

# **THE CODE OF CONDUCT AND RELATED ISSUES**

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## STATUTORY STARTING POINT

1. The current ethical standards framework for local government derives of course from Part III of the Local Government Act 2000. This introduced a set of measures which were intended to clarify and strengthen standards of conduct within local government. Part III (Sections 49 to 83 inclusive and Schedule 4) creates a statutory structure to guide and regulate member conduct. It applies to “relevant authorities”, as defined by Section 49(5).

2. Chapter I of Part III enabled the Secretary of State (“the SoS”), by order, to specify the principles which are to govern member conduct in “relevant authorities” in England and police authorities in Wales. The National Assembly for Wales (“the NAW”) has this power in relation to relevant authorities in Wales, other than police authorities. The SoS and NAW were also given power to issue a Model Code of Conduct setting out the standards of behaviour expected of members and co-opted members of the “relevant authorities”.

3. Upon the Model Code being issued, the “relevant authorities” would be required to adopt their own local Code. It at least must include the mandatory provisions of the Model Code. It may include any optional provisions and any additional provisions at the discretion of the authority provided they are consistent with the Model Code. LGA 2000 further required any member or co-opted member of the relevant authority to undertake to observe that authority’s Code.

4. LGA 2000 further required each relevant authority to establish a Standards Committee comprising at least two members of the authority (excluding the executive mayor or executive leader) and at least one independent person. The SoS or NAW may issue regulations regarding the composition and functions of the Standards Committee. LGA 2000 specifies the general functions of Standards Committees as being to promote and maintain high standards of conduct by members and co-opted members and to assist members and co-opted members to observe the authority’s Code of Conduct. The NAW may issue guidance with regard to the exercise of functions by Standards Committees.

5. Chapter 2 of Part III established the Standards Board for England (“the Board”). The Board has a statutory obligation to appoint Ethical Standards Officers (“ESOs”). Allegations of misconduct may be made to the Board. ESOs are given the power to investigate cases referred by the Board and to

determine certain findings. ESOs may refer cases on to the relevant Adjudication Panel (“the Panel”) or to the Monitoring Officer (“MO”). Chapter 3 of Part III provided similar powers in respect of the Commissioner for Local Administration in Wales.

6. Chapter 4 established the Panel for England and the Panel for Wales, with members appointed by the Lord Chancellor and NAW: see Section 75. It requires the President of the Panel to establish a Case Tribunal to consider any matter referred by him on the basis of an investigation report. A person subject to an adjudication is given rights of representation: see Section 77. The SoS and NAW are empowered to issue regulations concerning adjudication. The President of the Panel may also give directions regarding practice and procedure at Case Tribunals. LGA 2000 sets out provisions for decisions by interim Case Tribunals and Case Tribunals (see Section 76) including powers of suspension (in the former) (see Section 78) and of suspension and disqualification (in the latter) (see Section 79). The individual concerned is given rights to appeal to the High Court at both interim and final stages.

7. Chapter 5 of Part III contains supplemental provisions. These include the duty of the MO to establish and maintain a register of the interests of members and co-opted members. It also empowers the SoS and NAW to make regulations concerning the issuing of dispensations by Standards Committees. Schedule 5 to LGA 2000 contains consequential amendments. These include

amendments to Section 80 (disqualifications for election and holding office as member of local authority) and Section 87 (date of casual vacancies) of the Local Government Act 1972.

### SUBSEQUENT LEGISLATIVE DEVELOPMENTS

8. Since the enactment of LGA 2000, as regards members in Wales, there have been made pursuant to LGA 2000, inter alia:-

- (1) The Conduct of Members (Principles) (Wales) Order 2001, SI 2001/2276 (W.166), specifying the principles which are to govern the conduct of members of relevant authorities in Wales, and which must be reflected in the Model Code of Conduct prepared under Section 50 of LGA 2000;
- (2) The Conduct of Members (Model Code of Conduct) (Wales) Order 2001, SI 2001/2289 (W.177), which relates (Part 3) to members' interests and their registration, but also (Part 2) imposes general obligations, including to "show respect and consideration for others" (paragraph 4(a)), and not to "conduct himself in a manner which could reasonably be regarded as bringing his office or authority into disrepute" (paragraph

6(1)(b)), as amended by SI 2004/163 (W.18) and SI 2004/1510 (W.159);

- (3) The Standards Committees (Wales) Regulations 2001, SI 2001/2283 (W.172), and the Standards Committees (Wales) (Amendment) Regulations 2006, SI 2006/1849 (W.192);
- (4) The Local Government Investigations (Functions of Monitoring Officers and Standards Committees) (Wales) Regulations 2001, SI 2001/2281, as amended by SI 2005/761 (W.65), relating to those investigations of misconduct allegations which are carried out by local authorities themselves;
- (5) The Adjudications by Case Tribunals and Interim Case Tribunals (Wales) Regulations, SI 2001/2288;
- (6) The Standards Committees (Grants of Dispensations) (Wales) Regulations 2001, SI 2001/2279 (W.169); and
- (7) The Public Services Ombudsman for Wales (Standards Investigations) Order 2006, SI 2006/949 (W.98), made under ss69 and 70 of LGA 2000, which revoke the Local Commissioner in Wales (Standards Investigations) Order 2001, and makes

provision for the application (with modifications) of ss60-63 of LGA 2000 and ss26 and 32 of the Public Services Ombudsman (Wales) Act 2005 to standards investigations concerning the conduct of members or co-opted members of a relevant authority in Wales where an allegation has been made that such member or co-opted member has failed, or may have failed, to comply with the relevant authority's Code of Conduct. Adam Peat was appointed as Public Services Ombudsman for Wales with effect from October 2005.

9. Also:-

- (1) Chapter III of Part III of LGA 2000 has been amended by the Public Services Ombudsman (Wales) Act 2005, Schedule 4 to which amends Part III of LGA 2000 and transfers the function of investigating allegations about breaches of standards of conduct conferred on the Local Commissioner for Wales to the Ombudsman; and
- (2) Section 113 of the Local Government Act 2003 relates to delegation by Standards Committees and MOs.

## CASE LAW

10. There have been a number of cases in the Courts on the new ethical standards framework. In R (Richardson) v North Yorkshire County Council [2004] LGR 351 (“Richardson”) the first claimant was a member of the defendant council who had, with other local residents, objected to the interested party’s planning application in respect of quarrying gravel. The permission was granted (with conditions) by the council’s planning and regulatory committee. The first claimant was not a member of that committee. He had sought to attend the relevant meeting as a member of the public, but had none the less been excluded (and his constituents disenfranchised), on the grounds that he had a “prejudicial interest” in the matter under consideration. The Court of Appeal held that the restriction, under the English Model Code, that a member with a prejudicial interest in a matter must withdraw from a meeting whenever that matter is being considered, applies to any member of the authority, not merely to a member of the relevant committee. Further, it does not make any difference if the member seeks to attend the meeting merely in a personal capacity. As Simon Brown LJ, as he then was, with whom the other members of the Court agreed, said:-

“A member of the authority, attending a council meeting cannot in my judgment, simply by declaring that he attends in his private capacity, thereby divest himself of his official capacity as a councillor. He is still

to be regarded as conducting the business of his office. Only by resigning can he shed that role.”

11. Simon Brown LJ also said that the “initial and principal judgment” on the question whether a Member is properly to be regarded as having a “prejudicial interest” is “for the individual councillor himself”,

“But there comes a point at which it would clearly be irrational and therefore unlawful for the councillor to conclude that he does not have a personal interest under para 8(1) or, as the case may be, a prejudicial interest under para 10(1).”

12. As regards the principles to be applied (especially in a planning or licensing context) when an allegation of bias is put forward on the basis of predetermination, rather than on the basis of a personal interest, see post Porter v Magill [2002] 2, AC 357, Georgiou v Enfield LBC [2004] LGR 497 (“Georgiou”); R (Ghadami) v Harlow DC [2005] LGR 24; and Condrón v National Assembly for Wales [2005] EWHC 3007. The current state of law in this field would seem to be as follows. First, predisposition, as opposed to predetermination, would not appear to found a claim of apparent bias. However, the court may well be willing to infer predetermination, even on the basis of statements and conversations which are less than categorical in nature. Further, members of council committees should be extremely circumspect in



discussing decisions which are due to come before them with third parties, even in a casual and general sense, lest they be accused of predetermination. In addition, statements by members that they were not in fact biased and had retained open minds will not assist councils and their members greatly in cases based on apparent bias.

13. However, with Georgiou contrast R (Council for National Parks Ltd v Pembrokeshire Coast National Park Authority [2004] EWHC 2907 (Admin), and note that certain observations of Richards J (as he then was) in Georgiou have recently (25 August 2006) been doubted by Collins J in R (Island Farm Development Ltd) v Bridgend County Borough Council [2006] EWHC 2189 (Admin) (“Bridgend”). In Bridgend Collins J held that there was no apparent bias or pre-determination by a newly elected local authority in reaching a decision to discontinue negotiations for the sale of land, as there was no positive evidence to show that the local authority had approached the decision with a closed mind. Local authority councillors were entitled to have regard to and apply policies that they believed in, particularly if those policies formed part of an election manifesto. At paragraph 31 Collins J said:-

“The reality is that Councillors must be trusted to abide by the rules which the law lays down, namely that, whatever their views, they must approach their decision-making with an open mind in the sense that they must have regard to all material considerations and be prepared to

change their views if persuaded that they should. It is to be noted that the Court of Appeal sees nothing objectionable in a judge who has refused permission to appeal on the papers sitting on an oral hearing to reconsider his decision. That is because it is recognised that a judge is always prepared to be persuaded to change his mind. So it is with Councillors and, unless there is positive evidence to show that there was indeed a closed mind, I do not think that prior observations or apparent favouring of a particular decision will suffice to persuade a court to quash the decision. ...”

14. R (Dawkins v Bolsover DC [2004] EWHC 2998 (Admin) (Hughes J) was concerned with compliance with time limits. In R (Hathaway) v Ethical Standards Officer of the Standards Board [2004] EWHC 1200 (Admin) Evans-Lombe J recognized that the effect of the legislation may be to exaggerate the penalty (when elections occur during a period of disqualification), with potential for injustice. In R (Murphy) v Ethical Standards Officer of the Standards Board [2005] LGR 161 Keith J held that the phrase “well-being” in paragraph 8 of the English Code of Conduct in relation to whether a member has a personal and therefore potentially prejudicial interest is meant to be interpreted broadly. He further held that there had been no breach of Articles 6, 8 or 10 of the ECHR. In Scrivens v ESO [2005] LGR 641 Stanley Burnton J dealt with the test to be applied by Case Tribunals. The issue was whether the

Case Tribunal should apply a subjective or objective test to determine whether a Councillor held a personal or prejudicial interest. Stanley Burnton J said:-

“In my judgment a subjective test would confer considerable latitude on the conduct of members. It would seriously detract from the express object of the Act and the purpose of the code namely the promotion and maintenance of high standards of conduct by members. The effect of the Appellant’s contention, which is that a member of a local authority may participate with impunity in its consideration of a matter in which a fair-minded person would think that he has a disqualifying prejudicial interest, if the member wrongly but reasonably believes that he does not have such an interest, would be to damage public confidence in the affairs of local authorities. I find nothing in the Act to support the Appellant’s contention.”

He held that this was consistent with the objective test for bias.

15. In R (TGWU) v Walsall MBC [2001] EWHC Admin 452 it was held that a clear direction to members that they should recuse themselves would be unlawful; but in R (United Co-Operatives Ltd) v Manchester City Council [2005] EWHC 365 (Admin) it was held that advice to Members from the City Solicitor was not judicially reviewable. Elias J said: “It is for the Councillor to weigh up that advice in the light of perhaps other advice available to him, and

exercise his or her judgment ... There is no reason why the Councillor should not take legal advice from elsewhere ... contrary advice ... could also be considered, in certain contexts at least, as being influential”.

16. There have been a number of cases on penalty, including Hare v Bedford City Council [2006] EWHC 82 (Admin); and Sloam v Standards Board for England [2006] LGR 71; and, as to adequacy of reasons, Adami v ESO [2006] LGR 397 (Court of Appeal). Councillor Saunders has twice successfully appealed against a sanction of disqualification: Saunders v Kingston (No. 1) [2005] LGR 719 (Wilkie J) and Saunders v Kingston (No. 2) [2006] LGR 111 (Sullivan J).

17. In Saunders v Kingston (No. 1), the Appellant, as Leader of Peterborough City Council, had been contacted by the Chief Executive of a Council in Northern Ireland, who asked him to support a campaign for an inquiry into recent deaths of army personnel at local barracks. The Appellant’s response was intemperate and insulting. When taken to task, he repeated and compounded his aggressive response. He was reported to the Standards Board for England. The matter was referred to an Adjudication Panel by the defendant Ethical Standards Officer. Following a hearing before a Case Tribunal, the Appellant was found guilty of having failed to comply with the Code of Conduct and was disqualified from being, or becoming, a Member of any local authority for a period of two years. He appealed to the High Court.

18. The case threw up a number of interesting issues relating to the ethical conduct regime for members. First, Wilkie J rejected the contention that the Court was exercising a purely supervisory function on an appeal under Section 79 of LGA 2000. The Court was thus permitted to engage with the merits, whilst paying due deference to the role of the Tribunal.

19. Secondly, the Judge held that the Tribunal had erred in failing to consider Article 10 of the ECHR. Whilst Article 10 was engaged, however, the interference in question was justified under Article 10(2). The provisions of the model code of conduct were sufficiently certain to be “prescribed by law” for the purposes of Article 10. The concepts of treating others “with respect” and not bringing one’s office or authority “into disrepute” were well enough understood. Further, given that the Appellant’s comments did not on their face amount to the expression of political views, he was not entitled to the extremely high level of protection granted under the ECHR to political expression.

20. Thirdly, the Defendant had erred in not drawing to the Tribunal’s attention relevant Guidance on sanction. Furthermore, the Tribunal was not told that the Appellant had been re-elected as an Independent prior to the hearing, despite having been expelled from the Conservative Party for his conduct. That information ought to have been before the Tribunal, since the consequence of its decision on sanction was effectively to override the will of

the electorate. In the circumstances, the sanction imposed could not be justified.

21. In Saunders v Kingston (No 2) the Court emphasised the importance, as a starting point in considering what sanction to impose, of the Case Tribunal paying careful attention to the Guidance issued by the President of the Adjudication Panel. Sullivan J also held that the disqualification imposed in the present case had been a plainly disproportionate sanction for intemperate incidents which were a long way from the worst end of the spectrum of breaches of the Code of Conduct. The decision also contains some important guidance as to how the Court should proceed where it considers that a Case Tribunal has fallen into error.

22. All the cases referred to above concern English local authorities. They are not in all respects directly applicable in Wales. The primary legislation (in relation to investigations) and secondary legislation and guidance are different. In particular there are important differences between the two Model Codes, not least with respect to “dual-hatted” Members.

### WAY AHEAD

23. In July 2004 a Review Group reported on the operation of the Code of Conduct in Wales. They made 25 recommendations. These include that the

two stage approach in England (is there a personal interest? if so, is it a prejudicial interest?) should be adopted in Wales.

24. On 28 April 2005 the NAW circulated for consultation (by 29 July 2005) a draft revised Code of Conduct. This adopts the recommendation in relation to personal and prejudicial interests

### INTERESTS

25. Many of the allegations relate to members' interests. The statutory measures are not in identical terms to the common law formulation of bias, but similar considerations apply. The purpose of the provisions is to prevent a conflict between private interest and public duty. They are intended to prevent members from being exposed to temptation, or even the semblance of temptation. See Nutton v Wilson (1889) 22 QBD 744 per Lord Esher MR at page 747 per Lindley LJ at 748 and per Lopes J at 749 and Barnacle v Clark [1900] 1 QB at 282-284.

26. The prospect of an ultimate but not too remote pecuniary advantage, or disadvantage, has been regarded as enough under earlier legislation relating to pecuniary interests. The leading cases are England v Inglis [1920] 2 KB 636 at 639/640, Brown v DPP [1956] 2 All ER 189, and Rands v Oldroyd [1959] 1 QB 204, [1958] 3 All ER 344 especially at 211-214.

27. In Brown v DPP the question was as to lodgers' allowances to be paid by tenants of council houses. Three of the councillors considering the matter were council house tenants, but did not have any lodgers. The court held that those councillors who were already tenants of council houses ('a potential income producing asset') did have a pecuniary interest in the terms of the contract of tenancy as to lodger charges, albeit that they did not have lodgers as yet and might never have lodgers. The court contrasted the position of those who might become tenants of a council house in the future but who as yet had not become tenants. Lord Goddard CJ referred to 'the very wide terms' of the statutory provision, having stated that:

'It is no doubt of the greatest possible importance that there should be a strict observance of the Act.'

Donovan J said:

'The object of section 76(1) (of the Local Government Act 1933) is clearly to prevent councillors from voting on a matter which may affect their own pockets and which may therefore affect their judgment.'

28. In Rands v Oldroyd a member of a local authority who had a controlling interest in a building company was held to have an indirect



pecuniary interest in a question whether the authority's direct labour force should be augmented, notwithstanding that the company had resolved that it would not in future tender for building contracts for the authority, so long as the company was a building company and could contract.

29. As regards non-pecuniary interests, and the circumstances in which an interest will generally bar participation (subject to removal by dispensation) again they are not identical terms to the common law formulation of bias, but similar considerations nonetheless apply, and the case law under earlier legislation is likely to remain relevant. An example of local authority members having a non-pecuniary interest is when Liverpool City Council was considering a planning proposal on behalf of Liverpool Football Club and they were season ticket holders or regular attenders. See R v Local Commissioner for Administration, ex p Liverpool City Council (2001) 1 All ER 462, affirming (1999) 3 All ER 85.

#### MODEL CODE: INTERESTS

30. The provisions of the Model Code do not perpetuate the former distinction between pecuniary and non-pecuniary interests. Nor do they perpetuate the former distinction between direct interests and indirect interests.

31. Paragraphs 11-15 and 17 of the Model deal with the circumstances in which a Member or co-opted Member of a relevant authority can regard themselves as not having a personal interest in a matter and where they must regard themselves as having such an interest. Paragraphs 16 and 17 are then the transparency provisions. The Member who attends a Meeting of the authority (or exercises a delegate power) must disclose the existence and nature of the interest at the outset or when the interest becomes apparent.

32. There are other implications of a personal interest. In some circumstances the Member may speak, but not vote. In other circumstances, he must withdraw from involvement (unless granted a dispensation).

### THE OMBUDSMAN

33. The Public Services Ombudsman for Wales has issued, inter alia:-

- (1) Letter to Chief Executives and MOs dated March 2006; and
- (2) Supplementary Letter dated June 2006.

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