratic Services*

### **SUMMARY**

1. The Localism Act 2011 ["the Act"] makes a number of significant changes to the ethical framework for Members and co-opted members of local authorities as it appeared in the Local Government Act 2000.
2. This report summarises these changes and sets out the steps which the Council has already taken, and which it still needs to take, in order to comply with the requirements of the Act.

### **RECOMMENDATIONS: That:**

1. **the report be noted.**
2. **the Committee give its comments on the draft new code of conduct for Members and co-opted members (Appendix 1).**
3. **the Committee give its views on whether the Council should continue to have a Standards Committee and three Sub-Committees set up under it, once the Act comes into force.**
4. **the changes made to the law on predetermination by the Act and the consequent amendment which needs to be made to the Council's Planning Code of Conduct be noted.**
5. **a further report from the Borough Solicitor and the Head of Democratic Services be submitted to the next meeting which will ask the Committee to make a number of recommendations to full Council which will give full effect to the changes made to the ethical framework for Members and co-opted members by the Act.**

### **BACKGROUND INFORMATION**

3. The Act received Royal Assent on 15 November 2011. Chapter 7 prescribes a new ethical framework for Members and co-opted members of local authorities. A co-opted member is defined to include an individual who is not a member of the authority but who is a member of any committee or sub-committee of the authority and is entitled to vote on any question that falls to be decided at any meeting of that committee or sub-committee.

### **Duty to promote and maintain high standards of conduct**

4. Section 27 of the Act requires the Council to promote and maintain high standards of conduct by its Members and co-opted members and in discharging this duty, it must adopt a code of conduct.

5. The Act is much less prescriptive than the 2000 legislation in terms of what such a code must contain and this is exemplified by the fact that it has dispensed with the requirement that the Council must adopt a model code.
6. However, Section 28 of the Act requires that any code which is adopted by the Council has to be consistent with the following seven principles [commonly known as the Nolan principles of standards in public life]:
  - selflessness;
  - integrity;
  - objectivity;
  - accountability;
  - openness;
  - honesty;
  - leadership.
7. Furthermore, a code has to provide for what the Council considers appropriate in respect of the registration in its register and disclosure of both pecuniary and non-pecuniary interests.
8. The Act requires the Council to either revise its existing code of conduct or to adopt a replacement code. Members of the Committee will recall that they agreed at a previous meeting that a Working Group be set up to consider a new code for the Council's Members and co-opted members and a draft code produced by this Group is attached at Appendix 1. The views of the Members of the Committee are sought in relation to the draft code in light of the Act and their attention is drawn to the changes made in relation to interests [see paragraphs 24-26 below] which have not been incorporated in the draft for the reasons explained in paragraph 26.
9. The draft code is largely based on the existing code but the following amendments have been made to it:
  - The ten general principles of public life which underpin the current code are set out at the beginning of the code and the intention is that they should now form part of the code itself (paragraph 1(2));
  - The code will apply to Members and co-opted members in their personal lives where the conduct results not only in a criminal conviction but also where it results in a police caution being administered to them (paragraph 2(2)(ii));
  - In paragraph 3(2)(b), the code is more specific about the general obligation imposed on Members and co-opted members by adding the words, '*including any officer of the Council*' at the end of the paragraph.
  - In paragraph 4(a), the code is more specific about the general obligation imposed on Members and co-opted members by adding the words, '*including Part II information as defined in the Local Government (Access to Information) Act 1985*' at the end of the paragraph.
  - The inclusion of a new appendix – the Whips Protocol – to formalise the process whereby the initial referral of complaints against Members to the appropriate whips office becomes established procedure.

## **Standards Committee**

10. The Act repeals section 53 of the Local Government Act 2000 which makes it mandatory for a local authority to have a Standards Committee. Therefore, there will be no compulsion on the Council to have such a Committee in place. However, there will still be a need to have a mechanism to deal with complaints that the code has been breached. For example, the Act requires the Council to have in place arrangements under which firstly, complaints can be investigated and secondly, decisions on complaints can be made; however, no details of these arrangements are provided in the Act. Furthermore, the Council will still need to promote and monitor high standards of conduct and help Members and co-opted members comply with the code of conduct; these functions fall within the remit of its current Standards Committee. Therefore, the views of Members of the Committee are sought as to whether this Committee and the three Sub-Committees set up under it should continue. In particular, views as to whether the Review Sub-Committee should remain in place would be welcome (previously the Committee have indicated that the Review Sub-Committee should be discontinued).

## **Breaches of the Code and Sanctions**

11. If the Council finds that one of its Members or co-opted members fails to comply with its new code of conduct, it may have regard to that failure in deciding firstly, whether to take action in relation to the Member or co-opted member and secondly, what action to take.
12. The Act does not prescribe, save for one exception (see paragraph 37 below), what sanctions the Council may impose in the event that a finding is made that one of its Members or co-opted members has contravened the provisions of the Code. However, it does envisage that some action can be taken against them.
13. Contrast this with the position under the Local Government Act 2000 where a range of sanctions that were available to local authorities was expressly provided for. Examples of these sanctions are suspension of Members or co-opted members for a period up to six months and restriction of their access to Council premises for a period up to six months.
14. Therefore, the Association of Council Secretaries and Solicitors (the professional association representing Monitoring Officers in England and Wales) commissioned an opinion from a QC, specialising in local government law, requesting advice in relation to what possible sanctions may be imposed by local authorities under the Act. A copy of the QC's advice has been made available to the Borough Solicitor and it can be summarised as follows.
15. The QC advises that, as the Act is silent on the measures that can be taken against a Member or co-opted member who breaches the code, it is necessary to examine common law principles. The theme which emerges from established case law is that the common law does not afford local authorities the ability to issue sanctions that interfere with local democracy.
16. It follows that it will not be open to the Council to suspend or disqualify one of its Members. Nor will there be a power to exclude Members from meetings as a

disciplinary sanction. Members are democratically elected to serve in that role, and there would be a very strong presumption that only statute can confer a power to interfere with the will of the local electorate by removing them from their role or interfering generally with the performance of their duties.

17. As for the imposition of other sanctions, the QC's general view is that the range of measures available to local authorities is very limited. He advises that it is possible for authorities to impose the following sanctions in accordance with common law principles:
- Send the Member a formal letter;
  - The authority, or a committee of the authority, can issue a formal censure to a Member through a motion;
  - Issue a press release or otherwise publicise a decision that a Member has breached the authority's code of conduct;
  - Remove a Member from a committee of an authority provided that this decision is made by the Council itself following agreement from the relevant party group, and not by a committee of the authority.

### **Independent Members**

18. The Council's current Standards Committee has three independent, co-opted members appointed to it which include the Chairman and Vice-Chairman. Under the Act, the appointments of these independent members will come to an end.
19. The Act envisages a new role for an independent person which is set out in section 28[7] which states that there must be provision for the appointment by an authority of at least one independent person-
- a) whose views are to be sought, and taken into account, by the authority before it makes its decision on an allegation that it has decided to investigate, and
  - b) whose views may be sought-
    - (i) by the authority in relation to an allegation in circumstances not within paragraph [a],
    - (ii) by a Member, or co-opted member, of the authority if that person's behaviour is the subject of an allegation, and
    - (iii) by a Member, or co-opted member, of a parish council if that person's behaviour is the subject of an allegation and the authority is the parish council's principal authority.
20. The definition of an independent person is set out in section 28[8] which makes it clear that a person is not independent if the person is-
- a) a Member, co-opted member or officer of the authority,
  - b) a Member, co-opted member or officer of a parish council of which the authority is the principal authority, or
  - c) a relative, or close friend, of a person within paragraphs (a) and (b) above.
21. Section 28[8] also makes it clear that a person may not be appointed as an independent person if at any time during the previous 5 years the person was a Member, co-opted member or officer of the authority.

22. A person may not be appointed as an independent person unless-
  - a) the vacancy for an independent person has been advertised in such manner as the authority considers is likely to bring it to the attention of the public,
  - b) the person has submitted an application to fill the vacancy to the authority,
  - c) the person's appointment has been approved by a majority of the Members of the authority.
23. All three of the Council's current independent members fall within the definition of a co-opted member i.e. they are members of a Council committee, the Standards Committee, and they are entitled to vote on any question that falls to be decided at a meeting of this committee.
24. Although the wording in section 28(8) is clear, the QC's advice was also sought in relation to independent members and his clear view is that the current independent members of an authority will have to wait a further 5 years before they can reapply to become independent members.

### **Disclosable Pecuniary Interests and the Register of Members' Interests**

25. The Act abolishes the concepts of personal and prejudicial interests and is replaced by pecuniary and non-pecuniary interests instead. A Member or co-opted member of the Council will be required to register a Disclosable Pecuniary Interest [DPI] in a register of interests which the Monitoring Officer must maintain within 28 days of becoming a Member or co-opted member. The Monitoring Officer must also register any other interests which are notified to him.
26. DPIS are to be defined in regulations which have yet to be issued. It is anticipated that their definition will be in line with personal and prejudicial interests and will therefore include not only a Member's own interests but also those of his spouse or civil partner, or someone living with the Member in a similar capacity.
27. This means that in practice it has not been possible to define DPI's in the draft new code produced by the working group [Appendix 1] and the reference to personal and prejudicial interests has therefore remained. The draft code will need to be re-examined once the Government issues the regulations referred to in the above paragraph.

### **Disclosure of Interests and Withdrawal from meetings**

28. As set out above, DPIS are likely to be broadly equivalent to personal and prejudicial interests but there are some important differences. The current duty to disclose an interest and withdraw arises whenever a Member or co-opted member attends a meeting of full Council, Cabinet, a committee or sub-committee and is aware that he/she has a personal and prejudicial interest in any matter being considered at the meeting. In such a situation, the Member or co-opted member must declare the nature and existence of the interest at the meeting. However, a change to the current requirements is that the Member does not need to make such a declaration in circumstances where he/she has already registered the DPI.

29. If the DPI is not registered or is not the subject of a pending notification, the Member or co-opted member must notify the Monitoring Officer of the DPI within 28 days of the declaration.
30. Where a Member or co-opted member has declared a DPI in relation to any matter, they may not participate in any discussion of the matter at the meeting and they must also not vote on the matter. The same principles apply to single Members acting alone i.e. Cabinet Member decision making. In these circumstances, the Cabinet Member must not take any further steps in relation to the matter.
31. The Council's Standing Orders can be amended to set out the circumstances in which a Member or co-opted member should withdraw from a meeting while any discussion or vote takes place.
32. It is important to note that where a Member or co-opted member fails to register or declare a non-pecuniary interest, this will amount to a breach of the code of conduct and it will not constitute a criminal offence. Contrast the position with a DPI (see paragraph 38 below).

### **Sensitive Interests**

33. The Act repeats the existing provisions on Sensitive Interests such that where a Member or co-opted member is concerned that the disclosure of the details of the interest (which could be both a DPI and a non-pecuniary interest) would lead to them, or someone connected to them, being subject to violence or intimidation, they may request the Monitoring Officer to agree that it is a "sensitive interest".
34. If the Monitoring Officer agrees, the Member or co-opted member only has to disclose the existence of an interest, rather than the detail of it, at a meeting and the Monitoring Officer can also exclude the details of the interest from the published version of the register of interests.

### **Dispensations**

35. Currently, a Member or co-opted member who has a prejudicial interest in a matter may apply to the Standards Committee for a dispensation under two specified grounds.
36. Under changes made by the Act, the Council will be able to grant a dispensation for Members or co-opted members to be able to participate in or vote at meetings where they have a DPI, on receipt of a written request. A dispensation can be granted in the following circumstances:
  - a) That so many Members and co-opted members of the decision making body have DPIs in a matter that it would 'impede the transaction of the business'. In practice, this means that the decision making body would be inquorate.
  - b) Without a dispensation, the political balance of the decision making body would be so upset as to alter the likely outcome of any vote on the matter.
  - c) The authority considers that granting the dispensation is in the interests of persons living in the authority's area.

- d) Without a dispensation, no member of the Cabinet would be able to participate in any particular business of the Cabinet.
37. Any dispensation which is granted must specify how long it lasts for but the maximum period must not exceed 4 years. The Standards Committee should continue to have responsibility for granting dispensations.

### **Offences**

38. Under the existing code of conduct, if a Member fails to declare a personal or prejudicial interest, this constitutes a breach of the code. The Act has fundamentally changed this and provides for criminal sanctions in the Magistrates Court - a fine not exceeding level 5 on the standard scale - where a Member or co-opted member fails to register or declare DPI's or takes part in Council business at meetings or when acting alone when prevented from doing so. Furthermore, the Court considering whether an offence has been committed under this section may 'disqualify the person, for a period not exceeding five years, for being or becoming [by election or otherwise] a Member or co-opted member of the authority in question or any other authority'.
39. The prosecution must be brought by or on behalf of the Director of Public Prosecutions, and must be brought within 12 months of the DPP having the evidence to warrant prosecution and within three years of the offence being committed.

### **Predetermination and the Planning Code of Conduct**

40. Section 25 of the Act has made changes to the law on predetermination although the common law rules on bias remain as they are. Although the changes apply to all decision making by Members, nevertheless they principally apply to the areas of planning and licensing. The Monitoring Officer has sent a Briefing Note to all members of the Council in relation to section 25 which will be reproduced in the Planning Code of Conduct.

### **Transitional Provisions**

41. It is anticipated that Standards for England will be abolished by 31 March 2012 and there will be no requirement to have a Standards Committee with effect from July 2012, although the exact date has not yet been confirmed.
42. Transitional and savings provisions in the Act have the effect that any cases under investigation by Standards for England on 31 January 2012 are sent back to be dealt with by the Standards Committee of the authority of which the person under investigation is a Member or co-opted member. Only existing cases pending before the First Tier Tribunal are to be completed.
43. The right to appeal to the First Tier Tribunal will be removed. Therefore, only decisions made by local authorities in relation to breaches of a code of conduct will most likely be challenged by bringing proceedings for judicial review in the High Court.

## **CONSULTATION CARRIED OUT OR REQUIRED**

44. The Act does not require local authorities to undertake any form of consultation prior to implementing its requirements.

### **Financial Implications**

45. There are no specific financial implications arising from this report. However, the adoption of a Whips Protocol will hopefully assist in resolving complaints without having to resort to expensive, independent investigations.

### **Legal Implications**

46. The legal implications are contained in the body of the report.

BACKGROUND PAPERS: None.