

Committee: STANDARDS

Agenda Item

Date: 4 March 2013

5

Title: CODE OF CONDUCT

**Author: Michael Perry, Assistant Chief Executive
Legal, 01799 510416**

Item for decision

Summary

1. This report is to inform members of comments made by the government with regard to the Code of Conduct and to seek members' views as to whether any action needs to be taken.

Recommendations

2. Members consider whether the Code of Conduct should be reviewed.

Financial Implications

3. There are no costs associated with this report.

Background Papers

4. The following papers were referred to by the author in the preparation of this report and are available for inspection from the author of the report.
 - Letter of 19 November 2012 from the Department for Communities and Local Government to leaders of councils which are members of the Public Law Partnership.
 - Extract from Hansard of a debate held in Westminster Hall on the 16 January 2013.

Impact

- 5.

Communication/Consultation	None.
Community Safety	None.
Equalities	None.
Health and Safety	None.
Human Rights/Legal Implications	Local authorities have a statutory duty to adopt a Code of Conduct. The Localism Act requires that a Code of Conduct should

	be consistent with what are commonly referred to as “Nolan principles” and must contain provisions relating to the registration and declarations of interest. Providing the Code of Conduct accords with these requirements the content of a Code is left to the discretion of each authority.
Sustainability	None.
Ward-specific impacts	None.
Workforce/Workplace	None.

Situation

6. Prior to the Localism Act coming into effect, all local authorities were required to adopt a Code of Conduct. The Local Government Act 2000 gave the government power to prescribe a Model Code of Conduct. The most recent Code was prescribed by the government in 2007 to take effect in 2008. Local authorities were free to add to, but could not detract from, the Model Code.
7. The Localism Act contained wide ranging amendments to the standards regime. In particular whilst local authorities were required to adopt a Code of Conduct the power of the government to prescribe a Model Code was repealed. The Localism Act provided that a Code of Conduct must make provision for the registration and declaration of interests and must be consistent with the Nolan Principles. The Principles are specifically set out in the legislation. Apart from these provisions however there is nothing in the Localism Act to stipulate what should or should not go into a Code of Conduct.
8. In the lead up to the Act coming into force the government’s position was that it would not issue any guidance to local authorities on what the government expected a Code of Conduct to contain. The government was clear it would be left to the discretion of each authority as to what should or should not be in its Code.
9. The Standards Committee of this authority began working on a draft Code of Conduct in July 2011. On the 9 January 2012 the Standards Committee approved general principles and on the 12 March 2012 approved those parts of the Code of Conduct dealing with the registration and declaration of interests subject to necessary amendments as and when secondary legislation as introduced by the government.
10. Sometime after this council’s Standards Committee commenced work on a draft Code the Public Law Partnership (a partnership comprising all local authorities in Essex, Hertfordshire County Council, Suffolk County Council and some district councils from those counties) began working on a draft Code. Work proceeded in parallel. The Standards Committee was kept apprised of

developments. The Code ultimately proposed by this council's Standards Committee was very similar, but not identical, to that proposed by the PLP.

11. Having formulated a draft Code of Conduct this was recommended to Full Council for adoption (subject only to such amendments as may be necessary to comply with secondary legislation when issued) at its meeting on 17 April 2012. However, the week before that meeting both the Local Government Association and the government published different suggested versions of a Code of Conduct. In the circumstances, consideration of the Code by the council was deferred and the matter was referred back to the Standards Committee to consider the drafts put forward by the LGA and the government.
12. Those two Codes were subject to independent criticism by Peter Keith Lucas, a prominent local government solicitor in private practice. His view (shared by other lawyers within the PLP and me) is that the other draft Codes are too vague and incapable of enforcement.
13. The Standards Committee met to consider the other versions of the Code on the 14 May 2012 when it unanimously resolved to recommend that the Full Council approve and adopt the Code of Conduct previously put forward by the Committee.
14. It seems that the government is not happy that a number of authorities have adopted a Code of Conduct which is very similar to that which existed prior to the Localism Act 2011 taking effect. On 19 November 2012 Brandon Lewis MP, the Parliamentary Under Secretary of State for the Department of Communities and Local Government wrote to the leaders of all Public Law Partnership councils. A copy of that letter is annexed. In addition, on the 16 January 2013 a debate was held for MPs in Westminster Hall. The Hansard extract of that debate is also attached.
15. Although the Leader of the Council has clearly seen the letter sent to him by Brandon Lewis he has not suggested that the Code of Conduct be reviewed.
16. Mr Lewis is correct to state that the Localism Act enabled councils to make a break from the bureaucratic arrangements of the old regime. These arrangements were imposed by legislation and not adopted of the council's own choosing.
17. In particular the old arrangements required each complaint to be considered by an assessment sub-committee of the Standards Committee. By contrast our current arrangements require complaints to be assessed by the Monitoring Officer in consultation with an independent person. In the event that a standards assessment sub-committee determined that a complaint would not be investigated there was a right to seek a review from a review sub-committee. Under current arrangements there is no right of review of a decision not to investigate a complaint (other than by way of an application to the High Court for a judicial review of the decision). Under the old regime if a complaint was passed for investigation, there was a very lengthy investigation process and regardless of the outcome of the investigation (whether there was a finding of a breach of the Code of Conduct or not) a preliminary hearing by

the committee was required. If the investigating officer had found no breach of the Code the preliminary hearing could reject that finding and require a hearing in any event. If the investigating officer found there was a breach of the Code there would have to be a full hearing unless the Standards Committee determined that it was a case worthy of reference to the Adjudication Panel/First Tier Tribunal. Our current arrangements require only one hearing to consider the investigating officer's final report.

18. With regard to the contents of the Code, the view of members has been that the Code adopted by this council has advantages of certainty (the Code is clear and easily understood), familiarity (councillors are used to observing most of the provisions of this particular Code) and consistency (as most authorities across Essex are working to a very similar Code).
19. So far as I am aware all authorities in Essex other than Chelmsford have adopted the Public Law Partnership draft Code of Conduct or a Code very similar to it. I am not aware of any authorities undertaking a review as a result of the letter of the 19 November from Brandon Lewis.
20. Although not expressly referred to in Hansard it appears that the debate in Westminster Hall largely concerned chapter 6 of the Localism Act 2011 entitled "Predetermination".
21. Chapter 6 in fact contains one section, section 25 which provides that if there is an issue about the validity of a decision as a result of an allegation of bias or predetermination a decision maker is not to be taken to have had a closed mind when making the decision just because he or she had previously done anything that directly or indirectly indicated what view he or she took in relation to the matter.
22. It is important to point out that the law of bias and predetermination has always been a matter for the courts. Prior to the provision coming into effect the courts would, on an application for judicial review, strike down decisions of local authorities tainted by bias or predetermination.
23. There has been little case law since section 25 came into effect. In the case of *R v Tending District Council ex parte T W Logistics Limited*, Mr Justice Silber referred to the effect of section 25 being "a factor" in the exercise of his discretion to refuse to grant relief on the grounds of bias. In *E U Plants Limited v Wokingham Borough Council* the judge expressed no view on the section 25 issue as he found as a fact that there was no appearance of apparent bias in that case. There is therefore no judicial guidance as to exactly what section 25 means.
24. The difficulty in terms of interpretation of the section is that it uses the words "just because". Without judicial guidance it is impossible to say what these words mean. There will be clearly cases of bias where the courts will intervene. Mr Justice Beatson in the *Wokingham* case dealt with the issue of bias at some length in his judgement. Had he been satisfied that section 25 provided a complete defence, there would have been no need for him to do

so. Indeed the reverse was the case and he failed to consider section 25 because he was satisfied that there was no evidence of bias.

25. The other difficulty with regard to section 25 is that it only applies in considering the validity of a decision. Members of the public are entitled to expect their matters to be dealt with openly and fairly. They would feel justifiably aggrieved if they believed that a councillor or councillors were biased against them or had predetermined an issue in which they had an interest. Such matters could bring the council into disrepute which would constitute a breach of the council's current Code of Conduct.
26. Where a decision of the council is tainted by bias this may also lead to a complaint to the Local Ombudsman and a finding of mal-administration. In *R v Local Commissioner for Local Government in the North and North East England ex parte Liverpool City Council* the Court of Appeal upheld a finding of mal-administration where there had been a finding of bias. Section 25 would not be engaged in such a case as a finding by the Ombudsman does not affect the validity of a decision. A finding of mal-administration can lead to the Ombudsman directing that the council pays compensation to the complainant as well as reputational damage to the council.
27. In view of the uncertainty of interpretation and the fact that bias may still have consequences notwithstanding section 25, the Standards Committee and the council has been cautious in its approach and has incorporated provisions in the Codes of Best Practice Probitly in Planning and Licensing designed to assist members in avoiding any appearance of bias.

Risk Analysis

28. There are no risks associated with this report. Risks may arise from a review of the Code of Conduct should one be undertaken. These will need to be identified at the time.