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Code of Conduct for Local Authority Members and Officers

A Response to Consultation

1 Code of Conduct for Members
Responses to the specific questions:

1.1 Q1 – Do you agree that the Members' Code should apply to a member's conduct when acting in their non-official capacity?

It is clear that some conduct in private life can reflect upon a member's suitability to continue as a member, and that leaving a member in place until the next elections give the electorate an opportunity to remove him/her from office can seriously damage the reputation of an authority and of local government in general. It is therefore important that the Code of Conduct for Members should apply to at least some conduct in a member's private life.

However, the Consultation Paper makes no mention of the deficiency of drafting of Section 183 of the 2007 Act (new Section 49(2B) of the LGA 2000). This section provides that the Principles, and therefore the Code, can apply to conduct which "would constitute a criminal offence". But criminal conduct is a criminal offence whether or not it is prosecuted, so the use of the conditional in the word "would" means literally "conduct which would constitute a criminal offence if some unfulfilled condition was met" – i.e. conduct which currently does not constitute a criminal offence. Accordingly the Council considers that amendment of the primary legislation is required before the Code can actually be applied to criminal conduct in private life.

1.2 Q2 – Do you agree with the definition of "criminal offence" for the purpose of the Members' Code? If not, what other definition would you support? Please give details.

CLG's intention is that, by excluding criminal offences which result in a fixed penalty notice, the application of the Code should be limited to the more serious offences, and also avoid the confusion as to what fixed penalty notices constitute a criminal conviction, which are civil matters, and which are an alternative to prosecution. However, the proposed wording is insufficiently precise, as it can be interpreted as offences for which a fixed penalty notice is not available, or as an offence in connection with which the individual member was not given the option of a fixed penalty notice.

Further, a fixed penalty notice is sometimes available for relatively minor instances of what can be a serious offence, such as unauthorised tipping of waste materials. And failure by a member to comply with a regulatory regime which that member is responsible for enforcing can reflect very seriously on the credibility of that member, of the authority and of the regulatory regime. Thus, according to one interpretation, if a member who is the Portfolio Holder for Waste and the Environment were caught fly-tipping toxic chemicals above an aquifer, the availability of a fixed penalty notice for the offence of fly-tipping could take the offence outside the scope of the Code.

Even if the specific incident was at a level appropriate for a fixed penalty notice for fly-tipping, the offence would so directly relate to the member's responsibilities within the authority that it would be directly relevant to their credibility and that of

their authority, and accordingly the Code of Conduct should be capable of responding to that event. Where the offence is minor, or is not directly relevant to their work as a member, there remains the option for the Standards Committee (Assessment Sub-Committee) to resolve not to take any action in respect of it. Accordingly, there is no loss and considerable advantage in including all criminal offences, whether they result in actual prosecution or a fixed penalty notice.

Despite the provisions of the Local Government and Public Involvement in Housing Act 2007, there remains a valid issue as to whether the Code's application to private life should be limited to criminal conduct. Thus, many disclosures of confidential information occur in a member's private life. They are still disclosures of confidential information which the member has received in his/her capacity as a member, and they are just as damaging to the authority and to the credibility and reputation of members, but they occur in the pub or otherwise outside official activities, rather than in the course of a Council debate. As the conduct is just as reprehensible, and the damage is just the same as for disclosures during official activities, the Council considers that such disclosures should be equally covered by the Code of Conduct?

Equally, it is remarkable that the Code of Conduct as proposed would not cover misuse of confidential information for personal advantage. If the Cabinet Member for Environment gained insider information about future housing planning policy, and used that information in his/her private life to buy land which was likely to increase in value once the policy was published, since this would not result in a criminal conviction, it is not covered by the current or proposed Code, and yet this is precisely the sort of abuse of position which the Code of Conduct was originally intended to cover, but now does not cover.

1.3 **Q3 – Do you agree with this definition of "official capacity" for the purposes of the Members' Code? If not, what other definition would you support? Please give details.**

The basic general conduct provisions of the Code apply only when a member is acting in an official capacity. CLG proposes that "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."

See above as to whether it is appropriate that the Code of Conduct should apply only to criminal conduct when the conduct is not "in an official capacity".

A particular issue arises from the reference to acting as a "representative" of a local authority, as the word "representative" is not defined in the Act or the Code. Paragraph 2(5) clearly envisages that a member can be acting as a representative of the authority even where he/she is acting on behalf of another body. This illustrates the lack of precision, and therefore the scope for confusion, in the proposed drafting.

As the word "representative" is no longer used in the exceptions to prejudicial interests, there is no magic to its use here, and a more precise definition should be used, such as that the member was "engaged in the business of a body to which he/she has been appointed by, on the nomination of, or with the approval of the authority."

1.4 **Q4 – 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?**

The basic proposition is acceptable, but the Consultation Paper goes on to provide that the Code would only apply if the member was convicted in the country in which the offence was committed. No explanation for this proposal is provided. That is more problematic. Thus, for example, an Internet child pornography offence may well justify action under the Code of Conduct, but may be prosecuted in the USA under current law where the activity occurred in the UK but the images passed through a US computer server. At the extreme end of the scale, genocide and war crime offences may be tried in the International Criminal Court in the Hague, although the offence occurred in Bosnia. Serious corporate fraud can also be tried in the USA although the defendants have never entered the USA, but the offence impacted on US companies. And the UK law of corruption has recently been extended to include corruption overseas but triable in the UK. But clearly such a criminal conviction should be within the scope of the code of conduct, as it reflects so directly on the suitability of the member to continue to act as a member of a local authority. Accordingly the Council does not support the proposal that the conviction must arise in the same country as the offence was committed.

1.5 **Q5 – Do you agree that an ethical investigation should not proceed until the criminal process has been completed?**

There are three aspects to this question:

1.5.1 Should the breach of the code arise when the criminal conduct occurs, or only when a conviction has resulted? In other words, should it be possible to make a complaint about criminal conduct in advance of an actual conviction?

On occasions the fact of guilt is very evident long before the actual prosecution or conviction, and there can be a long interval between the events and the conviction. In a serious fraud case, this can be up to six years. In the case of Councillor J. Speechley's prosecution for misconduct in public office, it was some three years before the trial, and a further year before his appeal against conviction was rejected as wholly unmeritorious. It would risk bringing the process into serious disrepute if no complaint can even be entered until so long after the events. Accordingly, there should not be any limit on making a complaint before conviction.

1.5.2 Should the actual investigation be held over until a criminal conviction has occurred?

The Council recognises that it would be wrong to encourage a standards investigation which interfered with the criminal investigation. But where there is a long gap between the events and a conviction it discredits the standards system if no action can be taken, especially where the member's guilt may be very evident, or he/she may even have admitted guilt. Accordingly, there should be no bar on standards investigations and proceedings in advance of conviction

1.5.3 Should the actual conviction before a criminal court be the only admissible evidence of criminal conduct?

If a complaint is to be admissible before conviction, it follows that conviction cannot be the only admissible evidence of the criminal offence.

Standards proceedings are civil proceedings. They determine matters on the balance of the evidence before them. An actual conviction in a criminal court is the most cogent evidence of guilt, but it is not a comprehensive test. Thus, the member may have admitted guilt, or civil proceedings may have resulted in an injunction against the member for harassment, but there may either be no prosecution or the prosecution may not have been completed. Not all criminal offences result in a prosecution, so a member might have been sued successfully for fraud, which reflects very badly upon their suitability to be in control of public funds, but the CPS may have decided that despite evident guilt no public interest would be served by an actual prosecution. At an extreme level, if a member were found with their hand in the authority's till, or with the murder weapon in hand, or civil proceedings have demonstrated facts which amount to a criminal offence, it does local government no credit to leave the member in office until an eventual conviction.

Accordingly, evidence of criminal conduct other than a conviction by a criminal court should be admissible as evidence of criminal conduct. Otherwise much of the force of this provision will be lost, and complaints will be seriously delayed, discrediting the process.

1.6 **Q6 – 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? If so, please could you provide details of your suggested amendments?**

1.6.1 Make Paragraph 12(2) mandatory rather than adoptive for Parish Councils

At present, Paragraph 12(2), allowing a member who has a prejudicial interest to make representations as a member of the public but not take part in the decision itself, is a mandatory provision for most authorities, but only applies to Parish Councils if positively adopted. The Council considers that it would be sensible to make this mandatory for Parish Councils.

1.6.2 Membership of other bodies

It is suggested that Paragraphs 8(1)(a)(i) and (ii) be amended to make it clear that this refers to another body of which you are a member, or which exercise functions of a public nature. The Council is not aware of any ambiguity or confusion here, but if there is a problem we would support clarification.

1.6.3 Registration of Gifts and Hospitality

It is suggested that Paragraph 8(1)(a)(vii) might usefully be amended to clarify that a member is required to register any gift or hospitality with an estimated value of at least £25. The current drafting of Paragraph 8(1)(a)(vii) is different from that of other such outside interests, as it refers to "the interests" of the donor of hospitality provider, rather than referring to the donor or hospitality provider itself. This does not fit with the registration requirement in Paragraph 13, as taken literally it requires the member to register "the interests of" the donor or hospitality provider. Accordingly, Paragraph 8(1)(a)(vii) should be amended by the deletion of the words "the interests of", and Paragraph 13 should be amended by the addition of a new Paragraph 13(3) as follows – "(3) In respect of a personal interest arising under Paragraph 8(1)(a)(vii), you must register both the identity of the person from whom you have received the gift or hospitality and provide details of the gift or hospitality and its estimated value."

1.6.4 Prejudicial Interests

Paragraph 10 (1) and (2) could certainly be clarified if they were re-drafted to avoid the current double-negative. An amplification of the meaning of "determination" would be helpful. However, this Paragraph would still remain flawed because of the lack of clarity as to when the determination of an approval, consent, licence, permission is "in relation to" the member. The Council suggests that this be changed to say "determination of an application for approval….. made by you or on your behalf."

The disapplication of Paragraph 10(2)(c) to giving evidence before a Standards Committee would be welcome.

1.6.5 Registration of Interests

It is proposed that existing registrations of interests should carry forward when the revised Code is introduced. In 2007, it could be argued that this was not appropriate as the Code had been altered to require the additional registration of gifts and hospitality, but this did mean that all members had to be reminded to put in a new registration. However, it is good practice to give each member a copy of their existing register entries in May each year and ask them to ensure that it is up to date. Where this practice is followed, a new registration, incorporating any changes in the definitions of registrable interests, would be obtained anyway.

1.6.6 Additional Suggested Amendment - Application to suspended Members

The majority of the Code as currently drafted does not apply to a member when he/she is suspended. We have therefore had the spectacle of a member being strongly disrespectful of a Standards Committee following his suspension, but its not being covered by the Code. The Council suggests an amendment to Paragraph 2(2) to provide that a member's conduct in relation to his/her authority shall

be treated as being in an official capacity notwithstanding that the member was suspended at the time of the conduct

1.6.7 Additional Suggested Amendment - Disclosure and misuse of confidential information in private life

The disclosure of confidential information which a member has obtained through their connection with the authority, or its use for personal advantage, in private life, would be an example of serious misconduct, but at present this is not covered by the Code of Conduct. It is necessary to further amend Section 51 of the Local Government Act 2000 to refer to conduct which **does** constitute a criminal offence, rather than "**would**" constitute a criminal offence, so it is relatively simple to provide that non-criminal conduct can amount to a breach of the Code, where this is specified in the Code, and then amend Paragraph 2(3), such that Paragraphs 4 and 6(a) can constitute a breach of the Code even where the conduct occurs in private life and does not amount to a criminal offence.

1.6.8 Additional Suggested Amendment – Value of Shareholdings

Whilst the current use of a nominal value of £25,000 as the threshold for registration and declaration of shareholding has the benefit of certainty, the recent volatility of share values has pointed up its arbitrary nature. Thus a shareholding with a £25,000 nominal value may have little or no trading value, and similarly a member may have one or two £1 shares in a private company, which may have a trading value in millions. It is also limited to one class of securities, so that a member may have £20,000 nominal value in each of five classes of securities, and still have no requirement to disclose or register that interest. The Council therefore suggests that it would be appropriate to amend Paragraph 8(1)(a)(vi) to provide that a member has a personal interest in "any person or body who has a place of business or land in your authority's area, and in whom you have a beneficial interest in the securities of that person or body that exceeds a nominal value of £25,000, a current market value of £25,000 or 1/100th of the total issued share capital".

1.6.9 Additional Suggested Amendment – Gifts and Hospitality

With the passage of some seven years since the Code was introduced, the £25 threshold for declaration of gifts and hospitality has diminished by some 20% in real value. With the additional requirement to declare relevant gifts and hospitality at meetings, it is now appropriate at least to restore the original real value of the threshold in Paragraph 8(1)(a)(viii) and perhaps to set the value at a level such as £100 at which members would only have to declare and register really significant gifts and hospitality, of such a size that they might possibly influence the member's decision on a matter.

1.6.10 Additional Suggested Amendment – Close Association
Whilst The Council understands the intention of the 2007 Code amendment to extend beyond "friends" to business colleagues and

enemies, the phrase "person with whom you have a close association" is extremely vague. The Standards Board for England's description of the phrase is of little assistance: "A person with whom you have a close association is someone that you are in either regular or irregular contact with over a period of time who is more than an acquaintance. It is someone a reasonable member of the public might think you would be prepared to favour or disadvantage when discussing a matter that affects them. It may be a friend, a colleague, a business associate or someone whom you know through general social contacts."

Whether in the Code or in supporting Guidance it is necessary to make it clear that this provision only covers people with whom the member has such a close continuing relationship that a member of the public might reasonably conclude that it is likely to influence the member's perception of the public interest on matters which affect that individual.

1.6.11 Additional Suggested Amendment – the majority of council tax payers, ratepayer or inhabitants of the electoral division or ward affected by the decision.

The present Paragraph 8(1)(b) is unclear as to whether the comparator in any particular case is **either** council tax payers, ratepayers or inhabitant, **or** the aggregate of all three categories. In practice, it must be the category which the member comes within for this purpose, otherwise the relatively higher numbers of "inhabitants" would always dominate and make the mention of the other categories redundant. The Council suggests that Paragraph 8(1)(b) be amended to read "…. Than the majority of either the council tax payer, ratepayers or inhabitants of the ….. , in any case being a category of which you or the relevant person is a member."

1.6.12 Additional Suggested Amendment – Disclosure of Personal Interests

Paragraph 9(1) requires disclosures "at the commencement of consideration (of the matter)". In practice most authorities have disclosures of interest at the start of the meeting, which is advantageous in drawing to members' attention the need to make disclosures, allowing officers to remind individual members where a member may have forgotten to make such disclosure, and allowing the meeting then to discharge its business without frequent interruption. The Council suggests that Paragraph 9(1) should be amended to reflect this practice, to read "… at the commencement of the meeting or at such earlier occasion during the meeting as is prescribed by the authority for this purpose, or when the interest becomes apparent."

1.6.13 Additional Suggested Amendment – Registration of Sensitive Information

A relatively minor point, but the drafting of Paragraph 14(1) does not provide an audit trail. So the member can inform the Monitoring

Officer verbally of the sensitive information, and the Monitoring Officer can give verbal agreement to the fact that the information is sensitive. Then, when a complaint is made that the member has failed to register the interest, there is then no written record that the member has got clearance, leaving the conscientious member exposed. As a very simple amendment, The Council suggests that Paragraph 14(1) be amended to read as follows – "When you notify your authority's Monitoring Officer in writing that you consider that particular information relating to any of your personal interest is sensitive information, and your authority's Monitoring Officer has notified you in writing that he/she agrees that it is sensitive, you need not……"

1.7 **Q7 – Are there any aspects of conduct currently included in the Members' Code of Conduct that are not required? If so, please could you specify which aspects and the reasons why you hold this view?**

1.7.1 Additional Suggested Amendment – Disclosure of Public Service Interests

The Council has not found any benefit from the introduction of Paragraph 9(2) in the 2007 revisions, which also introduced a problem in respect of prejudicial interests, in that by the time a member would come to disclose such an interest, he/she would already have been required to leave the room, thus preventing them from making any disclosure of such interests. Accordingly, we suggest that Paragraph 9(2) be deleted.

1.7.2 Additional Suggested Amendment – Overview and Scrutiny Committees

Paragraph 11 provides that a member of the authority's executive will have a prejudicial interest in the matter when he/she is interviewed by the authority's Scrutiny Committee in respect of an executive decision which he/she has made. The Standards Board for England's advice has been that the power of the Scrutiny Committee to require the attendance of the member overrides the Code, but there is no clear basis for this assertion. On the plain words of the Code of Conduct, in the absence of any such exception in the legislation, it would appear that the executive member is required to attend, but then has a prejudicial interest and would be in breach of the Code of Conduct if he/she remained. Accordingly, in line with the suggested amendment for members giving evidence before Standards Committees, te Council would suggest that the exception in Paragraph 12(2) be extended to provide that attendance to give evidence at the request of the Scrutiny Committee should not be a breach of the Code of Conduct.

1.8 **Q8 – Are there any aspects of conduct in a member's official capacity not specified in the Members' Code of Conduct that should be included? Please give details.**

1.8.1 Additional Suggested Amendment – Application to informal meetings, Site Visits and Correspondence

The definition of “meetings” in Paragraph 1(4) is currently very limited. There is public concern at the possible undue influence applied by members in informal meetings and correspondence, for which there is no public access. The Welsh Code for Members has addressed this by extending the definition of “meetings” to include “informal meetings between a member and one or more other members or officers of the authority, other than group meetings”, and by requiring members to disclose that they are members in any correspondence with the authority, even if that correspondence is in a private capacity. This makes the position absolutely clear. It can readily be checked by inspection of correspondence and disclosure of officers’ notes of meetings as background papers when formal decisions come to be taken.

1.8.2 Additional Suggested Amendment – Application to Ward Councillor Decision-Making

Section 236 of the Local Government and Public Involvement in Health Act 2007 enabled local authorities to arrange for the discharge of functions by a ward Councillor within that ward. It made no provision for the application of the Members’ Code to such discharge of functions. The normal rules on disclosure of personal and prejudicial interests do not apply in this case as there is no “meeting”, yet the potential for conflicts of interest are greatly increased where a Councillor is taking decisions in the area in which he/she lives, where his/her family go to school and have their friends, or where he/she has his/her business. The obvious amendment would be to apply Paragraphs 9(6) and 12(1)(b) and (c) to any decision-making under Section 236, and require the recording of any personal interest in the record of the decision.

1.8.3 Additional Suggested Amendment – Private Representations

A dilemma arises where a member wishes to make representations to his/her own authority in a private capacity, for example as a householder in respect of a neighbouring planning application. On the one hand, disclosing in the representation the fact that he/she is a member risks an accusation of improper use of the member’s position to influence the decision. On the other hand, as the officers are probably well aware of the identity of the correspondent, failing to disclose this fact can risk an opposite accusation that the member is acting in an underhand manner. The Welsh Members’ Code has taken a robust approach and simply provided that a member must disclose the existence and nature of your personal interest when he/she makes representations to the authority on a matter in which he/she as a personal interest and, if the representations are made verbally, must then confirm that interest in writing within 14 days. This satisfactorily resolves this dilemma, enabling the fact of the member’s interest to be recorded in the correspondence.

1.8.4 Additional Suggested Amendment – Acting in the Public Interest and having regard to Officers’ Advice

The current Code contains no requirement to act in the public interest, as this fundamental requirement is relegated to the General Principles. Equally, the requirement in Paragraph 7(1) to have regard to officer advice is limited to the statutory reports of the Chief Finance Officer and the Monitoring Officer. These provisions are much better covered in the current Welsh Code of Conduct as follows:

"8. In participating in meetings and taking decisions on the business of the authority, you must –
(a) do so on the basis of the merits of the circumstances and in the public interest
(b) have regard to any relevant advice provided by the authority's officers – in particular by:
(i) the Chief Finance Officer
(ii) the Monitoring Officer
(iii) the Chief Legal Officer, who should be consulted whenever there is any doubt as to the authority's powers to act, or as to whether the action proposed lies within the policy framework agreed by the authority; where the legal consequences of action or failure to act by the authority might have important repercussions."

1.9 **Q9 – Does the proposed timescale of two month, during which a member must give an undertaking to observe the Members' Code of Conduct, starting from the date on which the authority adopts the Code, provide members with sufficient time to undertake to observe the Code?**

Firstly, it has been suggested that the provisions of Section 183(7) of the Local Government and Public Involvement in Health Act 2007 cannot alter the historic fact that when members gave an undertaking to observe the Code of Conduct, they could not have given a valid undertaking to observe those parts of the Code of Conduct which were at the time ultra vires the Local Government Act 2000. Accordingly, it would appear to be necessary for a member to give a new undertaking before the revised Code can apply to events in the member's private life.

Note, however, that as set out above, it is suggested that the wording of Section 51(4B) of the Local Government Act 2000 ("which would constitute a criminal offence") needs to be amended before the Members' Code of Conduct can apply to conduct which does constitute a criminal offence, and that amendment would be required before members gave such a new undertaking.

Further, it is suggested that the current wording of Section 52(1)(a) of the Local Government Act 2000, requiring members to give an undertaking to observe the authority's Code of Conduct "for the time being", is capable of interpretation as meaning that it is only an undertaking to observe the Code of Conduct which is adopted by the authority at the time that the undertaking is given. If that interpretation is correct, then a historic undertaking to observe the authority's Code of Conduct would not automatically carry forward to a revised Code of Conduct.

For all of these reasons, the Council agrees that it is appropriate to require members to give a fresh undertaking to observe the revised Code of Conduct following its adoption by the authority of which they are a member. The two month period for such undertakings was applied in 2001, when the Code of Conduct was

first adopted by each authority and is perfectly reasonable, but it is equally certain that in some authorities there will be members who fail to give such undertaking within that time. We therefore suggest that it would be appropriate, if the opportunity exists to amend the 2000 Act, to provide a basic requirement to give an undertaking within two months, and that if an undertaking is not given within that period then the member concerned is not disqualified but is prohibited from acting as a member of that authority until he/she has given such an undertaking.

1.10 **Q10 – Do you agree with the addition of a new General Principle, applied specifically to conduct in a member's non-official capacity, to the effect that a member should not engage in conduct which constitutes a criminal offence?**

The General Principles are supposed to be the enduring principles which underlie the Code. As such they should not be changed unless there are overriding reasons for doing so. Whilst this exhortation is clear well-intended, it is much wider than the Members' Code of Conduct, which is supposedly limited to criminal conduct which relates in some manner to the member's position as a member. In addition, the core principle is already substantially covered by General Principles 2 (Honesty and Integrity) and 8 (Duty to uphold the Law). Accordingly the Council is of the view that adding a general and unrestricted Principle of not engaging in criminal conduct is unnecessary.

1.11 **Do you agree with the broad definition of "criminal offence" for the purpose of the General Principles Order? Or do you consider that criminal offence should be defined differently?**

As set out above, the Council does not consider that it is necessary or helpful to change the General Principles for this purpose. However, if a change is to be made it should be limited to criminal conduct "which compromises the reputation of the member's office or authority, or their ability to perform their functions as a member".

1.12 **Do you agree with this definition of "official capacity" for the purpose of the General Principles Order?**

The Consultation Paper suggests that this new General Principle should be limited to conduct when "you are 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."

This is completely at odds with the intention as set out above to implement the provisions of the Local Government and Public Involvement in Housing Act 2007 in order to apply the Code of Conduct to criminal conduct in private life. If implemented as suggested, it would mean that the General Principles were narrower than the Code of Conduct which is supposed to give effect to them. Accordingly, the Council considers that the new General Principle, if adopted, should apply to criminal conduct "which compromises the reputation of the member's office or authority, or their ability to perform their functions as a member".

Note that the General Principles are currently drafted in the third person whereas the suggested new General Principle is drafted in the second person. Clearly the drafting should be consistent.

2 Code of Conduct for Employees

The first point to be made is that the Office of the Deputy Prime Minister (predecessor of Communities and Local Government) consulted on a draft Code for Officers in August 2004. That consultation was significantly more thorough than the present consultation, as it asked 16 questions, in contrast to the ten questions posed in the current consultation. The majority of the questions posed this time around are mere repetition of the questions posed in 2004, causing one to question what account if any ODPM took of the responses submitted then and whether there is any greater commitment now to implement an Officer Code of Conduct, given the lack of urgency since the legislation was enacted in 2001, and since a Welsh Code of Conduct was brought into effect in 2001. In addition, many of the questions posed in the 2004 consultation but omitted from the current consultation remain as pertinent today as they were then.

As ever, the detail is just as important as the Principles. Consultation on limited questions, even if for the full 12 week period set out in the Consultation Code of Practice, is of little worth if the draft Code covers issues which have not been canvassed in those limited questions, and there is inadequate time allowed for a meaningful consultation on the actual draft text. We have all too much experience of the difficulties caused by such inadequate consultation and the rushed implementation of Codes which have been drafted or re-drafted without taking account of the practical experience of local government.

2.1 **Q13 – Do you agree that a mandatory code of conduct for local government employees, which would be incorporated into employees' terms and conditions of employment, is needed?**

As this question follows an unequivocal statement in the consultation paper of the justification for such a Code of Conduct, and the principle is enshrined in the Local Government Act 2000, one has to ask whether this is a genuine question.

The Council considers that a Code of Conduct going beyond the normal provisions of standard terms and conditions of employment is useful at least for senior officers, that it is sensible to incorporate it in contracts of employment by operation of law, and that the disciplinary process of the employing authority is the appropriate means of enforcement.

2.2 **Q14 – Should we apply the Employees' Code to fire-fighters, teachers, community support officers and solicitors?**

The Consultation Paper suggests that it may be unnecessary or inappropriate to apply the Employees' Code of Conduct to employees in professions that are already covered by their own Code.

The purpose of most professional codes of conduct is to secure the reputation of the profession, not to protect the integrity and governance of the employer. They may overlap in some aspects, but they are directed to different ends. By way of illustration, the Solicitors' Code of Conduct 2007 contains no provisions on such matters as the requirements for respect, for the registration of outside interests, the notification of gifts and hospitality or the avoidance of involvement in the appointment of relatives and friends, all of which were important elements of the 2004 draft Code.

Accordingly, it may be appropriate to provide that where an employee is subject to a Code of Conduct which is a precondition of the employee performing the functions of the post, the Employees' Code of Conduct shall not apply in so far as it is incompatible with that other code.

2.3 **Q15 – Are there any other categories of employee in respect of whom it is not necessary to apply the Code?**

In general terms, if relevant employees are excused provisions of the Code which are incompatible with professional codes, there is much less need to exclude specific categories of employee from the Code.

2.4 **Q16 – Does the employees' code for all employees reflect the core values that should be enshrined in the code? If not, what has been included that should be omitted, or what has been omitted that should be included?**

2.4.1 Drafting

A code of conduct is different from a set of general principles. If it is incorporated into a contract of employment, it needs to be clear and precise. For this purpose it should comprise a set of duties and prohibitions, drafted with sufficient precision that an employee can readily identify how the Code applies to him/her, and when a particular act or omission would amount to a breach of the code. The Members' Code does now broadly comprise such a set of rules. But much of the proposed Employees' Code is very discursive in style and imprecise in its effect. This is exemplified by contrasting the paragraph on "treatment of information" in the Employees' Code with Paragraph 4 in the Members' Code of Conduct.

2.4.2 Application to private life

As drafted, the Employees' Code applies in an employee's private life, prohibiting an employee from having personal interest which conflict with their professional duties, requiring political neutrality even in private life, and requiring the disclosure of personal information to the employer, and perhaps to the general public. Following the determination that the provisions of the Local Government Act 2000 in respect of the Members' Code did not apply in a member's private life in the absence of an express statement to that effect in the legislation, is CLG confident that the Local Government Act 2000 provides a sufficient basis for an Employees' Code to be prescribed which would apply to employees' private life?

2.4.3 The Consultation Paper fails to ask whether consultees consider that it is appropriate to have a two-tier code, with core rules applied to all relevant employees, and additional provisions which apply only to senior employees.

The Council considers that the main public interest would be satisfied by a Code of Conduct which applied just to senior employees. The proposed core rules are already covered to a greater of lesser extent by standards terms and conditions of employment. But if the decision

is taken that core elements of the code should apply to all employees, then it is more important to keep the core rules to an absolute minimum.

2.4.4 Comparison with the Members' Code of Conduct

There would be considerable advantages in having commonality of language between the Members' and the Employees' Codes. Unfortunately the proposed Employees' Code appears to have been written with very little regard to the drafting of the existing or proposed Members' Codes. At the most basic level, the Members' Code is now written in the second person singular ("You must …"), but the Employees' Code is written in the third person plural ("Employees must …")

2.4.5 Political neutrality

On the basis (see below) that the additional rules will apply to all politically restricted post-holders, the second sentence of the provision on political neutrality (which applies only to officers who hold politically restricted posts) is redundant in the core rules. Further, if the Employees' Code is to be kept to a minimum, it should avoid provisions which are simply a repetition of existing legal requirements. Accordingly, this provision should be deleted.

2.4.6 Relations with members, the public and other employees

Whilst it would be nice if employees dealt sympathetically with members and others, it is unreasonable to suggest that employees should always have sympathy with those persons with whom they have to deal in the course of their employment. The requirement in the Members' Code to treat others with respect is much more appropriate, and unnecessary differences between the Members' and Employees' Codes should be avoided.

2.4.7 Equality

The entirety of this provision is simply a duplication of the requirements to act lawfully and within the policies of the authority, and so should be deleted.

2.4.8 Stewardship

The rest of the Employees' Code refers to "employees". This provision refers to "employees of relevant authorities." Consistent language should be used throughout the Code.

2.4.9 Personal interests

The requirement not to allow personal interests and beliefs to conflict with professional duties is not matched in the Members' Code of conduct.

The phrase “personal interests” is here used in a very different manner from the use of the same phrase in the Members’ Code. This will cause confusion and should be avoided.

2.4.10 Gifts and hospitality

The Employees’ Code should make it clear that it only applies to gifts and hospitality which the employee receives by reason of their employment.

2.4.11 Whistle-blowing

The inclusion of a requirement to inform the employer of an failure by another employee to comply with the Employees’ Code is in stark contrast to the removal of the similar provision from the Members’ Code in the 2007 amendments. The Council has no difficulty in a duty to report illegality or failure to comply with the policies of the authority, but we consider that the requirement in respect of the model Members’ Code is too obviously at odds with the Members’ Code.

Further, if retained, any such requirement should be applied to any breach of the employing authority’s employee code, rather than just the provisions of the model Employees’ Code.

2.4.12 Treatment of information

As set out above, this paragraph illustrates the discursive nature of the drafting, rather than being a clear set of duties and prohibitions.

2.4.13 Investigations by the Monitoring Officer

Whilst Monitoring Officer investigations are important, it would be equally important to secure the employee’s co-operation with any statutory investigation, including the authority’s eternal auditors and the Police.

2.5 **Q17 – Should the selection of “qualifying employees” be made on the basis of a political restriction style model or should qualifying employees be selected using the delegation model?**

The delegation model will not work. Strictly all local authority employees act only under powers delegated to them by the authority. In fact, the only exception to this is the personal statutory duties of the three statutory officers, the Head of Paid Service, Chief Finance Officer and Monitoring Officer, who should most certainly come within any definition of “qualifying employees”. Further, the manner in which schemes of delegations to officers are drafted is markedly different in different authorities. Some detail specific statutory powers for relatively junior officers. At the other end of the spectrum, some give broad generic delegations to the Chief Executive, and then enable the Chief Executive to sub-delegate those powers to other officers.

On the other hand, the category of "politically restricted posts" provides a convenient and precise definition of the most senior employees and those who are most closely associated with the formal member-level decision-making processes. There is no perfect definition as to which employees should be subject to additional provisions of the Employees' Code (or even to any provisions of the Employees' Code if the decision were taken that it was not necessary for less senior employees). But the one definition which we have to hand, which works and which is broadly on target, is that of politically restricted posts.

2.6 **Q18 – Should the code contain a requirement for qualifying employees to publicly register any interests?**

2.6.1 Is it appropriate that senior employees should be required to register outside interests?

Whilst a requirement to register outside interests is a requirement to disclose personal information, and as such may only be required in accordance with Article 8 of the Human Rights Act 1998 and the Data Protection Act 1998 where it is necessary for the protection of the rights and freedoms of others and the protection of public morals, the Council believes that there is a justifiable case for requiring senior employees to disclose private interests.

2.6.2 Should there be a public right of access to the register of employees' interests?

The matters which an employee will be required to register are matters in their private life. The requirement to register these interests with their employer is therefore an infringement of Article 8 of the Human Rights Act (Respect for private life, etc.) and potentially of the Data Protection Act 1998. Any public right of access to this personal information would be much more serious infringement of those rights of protection of private life and personal information, and should therefore only be granted if it is necessary for the protection of the rights and freedoms of others and the maintenance of public morals.

Since the Employees' Code is imported into employees' terms and conditions of employment and enforced through the employers' disciplinary process, it must be questioned what wider public interest would be served by the publication of such information, especially if the categories of registered information were widened, as suggested below. It should also be noted that JNC terms and conditions of employment currently prohibit the employing authority from disclosing personal information about an employee without his/her consent. On that basis, the Council considers that the register of employee's outside interests should not be open to public inspection.

A further question arises as to whether it should be open to inspection by all members of the employing authority. In the absence of express legislative provision, the view is taken that members would not have any automatic right of access to the register, but might make a specific enquiry in respect of a named officer where

they were able to demonstrate that they had a real need to know that information in order to discharge their functions as a member. Otherwise access would be limited to named employees in respect of only those employees for whom they had direct responsibility. The Council remains to be convinced that there is any justification for any change in that base position.

2.6.3 If the right of access to the register of employees' interests were limited in such a manner, there would be no need for a category of "sensitive information" to be disclosed but then omitted from the register.

2.7 **Q19 – Do the criteria of what should be registered contain any categories which should be omitted, or omit any categories which should be included?**

2.7.1 As set out above, the use of nominal values of securities produces a very arbitrary result, as pointed up by the current volatility of security values. As a result it would be better now to move to "any person or body who has a place of business or land in your authority's area, and in whom you have a beneficial interest in the securities of that person or body that exceeds a nominal value of £25,000, a current market value of £25,000 or one hundredth of the total issued share capital".

Without these provisions, the requirements of the Employees' Code will be significantly less onerous than the requirements of Section 117 of the Local Government Act 1972, which requires the disclosure of all pecuniary interests (although the definition of "pecuniary interest" would appear to have been repealed on the adoption of the first Members' Code in 2001).

2.7.2 The consultation paper contains no justification for omitting from the requirement to register under the Employees' Code particular categories of interest which are registrable under the Members' Code, including:

- Membership or a position of general control or management of outside bodies to which you have been appointed by the authority
- Membership or a position of general control or management of public authorities
- Membership or a position of general control or management of a body directed to charitable purposes
- Membership or a position of general control or management in a body the principal purposes of which include influencing public opinion or policy
- Any other employment or business carried on by you
- Any gifts and hospitality with a value greater than £25 which you have received by reason of your employment
- Any tenancy of the authority's property
- Any and in the authority's area which you occupy for 28 days or more.

Other employment or business, membership of pressure groups, the holding of other remunerated employment in the gift of the authority, and the receipt of gifts and hospitality by reason of your employment would appear to be of real interest, and should most certainly be included in the list of registrable interests. Thus, for example, it would be of serious concern if a senior finance officer was employed in their spare time by a financial consultancy which was seeking or had existing consultancy contracts with the authority, or was running a spare-time consultancy in such an area, if a senior planning officer of an authority were a member of a pressure group which had aims and objectives which were incompatible with the adopted planning policies of the authority, or an officer in charge of procurement were in receipt of significant gifts and hospitality from potential contractors with the authority.

2.8 **Q20 – Does the section of the employees' code which will apply to qualifying employees capture all pertinent aspects of the members' code? Have any been omitted?**

2.8.1 The omission of any class of "personal interests" requiring disclosure to the authority, whether or not some of them require registration, means that the Employees' Code is not only seriously out of line with the Members' Code, but also means that it fails to recognise the provisions of Section 117 of the Local Government Act 1972. Accordingly, employees will need not just to refer to the Employees' Code, but also to Section 117. This confusion can be avoided by including in the Employees' Code a requirement to notify the authority of any "personal interest", defining "personal interest" in such a manner that it includes not only "registrable interests", but also any interests which must be disclosed under Section 117, and in the process removing the difficulty caused by the repeal of the definition of "pecuniary interest".

2.8.2 Secondly, because the draft Employees' Code is written in very different and less precise language by comparison with the Members' Code, it simply is not possible to do a line-by-line comparison of both codes and their impact.

2.8.3 However, the suggestion that officers with a prejudicial interest should "wherever possible … take steps to avoid influential involvement in the matter" is completely at odds with the strict prohibition on member participation in a matter in which they have a prejudicial interest.

2.9 **Q21 – Does the section of the employees' code which will apply to qualifying employees place too many restrictions on qualifying employees? Are there any sections of the code that are not necessary?**

2.9.1 The proposed requirement for employees to consider advice provided to them and giving reasons is unnecessary. In the first place, the text is inconsistent with the title, as the text makes no reference to giving reasons for decisions and/or actions. In the second place, it is entirely up to an individual employee as to whether

he/she chooses to pay any attention to such advice, or to risk the penalties which may flow from ignoring it. Thirdly, no similar provision is contained in the Members' Code of Conduct.

2.9.2 The requirement to register interests with the authority's Monitoring Officer is at odds with the standard practice of authorities, where the register is normally held by the Head of HR. At the very least, the provision should require registration with "the Monitoring Officer or such other officer as he/she may designate for this purpose".

2.10 **Q22 – Should the employees' code extend to employees of parish councils?**

As set out above, there is little justification for legislating to require that relatively junior employees of a local authority be subject to any mandatory code provisions. It is always open to an authority to introduce such provisions as part of the authority's terms and conditions of employment. On that basis, and given the relatively lower pay levels of parish council employees and the very limited policy and regulatory functions of parish councils, the Council considers that the Employees' Code should be discretionary rather than mandatory for parish councils.

2.11 **Should authorities be required to incorporate the exact words of the employees' code into contracts of employment?**

[*The Council has already included in its standard terms and conditions of employment particular terms and conditions which cover some or all of the points contained in the draft Employees' Code, and in some cases actually go rather further. Many of those provisions are drafted in a manner different from the draft Employees' Code, and simply grafting the exact wording of the Employees' Code into such terms and conditions will produce contradictions and confusion.*] Accordingly, any statutory instrument prescribing the Employees' Code should provide that all relevant authorities must incorporate into their terms and conditions of employment provisions of no less effect than the Employees' Code, rather than necessarily the exact words and nothing more than the exact words of the Employees' Code.