

## **ITEM 10            Review and Revision of the Code of Conduct**

Report of the Head of Legal and Democratic Services

### **Recommended:**

**That OSCOM consider THE revised Code of Conduct and Arrangements for Dealing with Complaints and particularly the text highlighted in yellow at Annex 1 and approve the same or otherwise make further recommendations to Cabinet.**

#### **SUMMARY:**

This report constitutes the review of the Code of Conduct and Arrangements for Dealing with Complaints.

The report benefits from both advice of a senior barrister which was received in the context of Member's interests and the Revised Local Plan and also a wider consultative exercise undertaken by HIOWLA and led by Kevin Gardner in his capacity as Clerk to Hampshire Fire and Rescue Authority.

The report recommends revisions to both the Code of Conduct and the Arrangements for Dealing with Complaints, and significantly the substitution of "Personal Interests" for "Code of Conduct Interests".

### **1        Introduction**

1.1    The Localism Act 2011 ("the Act") changed the ethical framework of local government to dispense with both the Model Code and the Standards Board for England. The Act intended that Members would be given greater liberty to advocate and challenge under a new and apparently less onerous code of conduct.

1.2    The Act requires that each Council adopts a code of conduct ("the Code") which both promotes and maintains high standards of conduct by Members of the Council. The Code should reflect specific principles set out in the Act, namely:

- (a)    selflessness;
- (b)    integrity;
- (c)    objectivity;
- (d)    accountability;
- (e)    openness;
- (f)    honesty;
- (g)    leadership.

- 1.2.1 The Code must include appropriate requirements and procedures in respect of the registration, and disclosure, of pecuniary interests, and interests other than pecuniary interests. Breach of the Code is a matter for the Council. However, criminal offences are created in respect of the failure to disclose pecuniary interests.
- 1.2.2 The Council duly adopted a Code of Conduct on 4 July 2012, and subsequently delegated functions regarding the effective administration of complaints and the requirement for dispensations as provided for in the legislation.
- 1.2.3 More recently the Head of Legal and Democratic Services sought advice of a senior barrister regarding Members' disclosable pecuniary interests pursuant to the provisions of the Localism Act and regarding the interpretation and application of the Members' Code of Conduct, in the context of the Revised Local Plan and the decisions which fall to be made by Council. As a consequence of that advice, which gave consideration to the Code of Conduct Interest in addition to the impact of disclosable pecuniary interests, it was necessary for Members to be granted a dispensation in order to participate in the debate and progress of the Revised Local plan.
- 1.3 In addition it has become increasingly apparent that the Code fails to address Members' concerns regarding the transparency of their respective interests whether as Council appointees or privately in various charities and other community organisations.

## **2 Proposed Revision of the Code**

### Code of Conduct Interest ("CoCi")

- 2.1 The Act does not limit what might be included in the Code, only what **must** be included. Accordingly, the scope and content of the Code was agreed in consultation with Members having regard to the requirements of the Act, the dismantling of a national standards board, and Members' own concern that consideration should be given to interests which might arise in addition to those matters described in legislation as "disclosable pecuniary interests" ("dpi"). Those additional interests appear in the Code at Part 3: Interests. Paragraph 2: Code of Conduct Interests ("CoCi").
- 2.2 A dpi is as defined in the legislation.
- 2.3 A CoCi is defined only in the Code and is unique to this Council. A CoCi is a pecuniary interest, which whilst not a dpi will..."affect you...or relate to or affect a relevant person as defined in the Regulations, a member of your family or a close friend."

- 2.4 The Code requires the declaration of both dpi and CoCi where such interests are interests “in any matter to be considered”. A Member with a CoCi must leave the room and cannot vote (just as for a dpi), but may first make a statement as if a member of the public.
- 2.5 The draconian nature of the CoCi became clear when Council was required to consider the Revised Local Plan.
- 2.6 During 2014, the Head of Legal and Democratic Services instructed a senior barrister to advise as to the nature and consequence of the Code for Members when considering the Revised Local Plan.
- 2.7 The barrister advised insofar as Code of Conduct Interests that all Members with close friends and family, who owned property or operated businesses in the Borough which would be “affected” by the Revised Local Plan had a CoCi. That meant that essentially all Members would be precluded from debating or voting upon, the Revised Local Plan but for the grant of a dispensation.
- 2.8 The impact of the CoCi upon Members and the business of Council was as draconian as if such interests constituted statutory interests (dpi): the Council would be unable to transact business (it being likely that all Members have close friends and family living within the Borough, with homes and/or businesses and who would be “affected”).
- 2.9 It is now clear that the CoCi whilst intending to address the initial concerns of Members regarding interests which would not otherwise be caught by provisions in respect of dpi, far exceeds the requirement of the law, and unlike both the dpi which has clear statutory definition and its predecessor the “personal and prejudicial interest”, the CoCi has no limitations or moderating criteria.
- 2.10 Finally, the barrister was particularly concerned that all Members should have regard to the law of bias. The barrister advised that, whilst the law as it related to the Code and the law of bias were not the same (only the latter being the legal basis upon which a decision might be found to be unlawful), the failure on the part of Members to consider the Code carefully and to make relevant declarations, could only add weight to an allegation of bias and so render the decision of Council vulnerable to challenge in the courts.
- 2.11 In short, by application of the Code Members might ensure that they are seen to act without bias and consequently protect the decisions taken by Council or other committees against challenge through the Courts for reason of common law bias. Therefore, it is necessary that the Code should provide Members with sufficient guidance and clarity around such matters that they are able to give due consideration to their position before participating in the decision-making process.

- 2.12 The second element which suggests the necessary revision and replacement of the CoCi relates to those Members who are members of charities and other organisations, whether as appointees or privately. Previously, these “interests” were explicitly addressed in the Model Code of Conduct and for the most part were not interests which served to prevent full participation. Currently, there is no guidance or provision which would ensure clarity and transparency and so secure the integrity of the Member’s position. It appears that having regard to the current Code, such external roles do not constitute an interest of any sort.
- 2.13 Currently, Members make declarations of interest which have no origin in the Code, and which do not constitute “interests” but about which Members clearly wish to be clear and transparent.

“Personal Interests”

- 2.14 The draft revised Code which details the proposed changes to the Code is attached at Annex 1.
- 2.15 It is recommended that the Code of Conduct Interest is replaced with “Personal Interests” (“PI”), largely as framed during the HLOWLA consultation which ambitiously sought to establish a pan-Hampshire Code of Conduct. Nonetheless, there was by and large agreement across a number of authorities as to how interests other than dpi might be addressed.
- 2.16 The definition of a PI includes membership of other bodies such as charities, other public authorities and bodies seeking to influence opinion. The PI allows Members to declare an interest and so secure the transparency they seek at present.
- 2.17 Personal Interests also cover those interests which lie outside the definition of dpi, as required by the Act. However, unlike the CoCi which covers any and all pecuniary interests, even those that merely “relate” to particular person, the PI restores a sense of proportionality to the assessment of that interest. Whilst the PI addresses both “well-being” and “financial position”, such matters are only relevant where the degree by which a Member’s family or others of close association are affected more than any other inhabitant of the Borough.
- 2.18 Significantly, unlike a CoCi a Member is not compelled to withdraw from the meeting having made a statement, but rather can participate fully. That continued participation aligns more closely with the Act but is subject to the necessary consideration of bias, and the overarching principles of conduct in public service which are recited in the Code.
- 2.19 The draft Code of Conduct expressly allows Members with a PI to decline to participate in a meeting where that Member concludes that it would be inappropriate, for whatever reason, having sought advice where appropriate.

- 2.20 Whilst the proposed revision does not relieve Members of the requirement to consider such interests carefully, and that these issues will continue to be on occasion complex, it is submitted that the draft provides greater clarity around such interests and supports Members in their essential role as participants in decision-making.
- 2.21 In order to assist both individual Members and the committee process Members will be able to complete a Declaration of Interest form prior to the meeting (the form to be available on the Members Portal), the terms of which will be read out at the start of the meeting by the committee administrator.
- 2.22 The draft Code at Annex 1 includes text highlighted in yellow. The current Code does not expressly include close friends of your family members, only “close friends” of the Member. A “close associate” could include an employer or business partner, or a landlord for example, as well as a friend.
- 2.23 The term “close associate” is proposed in order that Members might guard against bias. Whilst a reasonable observer might conclude that Members might readily favour their close friends, such an observer could equally conclude that Members would disfavour those for whom there is some enmity on the part of the Member. Both the favour and the disfavour in such circumstances could constitute bias and render a decision unlawful at the instance of the Court.

#### Disclosable Pecuniary Interests (“dpi”)

- 2.24 These interests are defined by legislation and are a mandatory element of the Code.
- 2.25 The failure to comply with the Code in respect of dpi carries criminal sanctions which in part explains the demise of the Standards Board for England. An alleged failure to declare a dpi is a matter for the police rather than the Monitoring officer. Members will be aware that elsewhere criminal investigations and prosecutions have been undertaken.
- 2.26 Whilst the explanation of dpi in the current Code is not incorrect, the style of presentation by which it has been attempted to weave together both dpis and “Code of Conduct Interests” and all that follows, makes for difficult reading and accurate interpretation by Members and officers alike.
- 2.27 The draft revised Code necessarily incorporates all the information which is found in the current Code. The format however is different, intending to provide Members with a more coherent description of such interests, the requirements for registration and declaration, and the consequences which follow the declaration of such an interest at a meeting of the Council or one of its committees.

- 2.28 Dual-hatted Members who are County Councillors will be familiar with the format. However, there are points of difference which reflect more closely the Council's interpretation of the Act and which follow the Members' requirements expressed through Member workshop and consultation during 2012. A particular point of difference retained in the proposed revised Code is the requirement to withdraw from the room having declared a dpi.
- 2.29 Similarly, the revised Code retains the requirement that such declarations are made whenever the Member is "present" at a meeting of the council, and is not contingent upon being present as a member of the committee or otherwise a participant. That is what the Act requires and which as a principle, is consistent with decisions of the appellate courts albeit regarding the previous Model Code.
- 2.30 Finally and consistently with the current Code, the Act is followed to the letter so that there can be no participation by Members who declare a dpi at those meetings.
- 2.31 The draft revised Code at Part 4: Registration and Disclosure of Disclosable Pecuniary Interests includes optional text for Members to consider highlighted in yellow.
- 2.32 The current Code of Conduct requires that both the "existence and nature" of the interest is disclosed at the meeting. That provision exceeds what is required by law, particularly where the interest is recorded in the Member's Register of Interests. However, Members may even so prefer that those attending the meeting, and who perhaps have not had sight of the Register of Interests should understand both the nature of the interest, not merely its existence in law, and to that extent retain the wording of the current Code.
- 2.33 In view of the overarching requirement that there shall be transparency in all Members do, guidance from Members is sought as to whether any further detail need be given to the meeting where the nature of that dpi is already recorded in the Register. Members have a choice: by law they are not required to disclose the nature of their interest, only the existence.

#### Sensitive Interests

- 2.34 Sensitive interests are those interests which could cause the Member or a person connected with the Member to suffer intimidation or violence.
- 2.35 The current Code explains what a sensitive interests is and how it might be recorded on the Register. However the Code does not advise that such interests need not be registered at all, or how a sensitive interests which is also a dpi might be declared at a meeting.
- 2.36 The revised Code addresses both of these issues.

Other recommended revisions to the Code

2.37 Part 1: General Provisions.

- (a) The current Code makes no reference to the statutory requirement to publish the Members Register of Interests or to permit inspection of the Register during reasonable hours.
- (b) The revised Code includes those statutory requirements at paragraph 4,

2.38 Part 2: General Obligations for Members

- (a) Whilst current Members understand that they are bound to act in accordance with the legal obligations, policies and procedures of the Council, it is nonetheless a fundamental obligation which is appropriate to include in Part 2 in order to ensure that new Members and members of the public are similarly aware. The obligation is noted at paragraph 1.3.
- (b) The issue of bias is nowhere addressed in the current Code. It is recommended that Members should have clear guidance as to the necessity for independent judgement. The revised obligation appears at paragraph 2.1.

**3 Arrangements for Dealing with Complaints Corporate Objectives and Priorities (“the Arrangements”) (Annex 2)**

3.1 The Act whilst requiring that arrangements were in place to deal with complaints, reduced the effective sanctions available to the Council and particularly so regarding complaints relating to Parish Councillors.

3.2 The sanctions available are:

3.2.1 Where the matter relates to a Borough Councillor, that the Member be censured;

3.2.2 Where the matter relates to a Parish or Town Councillor, that it be recommended to the Council concerned that the member be censured (in which case it is a matter for that Parish or Town Council to decide whether to accept such a recommendation);

3.2.3 That there shall be whatever publicity regarding the sanction considered appropriate;

3.2.4 That it be recommended to the Council that the Member be removed from a specific committee(s).

3.3 The current arrangements provide for a process of initial assessment of a complaint by the Employment Appeals and Ethics Sub-Committee. That assessment does not make any finding of fact or determine the merit of the complaint but considers the complaint against certain criteria found at Annex 1 to the Arrangements for Dealing with complaints.

- 3.4 The recommended revision to the Arrangements allows for the initial assessment to be undertaken by means of consultation between the Monitoring Officer and the chairman of the Employment Appeals and Ethics Committee, and where the subject Member has requested, the Independent Person.
- 3.5 The revised procedure is intended to ensure that whilst there can be a full consideration of the complaint with Member participation, that consideration is not delayed by committee process which delay serves only to exacerbate the sense of grievance and anxiety of both complainant and Member alike.

#### **4 Consultations/Communications**

- 4.1 The report has been considered by the Corporate Portfolio Holder. The report will proceed to the General Purposes Committee and to Cabinet before then being considered by Council. All Members have been consulted and their comments considered in the drafting of this report and the attached Annexes.

#### **5 Option Appraisal**

- 5.1 The Council can decide not to adopt the revised Code of Conduct and/or Arrangements for Dealing with Complaints. In that event Members would continue to conduct themselves having regard to the current Code of Conduct and complaints would be managed under the existing Arrangements
- 5.2 The Council can decide to adopt the revised Code of Conduct and/or the Arrangements for Dealing with Complaints. In that event each Member would conduct him/herself having regard to the revised Code of Conduct and complaints would be managed under the revised Arrangements.
- 5.3 The second option is recommended by Officers. The revised Code of Conduct proposes greater clarity regarding both interests which are disclosable pecuniary interests and those which are not disclosable pecuniary interest. The revised Code enables Members to participate fully in the business of Council and its committees, as intended by the Act, having declared such interests and so secured the requisite transparency and openness which underpins the integrity of the decision-making process.
- 5.4 The revision to the Arrangements enables both complainants and Members reasonably to expect the swift assessment of complaints and so is consistent with that fundamental principle of natural justice.

#### **6 Resource Implications**

- 6.1 There are none save the resource engaged in publishing the revised documents and further training of Members.

#### **7 Legal Implications**

- 7.1 The legal implications are as set out above.



## 8 Other Issues

### 8.1 Wards/Communities Affected

8.1.1 All wards and communities in the Borough are affected

## 9 Conclusion

9.1 Members are required to have regard to the Members Code of Conduct when attending meetings and to declare interests as appropriate. The current Code of Conduct has not always proved easy to navigate for Members much less, members of the public. The proposed revisions to the Code of Conduct intend greater clarity and certainty regarding the integrity of the Members position and to enable a more effective complaints process.

### Background Papers (Local Government Act 1972 Section 100D)

Report of Corporate Portfolio Holder- Council- 4 July 2012

Report of Corporate Portfolio Holder- General Purposes Committee- 2013

Report of Corporate Portfolio Holder- Council- 2014

Code of Conduct - 2012

### Confidentiality

It is considered that this report does not contain exempt information within the meaning of Schedule 12A of the Local Government Act 1972, as amended, and can be made public.

No of Annexes:	2		
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