

EAST AYRSHIRE COUNCIL

REPORT TO POLICY AND RESOURCES COMMITTEE 5th APRIL 2001

ETHICAL STANDARDS IN PUBLIC LIFE – CODE OF CONDUCT FOR COUNCILLORS

Report by Director of Corporate Resources

1.0 PURPOSE OF REPORT

To advise Members of the current position in regard to the introduction of new legislation governing ethical standards in public life and a Code of Conduct for Councillors

2.0 BACKGROUND

Under current legislation the conduct of Members of Local Authorities is governed by a variety of provisions introduced over a period of time stemming from the Local Government (Scotland) Act 1973.

Amongst the provisions currently applying to Members are the various provisions regarding declarations of interests and the Register of Interests, the National Code of Conduct and the provisions for surcharge.

The question of a new regime for ethical standards in public life has been under discussion now for several years, with the report of the Nolan Committee (the Committee on Standards in Public Life) being produced in July 1997 and the production of a consultation document "A New Ethical Framework for Local Government in Scotland" having been issued in 1998. The outcome of the discussions over recent years is the Ethical Standards in Public Life etc. (Scotland) Act 2000 which received Royal Assent on 24th July 2000 and which is due to be implemented, possibly incrementally, by Statutory Instrument.

3.0 THE PRINCIPAL NEW PROVISIONS APPLYING TO LOCAL GOVERNMENT IN SCOTLAND

3.1 Code of Conduct for Councillors

A new Code of Conduct is to be issued by Scottish Ministers. This will contain principles and rules governing the conduct of Councillors and the registration and declaration of interests. A

draft code has been drafted by CoSLA and will require approval by the Scottish Parliament. A copy of this draft code has been distributed direct to elected Members. It will cover amongst other things the issues of eligibility or ineligibility to participate in discussion or to vote upon Council business where the Councillor has a personal interest, pecuniary or non-pecuniary and in this context "Council Business" includes matters being considered by any body on which a Councillor sits as a representative or a nominee of his or her own Council.

It is interesting to note that in contrast with the provisions for Local Government there will be a model code produced by Scottish Ministers for the conduct of Members of devolved public bodies which may contain both mandatory and optional provisions and the various devolved public bodies will require to produce their own codes of conduct for their Members having regard to the model code.

3.2 Standards Commission

3.2.1 Investigations and Hearings

In terms of the Ethical Standards in Public Life (Scotland) Act 2000 a "Standards Commission for Scotland" is to be established. Its Members will be appointed by Scottish Ministers (after appropriate consultation). Ministers will also appoint a Chief Investigating Officer whose duties will be to investigate and report to the Commission on cases in which a Councillor (or member of a devolved public body) has, may have or is alleged to have contravened the Councillors (or public bodies) code.

It will be for the Chief Investigating Officer to decide whether, when and how to carry out any investigation which shall, so far as possible, be conducted confidentially in response to written allegations of misconduct. The Chief Investigating Officer will have the same powers as the Court of Session in relation to attendance and examination of witnesses and production of documents and, through that Court, may invoke penalties on non-compliance.

The Chief Investigating Officer will report to the Commission if he or she deems appropriate having first, if intending to report to the Commission, given the Councillor concerned the opportunity to make representations in respect of the contents of the report. In such case the Council of which the Member alleged to have committed the offence is a Member will also at that stage receive a copy of the proposed report by the Chief Investigating Officer.

On receipt of a report by the Chief Investigating Officer the Commission will either require further investigation to be carried out, hold a hearing on the matter, or do neither and is not constrained as to the timescale within which further investigations or a hearing will be heard. Hearings before the Commission will be heard by not fewer than three Members of the Commission and the Councillor whose conduct is considered by the Hearing is entitled to be heard in person or be represented by a person of his choice.

The legislation contains other operational issues in relation to the Commission including the right of the Commission to publish, if they wish, the Chief Investigating Officer's report to the Commission. The findings of the Commission on a hearing must be in writing and must be copied to the Councillor concerned, the Council of which he or she is a Member and any other person upon payment of a reasonable charge.

It should be noted that anyone may lodge a complaint with the Standards Commission.

3.2.2 Sanctions

The powers of the Standards Commission, on finding that a Councillor has contravened the Councillors' Code, include (a) censure; (b) suspension for up to 1 year from attending one or more (but not all) of the following: meetings of the Council, of its Committees or Sub-Committees and of any body on which the Councillor is a representative or nominee of the Council; (c) suspension for a period of up to a year of the Member's entitlement to attend all meetings of the Council, its Committees or Sub-Committees and of any other body, and (d) disqualification of the Councillor for a period not exceeding 5 years from being nominated for election or for being elected as a Councillor.

A period of suspension, as opposed to disqualification, will end at the beginning of the next following ordinary election day for that Council.

Disqualification has the effect of vacating the Councillor's office and extends to any joint committees, boards or other bodies on which the Councillor is a representative or nominee of the Council. Where a member is disqualified as a Councillor and he or she is also a member of another devolved public body, but not as a nominee of the Council, the Commission may also remove and disqualify the member from their Membership of the other body.

3.3 New Duties Of Councils

- 3.3.1** Amongst its other powers, the Standards Commission may issue guidance to Councils to assist in promoting the observance by Councillors of high standards of conduct and observance of the Councillors' Code. Each Local authority shall, in accordance with any such guidance, have a duty to promote the observance by its Councillors of high standards of conduct and a duty to assist and to observe the Councillors' Code.

The Standards Commission is under obligation to issue guidance to Councils on its relationship with them in the carrying out of its functions and must consult appropriately prior to doing so.

- 3.3.2** Regulations may be made by Scottish Ministers for the purposes of registers of interests of Councillors and Councils will be under an obligation to set up, maintain and make publicly available for inspection a register of such interests as its Members are required to register. The Standards Commission in respect of its powers of suspension of Councillors following hearings and findings of misconduct, shall issue guidance to Councils on the extent to which Councillors should engage in activities which may be perceived to be the activities of a Councillor other than those strictly the subject of the suspension during the period when he or she is subject to suspension.

- 3.3.3** Councils which receive reports from the Standards Commission on the outcome of hearings are obliged to consider the findings of the Commission within 3 months of receiving them (or such longer period as the Commission may specify). This duty may not be devolved by the Council to any Committee, Sub-Committee or officer. It should be noted however that the right to impose penalties on the finding of misconduct is a right of the Standards Commission and not of the Council of which the Councillor is a member.

3.4 Further Powers Of The Standards Commission

3.4.1 Interim Action

The Chief Investigating Officer is empowered and, if directed by the Commission, must submit to the Commission an interim report on any investigation conducted by him. On receipt of any such report the Commission, if it feels that the continued presence of the Member under investigation as a Member of Council during the

investigation is likely to prejudice it or it is otherwise in the public interest to do so, may impose a suspension of a period of not more than three months on the Member subject to the accusation. This decision does not require a hearing to be held before proceeding but the Member concerned does have an opportunity to make representations on both the alleged contravention and on the interim report prior to any such decision being taken.

Such suspension ends when the finding of the Commission is issued clearing the Councillor concerned, or on the imposition by the Standards Commission of a sanction or indeed on the Commission deciding not to hold a hearing. There are other interim arrangements for suspension and how it impacts at or about the period of ordinary elections and the Commission does have the right to renew the temporary suspension of this type for further periods of 3 months at a time.

3.4.2 Forfeiture of Allowances etc.

A Member under a precautionary suspension of this type is still entitled to basic and special responsibility allowances but not to other expenses in contrast to a suspension imposed as a sanction following the outcome of a hearing when the Commission has the further right to determine that a Member on a penal suspension should also suffer withdrawal of any other remuneration or allowance deriving from Membership of the Council.

3.4.3 Appeal Processes

Members of Council who have been the subject of sanction by the Standards Commission do of course have the right of appeal to the Sheriff Principal of the Sheriffdom in which the principal office of the Council is located.

4.0 OTHER PROVISIONS OF THE ACT OF 2000

The Act also makes amendments to the provision for investigations and reports by the Controller of Audit and the Accounts Commission for Scotland respectively. The Act has generally improved the definition of the hearing processes, making appropriate provisions for attendance and representation, and obliges the Commission, amongst other things, to hold

a hearing if requested to do so by the local authority or a person named or referred to in a special report by the Controller of Audit to the Commission.

Similar provisions are made in respect of publication of Reports etc. as will be the case in respect of the Standards Commission.

There is a similar requirement on the local authority to consider a report to them by the Commission on the findings of a hearing, that consideration to be by the local authority and not delegated to a Committee or sub-committee or Officer. The provisions also require the authority to advertise their consideration of the report and of a subsequent decision made by the authority in respect of action following the findings.

The Accounts Commission, if they decide following a hearing that any of the relevant failures in respect of the accounts or any losses etc. have occurred, have the power to impose a number of sanctions: these basically mirror the sanction powers of the Standards Commission in respect of sanctions imposed on Councillors and they also include a recommendation to the Scottish Ministers that an order be made by them against the Council concerned to make such amendments to its accounts as are necessary.

Again, similarly to the Standards Commission, there are provisions for interim reports or investigations by the Controller of Audit and Interim precautionary suspension provisions. There are also appropriate provisions for appeal by persons against whom finding has been made or a sanction has been imposed.

In view of the new sanctions imposed by the 2000 Act, the provisions in the 1973 Act as to imposition by the Secretary of State of surcharge [i.e. payment by person held to be at fault (Member or Officer) to the local authority in terms of a report by the Accounts Commission] will be repealed when the 2000 Act comes into force.

The various sections of the previous legislation which have been replaced by the 2000 Act (for example Registers of Interest, Declaration of Interest etc.) will be repealed when the 2000 Act comes into force.

5.0 IMPLEMENTATION

As referred to earlier in this report the provisions of the Ethical Standards in Public Life etc. (Scotland) Act 2000 are to be implemented by Statutory Instrument. Members will be advised as and when the various provisions of the Act, together with their impact, come into force.

6.0 CODE OF CONDUCT

6.1 Consultation

The Scottish Executive is currently consulting on the provisions of the draft Code of Conduct. The consultation period ends on 18th April. The draft Code re-iterates that it is the personal responsibility of individual Councillors to observe the rules of conduct set out by statute and in the Code and the guidance from the Standards Commission.

6.2 Contents of Draft Code

6.2.1 Principles – the code is based on nine general principles: duty, selflessness, integrity, objectivity, accountability and stewardship, openness, honesty, leadership and respect. These principles are defined in section 2 of the Code, which is reproduced, for ease of reference, at Appendix 1.

6.2.2 Conduct – Section 3 covers a range of conduct issues: relationship with employees, allowances, gifts and hospitality, conduct at meetings, confidentiality requirements, use of Council facilities, appointments to other bodies, dealings as an individual with the Council, responsibilities as an individual to the Council (referring in particular, to avoidance of debt to the Council and its potential for producing conflict of interest). Given that the Code is intended to clarify what is to be regarded as “unacceptable” actions, the provisions of this section should occasion no surprise. It is, however, noteworthy that failure to comply with the Code on any point constitutes grounds for complaint against a Councillor to the Standards Commission with, ultimately, the possibility of the imposition of sanctions and constitutes in that sense a much more rigorous regime than is currently the case.

In respect of the relationship of Councillors with Council employees, the draft code contains, in an appendix, a proposed protocol governing a range of issues. These, in themselves, are not unusual, nor is their codification unhelpful. The draft code indicates that members “should” follow the protocol, unlike other aspects of the code where Councillors “must” follow the code. This may be intended to indicate that breach of the protocol is not breach of the code, with corresponding sanctions. If this is the case, it would perhaps be more sensible to divorce the protocol entirely from the code. In any event, the code should leave no doubt as to the status of the protocol.

6.2.3 Registration of Interests - Sections 4 and 5 deal with the Register of Interests and what requires to be registered. Under the Act of 2000, Ministers may issue Regulations by Statutory Instrument governing the registration requirements and guidance may also be issued by the Standards Commission.

Failure to comply with requirements of the Code of Conduct will constitute a breach, giving grounds for complaint to the Standards Commission. The Code covers both financial and non-financial interests. The definition of interests is detailed; in respect of non-financial interests, the definition is “those which members of the public might reasonably think could influence your actions, speeches or votes in the Council.”

6.2.4 Declaration of Interests - Section 6 deals with declaration of interests. The requirements proposed in the Draft Code relate both to interests requiring to be registered (which are largely, but not exclusively, financial in nature) and to non-registrable interests. Given that the registrable non-financial interests include membership or holding office in a variety of organisations where the public might reasonably think membership could influence actions, speeches or votes, the subsequent reference in the declaration provisions to “private and personal interests” requiring to be declared, but not necessarily registered, could lead to confusion. It is however clear that the declaration requirements do include interests of family, friends and those arising through association with clubs, societies and other organisations. While the interests of family members (not defined in the draft Code) may be known to Members, this is not necessarily the case. When it comes to friends, this is even more problematic. It is suggested that the code would be greatly improved by tightening up the definition of such interests, bearing in mind the potential impact of a breach of the Code.

The method for declaration of interests is defined. An interest must be declared at the beginning of the meeting if a Member attends or takes part in the meeting in any way. It must be made as soon as possible after commencement of the meeting and must be an oral statement stating the nature of the interest, and must start with the statement “I declare an interest.”

While the mechanics of the process are clearly prescribed, members are still left to make what might be difficult judgements on the need to declare the interest. They must, both in respect of registrable and non-registrable interests, decide not only whether an interest is “sufficiently relevant” to the proceedings to require a

declaration and not only whether they will be influenced by it but also whether anybody else might reasonably think they might be.

Once an interest has been declared in respect of an item, the Member must leave the room during that item.

It is unfortunate that it is in respect of this crucial and perhaps most difficult of issues that the draft Code suffers from a loss of clarity. It advises Members to err on the side of caution. As an example, it discusses the necessity or otherwise to declare an interest in respect of an item involving not just a company from which a Member has received remuneration but an item relating to the industry to which that company belongs. It advises that a Member would need to consider this before participating in any proceedings. It adopts the same approach in respect of former registrable interests that have ceased and to one-off interests that may have arisen in the past. In all of these examples the advice is to consider what a member of the public might think and to err on the side of caution.

The same approach is taken to the position where a member has been appointed by the Council to another body. If that membership can be viewed as more significant than such membership by a member of the public or if the public would think it wrong for the Member to take part in decision-making, the interest should be declared. If neither of these applies, the Member may still participate and vote. However the interest must still be declared.

It is suggested that this position, rather than producing transparency, will only lead to confusion in the public mind. In the draft Code it is repeatedly emphasised that a declaration of interest leads to withdrawal from the meeting during the item concerned. In this case there is a hybrid proposal, where a Member would be declaring an interest (presumably in the prescribed form) yet failing to withdraw, and attempting to give an explanation of the rationale for this. The mere fact of declaration is likely to give rise to more questions than the explanation will answer. Given the range of other bodies to which members are appointed, it is submitted that this issue should be re-visited and the advice and procedure clarified.

It is unfortunate that interests of spouses and co-habitees (where these interests are known) is covered in the same way as appointments to outside organisations – particularly given the

difficulty of addressing these in any event – viz. the difficulty of proving or disproving knowledge of someone else’s interests.

Where a Member would be in the position of requiring to make frequent declarations of interest, the advice is either to decline the appointment or the committee membership. This also applies to appointments to office within the Council where that would involve regular contact with organisations or individuals with whom the Member has “an involvement or association” which “might give rise to any suspicion of bias.”

The principles about declaration of interest are to be applied, outwith the formal decision-making process, to contacts with employees, other Members and party groups.

Further potential confusion is caused by a provision that it can be appropriate for a Member to be appointed to a Committee because of a “legitimate personal interest” (as opposed to a “non-business or financial interest”). However such Members should adopt the principle of declaration of that interest at all times. It is impossible to understand what this means or its practical effect.

Similar dispensation provisions apply as at present where the number of declarations of interest in a matter would impede Council business. Dispensation can be applied for to the Standards Commission in respect of both financial and non-financial interests. It is suggested that applications should be made sufficiently in advance of a meeting to enable the Commission to give proper consideration to the request. It is submitted that as, in many cases, Members will not be aware of an item until they receive an Agenda, this proposal raises some practical issues. Provision should at least be made for block dispensations to be sought in advance for issues where a number of Members may be affected.

In summary the provisions in Section 6, covering as they do an area where not only does an elected member bear full personal responsibility, with the potential for sanctions in the event of an honestly reached but difficult decision being later deemed to be wrong, but also an area where advice or guidance by officers will necessarily be severely limited, require, it is submitted, to be clarified significantly in order to afford any significant assistance to Members faced with an issue. It is also submitted that the potential vulnerability of Members in respect of the interests of others needs to be governed by some protective provisions less likely to leave Members unfairly exposed to criticism.

6.2.5 Lobbying and Access to Councillors

The Code recognises that Members are likely to be lobbied by both individuals and organisations and sees this as part of an open, accessible, participative and responsible approach. It distinguishes, as would be expected, particular types of issue which Members are called upon to determine: regulatory matters (e.g. planning), quasi-judicial (licensing) and staffing. It re-emphasises that party group meetings should not play a role in deciding how Members should vote on such issues and makes it a specific breach of the Code to comply with any such group view on these matters if it differs from a Member's own view.

6.2.6 Decision-making

The draft Code recognises that amongst the points of view a Councillor requires to take into account in reaching a decision, is the wishes of the Member's political party or group. The Code re-states the position that an individual Member retains individual legal responsibility for his or her decision.

The section deals in some detail with the approach a member should take in dealing with an application for planning permission, a licence or other permission.

In summary, these follow existing good practice and are consistent with current advice to Members: ensuring applications are dealt with properly and parties dealt with fairly; avoidance of impropriety and suspicion or appearance of improper conduct; declaration of interest and non-participation in decision where appropriate; avoiding personal involvement in the organising of either support or opposition or in lobbying; not seeking to influence planning officers in their professional duties; not acting for an applicant for permission; not making public statements in advance and ensuring you are not seen as prejudging a committee decision; not indicating (or giving grounds to doubt impartiality) your support or opposition nor declaring your voting intentions in advance; declaring an interest and not participating in the decision if your views are known in advance; ensuring you participate in a decision only where you have heard the whole case. Specific advice is given in relation to the Licensing Board where canvassing a member of the Board is an offence and Members are advised of their responsibility to avoid being put in this position.

7.0 CONCLUSION AND RECOMMENDATIONS

The draft Code of Conduct is an important feature of the new ethical standards regime and, in view of the implications for Elected Members of

breach of the Code, it is critical that it is not only clear in its terms but that the advice it contains is as helpful as possible to Members.

Elected Members will carry personal responsibility for compliance with the code and it is submitted that the present wording in the draft is not, in some respects, as clear as might be desired.

It is therefore recommended that a response be made to the consultation document seeking greater clarification within the Code in respect of the areas – indicated within this report – where confusion exists or where additional clarification would enhance the ease of operation of the Code.

Recommendation

It is therefore recommended that a response be made to the consultation document highlighting the areas of potential confusion within the draft Code and seeking greater clarification in respect of those issues and of the advice given on interpretation and implementation.

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FL/BH/CMcT

20th March 2001

LIST OF BACKGROUND PAPERS

NIL

Any person requiring further information on this report should contact Barbara Haughan, Head of Administrative and Legal Services, (01563 576061).

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AGENDA