

Association of Council Secretaries and Solicitors

Briefing Note on the draft revised Code of Conduct for Members

Introduction

The draft Regulations involve the production of a single model code (rather than the 4 current models) with provision in the Regulations for non-relevant provisions for different authorities to be non-mandatory. It will therefore be necessary for each authority to adjust the model by deleting the non-mandatory elements relating to it, prior to adopting, rather than simply adopting the entire code.

(Para 2(3) of the draft revised code appears to have been excluded from this drafting device, but presumably can also be omitted from all codes other than those of police authorities and the MPA, as being inapplicable to them.)

One affect of this seems to be that the SBE and APE will need, in the future, to refer to the authority's actual code, rather than the relevant model, in dealing with cases. The draft revised code seems to be drafted to avoid the need for further revision when the provisions of the LGPIH Bill are applied (extend to behaviour outside official capacity).

Intention

The draft revised code seeks to

- Reflect the recommendations of the SBE following the review.
- Reflect APE and High Court decisions on interpretation (discrimination, private capacity, disclosure in public interest)
- Modify the effect of the Richardson decision to allow a member to make representations whilst having a prejudicial interest.
- Extends the application of the code to the GLA.
- Improve the structure and drafting of the code. *(Definitions at the front. Part 2 of the draft revised code is reconstructed to firstly define personal interests and then to deal with disclosure, avoiding the difficult cross referencing in the current code. The wording of some interests is adjusted to accommodate this structural change.)*
- Be gender neutral. *(It would be even less clumsy and reduce the number of words if put in the second person 'you', 'your', wouldn't it? Most other codes are expressed this way)*
- Improve some definitions.

Relaxations

The draft revised code provides a number of relaxations from the requirements of the current code;

- Modifies the obligation to promote equality and not to unlawfully discriminate. -2(2)(a)
- Applies an additional limitation to the obligation not to disclose confidential information (reasonable and in public interest, in good faith and not in breach of reasonable requirements). -3((a)(iii) *This appears to be designed as a separate test to that under the FOI Act so that APE can adjudicate on it.*

- Removes the obligation to report allegations of failure to comply with the code. (current Code para 7)
- Modifies the well-being interest to relate only to the ward (where applicable) rather than the whole of the authority's area. -7(c) (*This dispensation will not assist most parish councillors. It presumably applies to joint committees, but it is not entirely clear how it applies to local authority members on police and fire authorities.*)
- Limits the obligation to disclose a personal interest of a family member, friend or person having close personal association to those that the member is aware of, or ought reasonably to be aware of. -8(4) (*Presumably these interests were not registered under the current code on account of the member not being aware of them, but the excuse would now have legal validity! But what should a member do to meet the reasonable test?*)
- Makes provision for sensitive interests to be excluded from the public register in very limited circumstances and for the sensitive information to be not disclosed when the interest is disclosed. -8(5) and 13 (*'creates or is likely to create a serious risk of' .. 'violence or intimidation' seems to be too narrow to be of much value. Members may wish to seek a wider effect to this provision.*)
- Creates a new category of public service interest as to membership of other relevant (*meaning?*) authority, public authority or body the member is appointed to by the authority. -8(7) The interest need only be disclosed when the member addresses the meeting. -8(2) (*It may seem odd to a member of the public for one member disclosing an interest and another not (because s/he did not speak), when both take part in the decision by voting. Does this relaxation have any real value?*) A public service interest is not a prejudicial interest except in the limited circumstances of relating to the financial affairs of the body or the determining of any approval, consent, licence, permission or registration. -9(2)(a)(i) and (ii) (*Monitoring Officers will need to be mindful also as to the possibility of bias in the case of members with public service interests participating in decisions under this general exemption*) A public service interest, for the purposes of the prejudicial interest provisions, is extended to include an interest in a charity, a lobbying or philanthropic body of which the member is a member. -9(4) (*The way this is drafted is not ideal and the risk of bias is not provided for*).
- Broadens the dispensation relating to housing by excluding the reference to rent arrears. -9(2)(b)(i)
- Creates additional dispensation for LGA2000 indemnities under S101. - 9(2)(b)(v)
- Creates additional dispensation as to bestowing title of freeman -9(2)(b)(vi)
- Creates additional dispensation for setting council tax under LGFA 1992. - 9(2)(b)(vii) (*Does not appear to apply to setting precepts.*)
- Provides for a member, otherwise having a prejudicial interest, to attend a meeting for the purpose of making representations, answering questions or giving evidence, provided the meeting agrees and subject to the member withdrawing after so doing. -9(3) (*not absolutely clear, but presumably a personal interest still needs to be disclosed by the member. Meetings will require careful managing to ensure such members are excluded from the decision making part of the meeting. The wording and meaning is different to the similar provision relating to attendance at scrutiny committees.*)

- Clarifies the provisions on interests at overview and scrutiny committees generally and limits the definition of prejudicial interest to the circumstances of membership of the executive or other committee at the time of the decision and presence of the member when the decision was made.

Additional obligations

The draft revised code imposes the following additional obligations on members;

- Not to bully any person -2(b)
- Not to intimidate a person involved in proceedings under the code -2(c)
- Extends criminal offence disrepute to offences committed before taking office but conviction after taking office. -4(2)
- Extends the improper influence provisions to include attempt. -5(a)
- Extends meaning of political purposes in the use of the authority's resources provision to specifically include 'party political purposes'.
- Extends the provision on use of the authority's resources to include having regard to the Local Authority Code of Publicity. -5(b)(iii) *(There is logic to this otherwise breaches will not be subject to sanction under the ethical framework, but the Code of Publicity is in need of review)*
- Extends obligation to have regard to advice of MO and CFO to include any relevant advice (not just statutory advice) -6(a) *(MOs and CFOs will need to produce internal arrangements to clarify precisely what amounts to their advice! MOs may need to tell CFOs about this proposed change!)*
- Imposes a requirement to disclose a gift or hospitality (registered in last five years) as an interest -7(a)(vi) and 8(3) Gifts and hospitality are to be registered in the interests register which is a public document, rather than a separate notification to the MO. *(In the circumstance of a gift or hospitality amounting to a personal interest, the threshold of £25 seems now to be low. A weakness of this arrangement is that there is no distinction between a bouquet of flowers or meal costing £30 and a holiday costing several hundred pounds, in respect of the disclosure or the cut-off period of 5 years. Again, no reference to bias)*
- Extends the well-being interest to a person with whom the member has 'a close personal association' -7(a)(c) *(No definition. Is a friend a different relationship, now?)*

Omissions

The draft Code does not include as a preface the General Principles, presumably because of legal difficulty, but it would be legitimate for local authorities to effect this locally, in order to identify the relationship between the General Principles and the Code.

The opportunity to bring the application of the code and the law of bias closer together has not been taken in the draft.

Whilst the inclusion of a definition of bias may be difficult to draft to reflect current law, it would be possible to refer to the law of bias in two paragraphs. (Unless bias amounts to disrepute (which is not clear cut), an act of bias by a member that results in a local authority decision being annulled, is excluded from the enforcement part of

the ethical framework. This would seem to be odd, if not perverse.) An additional clause in Para 4(2) could include a finding of bias against a member as conduct amounting to disrepute.

It would be sensible to add an additional exception in para 9(2)(a) to public service interests that *would* be prejudicial, on the lines that participation in the matter would amount to bias or apparent bias.

Drafting aspects

Whilst the reconstruction of the interests' part of the code helps to improve clarity, it would seem sensible to go one stage further and include all the bits dealing with 'public service interests' in a separate paragraph. -8(2), 8(7)(a)(i),(ii) and(iii), 9(2) and 9(4)(b). Having different definitions for public service interest in 7(a) and 9(4) could be confusing.

Conclusion

The draft revised code contains a lot of detailed alterations to be absorbed by members, but most involve a measure of practicality and common sense. The significant changes are the omission of the obligation to report allegations of breach, and the relaxations involving disclosure of interests and prejudicial interests. The detail will need to be absorbed by democratic services officers responsible for handling meetings.

There is modest scope for improving the draft revised code, particularly in referring to bias law, in view of the increased risk of bias with the relaxation of prejudicial interests.

Tony Kilner
Policy and Development Officer
ACSeS
30.01.07