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COUNCILLORS

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A ELIGIBILITY

Eligibility requirements—general

- 2.01** There are four broad requirements for eligibility to serve as a councillor. They concern citizenship, age, residence, and the absence of disqualification. Candidates must be British subjects, citizens of the Republic of Ireland, or citizens of the European Union who do not fall into either of those two categories: Local Government Act (LGA) 1972, s. 79(1). The expression ‘British subject’ is defined for this purpose by the British Nationality Act 1981, s. 51(1)(b) as ‘a person who has the status of a Commonwealth citizen under this Act’. Therefore citizens of the countries listed in Schedule 3 to that Act are entitled to stand for elected office in local government. They must have attained the age of 21 years on what is referred to as the ‘relevant day’. This, confusingly, is two dates in elections requiring nomination: the date of nomination and the date of the election. In the case of all other elections, it is the date of the poll: LGA 1972, s. 79(2).

Residence requirements

- 2.02** The residence requirements are more complex. The candidate must:
- (a) be a local government elector for that area on the ‘relevant day’ and continue to be thereafter; or
 - (b) have occupied as owner or tenant any land or other premises in that area for 12 months preceding that day; or
 - (c) have had his or her principal or only place of work for the preceding 12 months in that area; or
 - (d) have resided in the area for the preceding 12 months; or
 - (e) in the case of parish or community councils, have resided in the area of the parish or community or within three miles of it for the preceding 12 months.

The word ‘land’ is defined in s. 270 of the LGA 1972 as including ‘any interest in land and any easement or right in, to or over land’. This is a very wide definition. It is curious to reflect that possession of an easement or other obscure interest in land is thought to be a sufficient interest in an area for a person to be allowed to stand for public office. Given this wide definition, it is questionable whether the word ‘premises’ was needed as well. This word is not defined in the Act but modern case law gives it a wide meaning. See, for instance, *Gardiner v Sevenoaks RDC* [1950] 2 A11 ER 84, in which it was held to include man-made enclosed caves, and *Bracey v Read* [1962] 3 A11 ER 472, in which it was decided that the word should encompass ‘gallops’ on open downland.

- 2.03** The word ‘work’ was considered in the Court of Appeal in *Parker v Yeo* (1992) 90 LGR 645. In this case Mr Yeo had been a city councillor since 1983 and based his qualification on the fact that he was employed within the city council’s area. In 1990, the business for which he worked ceased trading and he retired. He continued to sit as a councillor and in May 1992 he was re-elected. He based his qualification on the ground that his duties as a city councillor which he undertook mainly at the civic centre constituted ‘work’ within the meaning of

LGA 1972, s. 79(1)(c). He had attended and sat on various committees and working groups, served as deputy leader of the Conservative group, and no doubt dealt with correspondence and performed numerous other tasks. His election was challenged by the unsuccessful candidate. The petition succeeded in the Divisional Court, but this was overturned by the Court of Appeal. It was held that the word 'work' should be given its ordinary and natural meaning, that the duties Mr Yeo undertook at the civic centre would normally be described as work, and that there was much to be said on policy grounds for allowing those who used their time and energy in serving a particular area to be able to use this service as a reason for continuing to represent that area. It was suggested that voluntary work or the work of a candidate in 'shadowing' a councillor could also constitute work for the purposes of this section.

The issue of residence was considered in *Fox v Stirk and Bristol Registration Officer* [1970] 2 QB 463, in which the Court of Appeal held that students in a hall of residence were entitled to be registered as electors for the area in which the hall was situated. The students occupied their rooms for at least 29 weeks of the year, sometimes longer, but they had to vacate them for at least six weeks each year. Lord Denning said there were three general principles to be considered: **2.04**

- (a) A person may have more than one residence.
- (b) Temporary presence at an address does not make a person resident at that address.
- (c) Temporary absence does not lead to loss of residence.

The word has no technical or special meaning but ordinarily implies a degree of permanence.

The case of *Hipperson v Electoral Registration Officer for Newbury District* [1985] QB 1060 concerned the eligibility to stand for the local authority of the women encamped at Greenham Common. Their names were included in the electoral register, then removed by the electoral registration officer as a result of an objection. Their exclusion was based on the illegality of their residence. Their appeal to the county court was allowed on the ground that, while they had always been in breach of s. 137 of the Highways Act 1980, the illegality of their residence did not affect their qualification for voting. An appeal by the objector to the Court of Appeal was dismissed. The Court held that the standard of accommodation was irrelevant: there was no need for people to live in a permanent building in order to be able to vote. The fact that their residence there was precarious, in the sense that they might well soon have to leave, was also irrelevant. As Donaldson MR remarked: 'In practice [the camp] seems to have a marked degree of continuity.' It is surprising that this argument was put forward. The notion of disqualification on the basis of precariousness seems alarming as well as extremely difficult to implement. Would those in danger of eviction because of rent or mortgage arrears be disqualified? This would be placing quite a burden on the shoulders of the electoral registration officer. It was also pointed out that disqualification on the basis of illegality would also have very wide consequences, disqualifying a whole range of citizens. However, a distinction was drawn between breach of a statute and breach of a court order: 'If a court has ordered a citizen to cease to reside at a particular address, he cannot rely on his continued presence at that address as a qualification for the franchise.' **2.05**

B DISQUALIFICATIONS

2.06 In addition to holding the above qualifications, a candidate for membership of a local authority must not be disqualified. The disqualifications set out in s. 80 of the 1972 Act are as follows:

- (a) holding any office or employment, appointments to which are or may be made or confirmed by the local authority;
- (b) being bankrupt or having made a composition or arrangement with creditors;
- (c) having been sentenced within the previous five years to a term of imprisonment (whether suspended or not) of not less than three months;
- (d) being disqualified under Part III of the Representation of the People Act 1983 or under the Audit Commission Act 1998.

A further disqualification was added by the Local Government and Housing Act 1989, in that holders of 'politically restricted' posts in a local authority cannot stand for election in any local authority. Politically restricted posts are dealt with in the next chapter.

C RIGHTS TO INFORMATION

Statutory rights

2.07 Councillors have more rights to information than do members of the public. The public's rights are considered in chapter 15. The rights of councillors have fuelled a considerable amount of litigation. They derive from common law and statute. The statutory rights are contained in s. 100F(1) of the LGA 1972:

any document which is in the possession or under the control of a principal council and contains material relating to any business to be transacted at a meeting of the council or a committee or sub-committee of the council shall, subject to subsection (2) below, be open to inspection by any member of the council.

2.08 Subsection (2) allows documents not to be disclosed if they contain exempt information falling within paragraphs 1 to 6, 9, 11, 12, and 14 of Part I of Schedule 12A to the Act. Schedule 12A is set out in Appendix 1 below. It sets out the categories of information which a local authority may deem too sensitive for the general public. Section 100F(2) in effect designates some of the categories as super-sensitive, too confidential even for the eyes of elected members. The reasoning behind the choice of paragraphs is not entirely clear. Personal information is obviously regarded as highly confidential, unless the identity of informants can be regarded as personal; commercial information is seen as rather less sensitive.

2.09 There are two other important limitations contained within s. 100F(1). First, the information must be 'in the possession or under the control of' the council. Some information could be available on council premises but fall outside this description, such as information relating to the activities of a trade union or a political party. Secondly, the information must relate to business being transacted at a council meeting, or a committee or sub-committee meeting. Information about matters which have not come to the attention of one of these

bodies is excluded altogether from the section. Section 100F(5) provides that ‘the rights conferred by this section on a member of a principal council are in addition to any other rights he may have apart from this section’. Thus it is clear that the common law rights of councillors to information are preserved.

The ‘need to know’ test

The extent of these rights was considered by the House of Lords in *R v Birmingham City Council, ex parte O* [1983] 1 AC 578. This concerned a councillor, who was not a member of the social services committee but who had information which led her to have some anxiety about a family who had been approved by the city council as prospective adopters. She sought access to the social services files and, on the advice of the Council’s legal adviser, the council resolved to disclose them. This decision was challenged by the family who were the subject of the enquiry. However, as the courts perceived, the real conflict was between the city council and its social workers. The House of Lords reviewed the case law and concluded that there was no right to a ‘roving commission’, that simply being a councillor did not entitle a person to trawl through every filing cabinet in the Town Hall in the hope of finding something interesting and that ‘mere curiosity’ was not in itself a good enough reason for granting access. They concluded too that committee members had the right to all information relating to the business of that committee. Then Lord Brightman, giving the leading judgment, continued (p. 594):

In the case of a committee of which the councillor is not a member, different considerations must apply. The outside councillor, as I will call him, has no automatic right of access to documentary material. Of him, it cannot be said that he necessarily has good reason, and is necessarily entitled, to inspect all written material in the possession of the council and every committee and the officers thereof. What Donaldson LJ described as a ‘need to know’ must be demonstrated.

Whether a councillor does have a ‘need to know’ is of course a question to which there may be scope for considerable disagreement. It is a question for the council to decide. Provided that this decision is not challengeable on any of the administrative law grounds the courts will not interfere. In this case the House of Lords declined to interfere with the decision to grant disclosure.

Rights of committee members to information

For committee members, the House of Lords was prepared to grant very wide access indeed (p. 594):

In the case of a committee of which he is a member, a councillor as a general rule will *ex hypothesi* have good reason for access to all written material of such committee. So I do not doubt that each member of the social services committee is entitled by virtue of his office to see all the papers which have come into the possession of a social worker in the course of his duties as an employee of the council. There is no room for secrecy as between a social worker and a member of the social services committee.

The words ‘as a general rule’ might still allow for exceptions. In spite of the fact that the above passage indicates that a member of the social services committee does in fact have a

'roving commission' it is still possible that a council should decline access to committee members if it was considered that a councillor was seeking the information for improper motives.

- 2.12** The *Birmingham* case established that a councillor's 'need to know' can override confidentiality. The documents in that case were highly confidential, and the councillor was under a duty, once they were disclosed to her, to respect that confidentiality. However, once a need to know is established, then it is no answer for the council to plead confidentiality as a ground of non-disclosure. Nor is it an answer for the council to say that there are other means of obtaining the same information.
- 2.13** In *R v Hackney LBC, ex parte Gamper* [1985] 1 WLR 1229, the applicant David Gamper was leader of the opposition Liberal Group on Hackney Council. The council had, after the Local Government, Planning and Land Act 1980 came into force, set up a public services committee to oversee the operations of the direct labour organisations (DLOs). It also established three sub-committees to deal with policy and operational matters. One of these was responsible for the building works DLO. Mr Gamper was a member of the public services committee and also chaired the Shoreditch district housing committee. In that capacity, and also in his capacity as an individual councillor, he received complaints from the council's tenants about the DLO's performance, especially about the length of time it took to undertake repairs and the time properties remained empty awaiting renovation. He was therefore concerned about the efficiency of the DLO and requested copies of the documents from the sub-committee responsible for it. He also tried to attend one of the sub-committee's meetings. However, shortly afterwards, Standing Orders were changed so that only appointed members could attend certain sub-committees, including those responsible for the DLOs.
- 2.14** In its letter refusing copies of the documents and access to the sub-committee meetings, the council said that its view was that 'certain sub-committees should be held in private because of the confidential nature of their business' and concluded by saying:

I do hope you will recognise the special circumstances that apply here and whilst in no way wishing to impugn the integrity of Councillor David Gamper, the utmost need to preserve confidentiality for the direct labour organisations who are competing on a commercial basis for contracts and thereby maintaining the jobs of the workforce.

This was a weak argument and does not appear to have been put forward as a defence when Mr Gamper sought judicial review of the above decision. Instead, the council appears to have relied on the argument that he could obtain the information he required in other ways, such as by raising questions at council meetings. The court described this answer as 'unconvincing': the applicant had a 'general concern for the efficiency of the DLO operation as a whole'. He was a member of the parent committee which had 'a residual responsibility for the activities of the delegate and an obligation, in certain circumstances, to exercise some degree of control' (Donaldson LJ in the Court of Appeal decision of *R v Birmingham City Council, ex parte O* [1982] 1 WLR 679 at p. 691, quoted on p. 1238). On this ground alone he had established a need to know.

- 2.15** The court then had to decide whether it should intervene and quash the decision. Following the *Birmingham* ruling that the decision was a matter for the council and open to review by

the courts only on the basis of *Wednesbury* unreasonableness, the court concluded that the council had failed to take into account a relevant factor, namely whether the applicant had established a need to know. Lloyd LJ also concluded that in imposing a blanket denial the council had acted in a way that no reasonable council could act if properly directed. He declined, however, to draw the conclusion that the council was motivated by an improper purpose, namely to protect the DLO at all costs.

The court finally had to consider the issue of attendance at meetings, as the existence of such a right had not been considered in the *Birmingham* case, or in any other decided cases. Lloyd LJ's conclusion was that there was no logical distinction between the two. The question was: did the councillor need to attend in order to perform his duties properly? The right to attend does not carry with it a right to participate or a right to vote. The question of whether a 'more urgent need to know' was required to justify attendance at meetings than receipt of documents was left open. It has not been considered in any subsequent case. However, there is no sensible reason for believing that a more stringent test should be required.

D DUTIES OF COUNCILLORS

Councillors have a duty to consider the issues on which they are called upon to vote. They cannot fetter their discretion by agreeing in advance to vote in accordance with party policy in all circumstances or the dictates of some other body so as to deprive themselves of all real choice. If they do so, then their decision is liable to be quashed. However, party policy and party loyalty are relevant considerations and can be taken into account provided they do not exclude all other considerations. The issue of the extent to which councillors could take these factors into account was considered by the Court of Appeal in *R v Waltham Forest LBC—ex parte Baxter* (1998) 86 LGR 254. The London Borough of Waltham Forest had decided to impose a very large rate increase—62 per cent in the case of domestic rates—leading to some disgruntlement among many of those called upon to pay. Some of the more determined among the disgruntled ratepayers sought judicial review of the council's decision. Although the basis of their complaint was originally unclear, the case resolved itself into a dispute about whether some members of the council had fettered their discretion by voting in accordance with the Labour group policy instead of being guided solely by their own convictions. **2.16**

In the Divisional Court it was also suggested that the councillors voted as they did because they were following the instructions of a Labour party body known as the Local Government Group; this allegation was not made out on the facts. The Court of Appeal said that if it had been, this would have been a ground for quashing the decision. Instead, the argument centred on the decision of the Labour group in council: some members who had argued and voted against the rate increase at the group meeting, voted for it in council. If they had not done so, the increase would not have been agreed. Four of the councillors concerned gave evidence at the hearing before the Divisional Court who dismissed the application. **2.17**

The applicants appealed. Lord Donaldson MR held first that no inference could be drawn from the fact that the way the councillors voted on the issue in council was contrary to their **2.18**

earlier expressed views. Apart from anything else, it was open to them to change their opinion at any time. The evidence of the four councillors was re-examined with some care. One felt that it would be preferable to remain in the group and continue to argue his case to his colleagues from within. He would have felt obliged to resign from the group if he had voted against its policy in council. The others essentially set great store by party unity and felt that to defy group policy would lead to less effective local government. Lord Donaldson MR summed up in the following passage what a councillor's duty was:

It is to make up his own mind on how to vote, giving such weight as he thinks appropriate to the views of other councillors and to the policy of the group of which he is a member. It is only if he abdicates his personal responsibility that questions can arise as to the validity of his vote. The distinction between giving great weight to the views of colleagues and to party policy, on the one hand, and voting blindly in support of party policy may on occasion be a fine one, but it is nevertheless very real.

If the above decision had been decided otherwise, it would have been a major blow to the way in which political parties operate within local government. The Court of Appeal judgment makes it very difficult indeed to impugn local authority decisions on the basis that councillors have fettered their discretion by following the views of their political group.

E STANDARDS OF CONDUCT

Background

2.19 There used to be three separate regimes for ensuring that councillors maintained an appropriate standard of conduct when carrying out their public duties:

1. The provisions in the Local Government Finance Acts allowing them to be surcharged and/or disqualified if they incurred unlawful expenditure.
2. The requirements relating to disclosure of pecuniary interests in the Local Government Act 1972.
3. The National Code of Local Government Conduct adopted pursuant to s. 31 of the Local Government and Housing Act 1989.

The effects of surcharge could obviously be drastic. If the sums involved were large, councillors could face personal bankruptcy. These provisions were abolished by the Audit Commission Act 1998.

2.20 A failure to observe the rules relating to pecuniary interests was a criminal offence, for which a councillor could potentially be imprisoned. However, a breach of the Code of Conduct was unlikely to result in any effective sanction. If there was an Ombudsman investigation and the breach of the Code was considered to be maladministration, the councillor could be named in the report. It was also possible for political parties to take action against their members. This could involve suspension from the applicable group or removal from a particular committee. If a councillor was found to be in breach of the Code this could be made public knowledge.

2.21 There were thus two regimes which could be draconian and one which was almost useless.

There was felt to be a need to draw a clearer distinction between corrupt behaviour (which needed to be punished under the criminal law) and failure to declare interests (which did not need to be criminal behaviour but did need to be subject to some effective sanctions). There was also a lack of logic about some aspects of the Code of Conduct. For instance, it required personal interests to be treated in the same way as pecuniary interests. This was remarked on by the report of the Widdicombe Committee in 1986. The Widdicombe report did not result in any changes to the Code of Conduct or the laws relating to pecuniary interests, although the Code was for the first time placed on a statutory footing.

The issue of such conflicts was considered in detail by the Nolan Committee on standards in public life which in its third report which considered local government concluded: **2.22**

Potential conflicts of interest are likely to occur frequently, and public interest requires that a sensible balance should be struck between avoiding impropriety, and enabling councillors to fulfil the role for which they were elected.

This is really the essence of the problem. Councillors should be part of the communities which elect them. Thus events in their area are likely to affect their homes and businesses. A very strict approach to pecuniary interests of this nature would therefore be an attack on one of the positive aspects of local decision-making, which is that people are able to have an influence on what happens in their area. On the other hand, if elected representatives are seen to act from personal interests, as opposed to representing the interests of their communities, then this will soon undermine public confidence in the decision-making process. Following the Nolan report, the issue of members' conduct was considered by the Government and its conclusions were contained in the White Paper 'Modern Local Government—In Touch with the People'. This proposed a mandatory code and a new National Standards Board to supervise enforcement.

Principles governing the conduct of members

These recommendations were enacted in the LGA 2000. Part III of the Act deals with the conduct of members and employees. The Secretary of State has power both to set out the principles which are to govern the conduct of members and to prescribe a model code. Section 49 gives power to the Secretary of State to specify the principles which are to govern the conduct of members of authorities in England. This also applies to co-opted members. These powers are given to the National Assembly for Wales to determine the principles which should apply to Welsh authorities. **2.23**

The principles are set out in the Relevant Authorities (General Principles) Order 2001. (SI No. 2001/1401) and the Conduct of Members (Principles) (Wales) Order (SI No. 2001/2276 (W.166)). The set of principles is the same in both orders: **2.24**

1. **Selflessness.** Members should serve only the public interest and should never improperly confer an advantage or disadvantage on any person.
2. **Honesty and Integrity.** Members should not place themselves in situations where their honesty and integrity may be questioned, should not behave improperly and should on all occasions avoid the appearance of such behaviour.

3. **Objectivity.** Members should make decisions on merit, including when making appointments, awarding or recommending individuals for rewards or benefits.
4. **Accountability.** Members should be accountable to the public for their actions and the manner in which they carry out their responsibilities, and should co-operate fully and honestly with any scrutiny appropriate to their office.
5. **Openness.** Members should be as open as possible about their actions and those of their authority, and should be prepared to give reasons for those actions.
6. **Personal judgement.** Members may take account of the view of others, including their political groups, but should reach their own conclusions on the issues before them and act in accordance with those conclusions.
7. **Respect for others.** Members should promote equality by not discriminating unlawfully against any person, and by treating people with respect, regardless of their race, age, religion, gender, sexual orientation, or disability. They should respect the impartiality and integrity of the authority's statutory officers, and its other employees.
8. **Duty to uphold the law.** Members should uphold the law and, on all occasions, act in accordance with the trust that the public is entitled to place in them.
9. **Stewardship.** Members should do whatever they are able to do to ensure that their authorities use their resources prudently and in accordance with the law.
10. **Leadership.** Members should promote and support these principles by leadership, and by example, and should act in a way that secures or preserves public confidence.

2.25 It is difficult to see what purpose is served by setting out this bland uncontroversial list of objectives. It is not specific enough to have any value as a framework for what local government is intended to achieve. Some of the principles are also open to more than one interpretation. For instance, 'accountability' could refer to accountability to the authority of which he is a member, the members of the public in his area, the ward he represents, or to the political party which selected him as their candidate. It might also be argued that some of these principles run counter to the way in which authorities are run now that they have new and more streamlined structures in place. The cabinet or mayoral style of government is likely to mean less openness. There are fewer opportunities to attend meetings at the Town Hall than there once were.

Codes of conduct

2.26 The Secretary of State and the National Assembly for Wales have power under s. 10 of the 2003 Act to draw up model codes of conduct. The Secretary of State has power to invite another body to draw up a proposed model code, or revisions to a model code and to consult with specified persons about the proposed code.

Authorities are under a duty to adopt a code of conduct (s. 51). Their code:

- (a) must incorporate any mandatory provisions of the model code which apply to that authority;
- (b) may incorporate optional provisions from the model code;
- (c) may include other provisions which are consistent with the code.

2.27 Whenever an authority adopts or revises a code under these provisions they must:

- (a) ensure that copies are available at an office of the authority during office hours;

- (b) advertise the adoption/revision in a local newspaper;
- (c) send a copy to the Standards Board (if in England) or the Commissioner for Local Administration (if in Wales).

When the code was adopted for each authority the existing councillors had to provide a written undertaking to observe the code. New councillors and new co-opted members must undertake to comply with the code before they are allowed to carry out their functions as members.

The Code of Conduct—general

There have been various model codes drawn up. There is a code for England set out in The Local Authorities (Model Code of Conduct) (England) Order 2001 SI No. 3575. There is also a separate code for parish councils: Parish Councils (Model Code of Conduct) Order 2001 SI No. 3576. Prior to the adoption of these codes, the Government undertook a lengthy consultation exercise. They first invited the Local Government Association to draw up a suggested draft code for England. They then issued a draft code for consultation before finally adopting the model code. **2.28**

Paragraph 1 of the code provides that a member must observe the authority's code of conduct whenever he: **2.29**

- (a) conducts the business of the authority;
- (b) conducts the business of the office to which he has been elected or appointed;
- (c) acts as a representative of the authority.

Paragraph 1(2) provides that the code is not (apart from paragraphs 4 and 5(a)) to have effect in relation to a members' activities undertaken in anything other than an official capacity. Sometimes the distinction between official and private business is not easy to draw. Is a councillor attending a meeting of the local political party which selected him as a candidate acting as a representative of the authority? If he was a member of the party in the ward he represents, he might be attending the meeting in a personal capacity even if he was not a councillor. If though his position as a councillor creates an expectation that he will report back on events in the Council it could be argued that this meant he was conducting the business of the authority. What if the Leader of the Council or Mayor is attending a social event e.g. with the local Chamber of Commerce? Does the fact that they would probably not be invited if it was not for the office they hold mean that they are attending in an official capacity?

Paragraphs 2 to 6 of the model code set out the general obligations to which a member is subject. These are an interesting mixture of airy principles and practical guidance. Under paragraph 2 a member must— **2.30**

- (a) promote equality by not discriminating unlawfully against any person;
- (b) treat others with respect;
- (c) not do anything which compromises or which is likely to compromise the impartiality of those who work for, or on behalf of, the authority.

Thus it would be a breach of the code to commit an act of unlawful discrimination, such as

racial discrimination, but it would not be a breach to discriminate on grounds where discrimination was legal. The second of the above principles must be seen as an attempt to elevate the level of debate within authorities. It is too vague to be useful advice. The third principle would be more helpful if it was accompanied by practical guidance about what it meant. It could mean, for instance, that putting pressure on officers to provide advice which was politically expedient, as opposed to impartial but inconvenient, would constitute a breach of the code.

2.31 Paragraph 3 deals with confidential information. A member must not—

- (a) disclose information given to him in confidence by anyone, or information acquired which he believes is of a confidential nature, without the consent of the person authorised to give it, or unless he is required by law to do so; nor
- (b) prevent another person from giving access to information to which that person is entitled by law.

Whether information is given in confidence will be a question of fact to be judged by the circumstances. It does not need to be expressly stated to be confidential at the time it is given. For instance, personal information told to a councillor at an advice surgery is likely to be regarded as confidential even when not explicitly stated to be so.

2.32 Paragraph 4 is another vague exhortation:

A member must not in his official capacity, or any other circumstances, conduct himself in a manner which could reasonably be regarded as bringing his office or authority into disrepute.

This is one of the exceptions to the rule that the code is concerned with official conduct only. There is little guidance though on what sort of conduct will be considered as bringing the authority into disrepute. Presumably any criminal offence, other than a minor motoring offence, will come into this category. Short of this, it is difficult to see why elected representatives should be expected to observe different standards of conduct in their personal lives than other citizens.

2.33 Paragraph 5 both states the need for probity and also attempts to define the dividing line between the functions of an authority and political purposes. A member—

- (a) must not in his official capacity, or in any other circumstances, use his position as a member improperly to confer on or secure for himself or any other person, an advantage or disadvantage; and
- (b) must, when using or authorising the use by others of the resources of the authority:
 - (i) act in accordance with the authority's requirements, and
 - (ii) ensure that such resources are not used for political purposes, unless that use could reasonably be regarded as likely to facilitate, or be conducive to, the discharge of the functions of the authority or of the office to which the member has been elected or appointed.

Councillors will often be involved in activities which could be deemed political but which are also relevant to their position as councillors. No doubt many councillors would see a benefit to the authority in activities which would be regarded by others as political infighting.

2.34 Paragraph 6 is a reminder of the importance of taking into account officers' advice. A

member must when reaching decisions have regard to any relevant advice provided to him by

- (i) the authority's chief finance officer acting in pursuance of his duties under s. 114 of the Local Government Finance Act 1988, and
- (ii) the authority's monitoring officer acting in pursuance of his duties under s. 5(2) of the Local Government and Housing Act 1989; and

give the reasons for those decisions in accordance with the authority's and any statutory requirements in relation to the taking of an executive decision. (See para 2.36 below.)

Under paragraph 7 members are under an obligation, if they become aware of a breach of their authority's code of conduct, to report this to the Standards Board.

The Code of Conduct—personal interests

For the purposes of the code, there are two levels of interests:

2.35

- (a) personal interests—which must be disclosed but which do not prevent a member being involved in making decisions which affect such interests;
- (b) prejudicial interests—which require a member to abstain from involvement in any decision which relates to that interest.

A personal interest is defined by paragraph 8:

A member must regard himself as having a personal interest in any matter if the matter relates to an interest in respect of which notification must be given under paragraphs 14 and 15 below, or if a decision upon it might reasonably be regarded as affecting to a greater extent than other council tax payers, ratepayers or inhabitants of the authority's area, the well-being or financial position of himself, a relative or a friend or—

- (a) any employment or business carried on by such persons;
- (b) any person who employs or has appointed such persons, any firm in which they are a partner, or any company of which they are directors;
- (c) any corporate body in which such persons have a beneficial interest in a class of securities exceeding the nominal value of £5,000; or
- (d) any body listed in sub-paragraphs (a) to (e) of paragraph 15 below in which such persons hold a position of general control or management.

The word 'relative' is defined as meaning 'a spouse, partner [meaning a member of a couple who live together], parent, parent-in-law, son, daughter, step-son, step-daughter, child of a partner, brother, sister, grandparent, grandchild, uncle, aunt, nephew, niece, or the spouse or partner of any of the preceding persons'.

Paragraphs 14 and 15, referred to in the above paragraph, deal with the registration of financial and other interests (Paragraph 14 deals with financial interests. Paragraph 15 deals with other interests.):

2.36

14. Within 28 days of the provisions of an authority's code of conduct being adopted or applied to that authority or within 28 days of his election or appointment to office (if that is later), a member must register his financial interests in the authority's register maintained under section 81(1) of the Local Government Act 2000 by providing written notification to the authority's monitoring officer of—

- (a) any employment or business carried on by him;
- (b) the name of the person who employs or has appointed him, the name of any firm in which he is a partner, and the name of any company for which he is a remunerated director;
- (c) the name of any person, other than a relevant authority, who has made a payment to him in respect of his election or any expenses incurred by him in carrying out his duties;
- (d) the name of any corporate body which has a place of business or land in the authority's area, and in which the member has a beneficial interest in a class of securities of that body that exceeds the nominal value of £25,000 or one hundredth of the total issued share capital of that body;
- (e) a description of any contract for goods, services or works made between the authority and himself or a firm in which he is a partner, a company of which he is a remunerated director, or a body of the description specified in sub-paragraph (d) above;
- (f) the address or other description (sufficient to identify the location) of any land in which he has a beneficial interest and which is in the area of the authority;
- (g) the address or other description (sufficient to identify the location) of any land where the landlord is the authority and the tenant is a firm in which he is a partner, a company of which he is a remunerated director, or a body of the description specified in sub-paragraph (d) above; and
- (h) the address or other description (sufficient to identify the location) of any land in the authority's area in which he has a licence (alone or jointly with others) to occupy for 28 days or longer.

15. Within 28 days of the provisions of the authority's code of conduct being adopted or applied to that authority or within 28 days of his election or appointment to office (if that is later), a member must register his other interests in the authority's register maintained under section 81(1) of the Local Government Act 2000 by providing written notification to the authority's monitoring officer of his membership of or position of general control or management in any—

- (a) body to which he has been appointed or nominated by the authority as its representative;
- (b) public authority or body exercising functions of a public nature;
- (c) company, industrial and provident society, charity, or body directed to charitable purposes;
- (d) body whose principal purposes include the influence of public opinion or policy; and
- (e) trade union or professional association.

A member who has a personal interest in a matter who attends a meeting of the authority at which that matter is considered must disclose to that meeting the existence and nature of that interest at the commencement of that consideration, or when the interest becomes apparent. The interest therefore does not need to be disclosed at the beginning of the meeting, but when the item in which the member has an interest is reached. If a member participates in an 'executive decision' (an 'executive decision' means a decision made or to be made by a decision-maker in connection with a function which is the responsibility of the executive of a local authority: Regulation 2 Local Authorities (Executive Arrangements) (Access to Information) (England) Regulations 2000 SI No. 2000/3272) in which he has an interest, he must ensure that any 'written statement' of that decision records the existence and nature of that interest. There is therefore a duty on a member to ensure that any minute of the relevant meeting is correct in this respect.

The Code of Conduct—prejudicial interests

A 'prejudicial interest' is defined by paragraph 10 which provides that a personal interest in a matter becomes a prejudicial interest 'if the interest is one which a member of the public with knowledge of the relevant facts would reasonably regard as so significant that it is likely to prejudice the member's judgement of the public interest'. There are a series of exceptions set out in paragraph 10(2) broadly corresponding to the dispensations which were issued under the old rules relating to pecuniary interests: **2.37**

A member may regard himself as not having a prejudicial interest in a matter if that matter relates to—

- (a) another relevant authority of which he is a member;
- (b) another public authority in which he holds a position of general control or management;
- (c) a body to which he has been appointed or nominated by the authority as its representative;
- (d) the housing functions of the authority where the member holds a tenancy or lease with a relevant authority, provided that he does not have arrears of rent with that relevant authority of more than two months, and provided that those functions do not relate particularly to the member's tenancy or lease;
- (e) the functions of the authority in respect of school meals, transport and travelling expenses, where the member is a guardian or parent of a child in full time education, unless it relates particularly to the school which the child attends;
- (f) the functions of the authority in respect of statutory sick pay under Part XI of the Social Security Contributions and Benefits Act 1992, where the member is in receipt of, or is entitled to the receipt of such pay from a relevant authority; and
- (g) any functions of the authority in respect of an allowance or payment made under sections 173 to 176 of the Local Government Act 1972 or section 18 of the Local Government and Housing Act 1989.

Under paragraph 12 of the code, a member with a prejudicial interest in any matter must— **2.38**

- (a) withdraw from the room or chamber where a meeting is being held whenever it becomes apparent that the matter is being considered at that meeting, unless he has obtained a dispensation from the authority's standards committee;
- (b) not exercise executive functions in relation to that matter; and
- (c) not seek improperly to influence a decision about that matter.

The meaning of paragraph 12 was considered by the Court of Appeal in the following case.

R v North Yorkshire County Council, ex parte Richardson

The first major case arising from the operation of the new code of conduct was *R v North Yorkshire County Council, ex parte Richardson* [2004] 1 WLR 1920. (The case was partly concerned with the interpretation of the Environmental Impact Assessment Regulations. This aspect lies outside the scope of this book.) **2.39**

The facts. Paul Richardson was a member of the North Yorkshire County Council. He lived in the village of Littlethorpe and also represented his village on the County Council. The operators of a local quarry applied for an extension of their permission to quarry sand and gravel. This extension would have allowed them to carry on operations very close to Littlethorpe, and Mr Richardson's house would have been among those most affected. **2.40**

Mr Richardson was therefore faced with the type of conflict typical of the genuinely local councillor. Since he was the sole representative of the electoral division which included Littlethorpe, he saw himself as the voice on the Council of his constituents, who were strongly opposed to the extension of the quarry. However, he also had a strong personal interest as the extension would mean that quarrying would be permitted within 250 yards of his house.

2.41 The application for planning permission was due for consideration at the Council's Planning and Regulatory Functions Committee on 11 June 2002. Mr Richardson was not a member of this committee but was intending to attend it to make representations on behalf of his constituents. On 5 June he was informed that he had a prejudicial interest within the meaning of the Code and he would therefore not be allowed to attend or speak at the 11 June meeting. He attended at the outset and made a statement to the effect that the rights of representation of the Littlethorpe community had been denied by Government legislation. He then withdrew from the room. He subsequently challenged the decision to require him to withdraw arguing that he did not have a prejudicial interest and that, even if he had, there was no obligation on him to withdraw. His application was rejected by Richards J. He appealed to the Court of Appeal.

2.42 The decision. Lord Justice Simon Brown indicated that four questions arose on this part of the case:

- (a) Which 'member[s]', assuming that they have a prejudicial interest in a matter, are required by paragraph 12(1) of the Code to 'withdraw from the room or chamber where a meeting is being held when . . . the matter is being considered at that meeting'? Is this requirement imposed on all members of the authority or only on those who are members of the committee holding the relevant meeting?
- (b) Whatever the answer to the first question, is a member, paragraph 12 notwithstanding, entitled to attend such a meeting in his personal capacity as opposed to his representative capacity?
- (c) Was Mr Richardson properly to be regarded as having a 'prejudicial interest' in the matter of this planning application?
- (d) Did Mr Richardson indicate that, even were he not permitted to attend the June meeting in his representative capacity, he wished to attend in his personal capacity?

He dealt with them in the order of their importance, since the first were of general importance and application, the third touched upon the correct approach to determining what amounts to a prejudicial interest, and the fourth was a question turning on the individual facts of this case.

The meaning of the word 'member' in paragraph 12

2.43 The conclusion of Richards J had been that there was no justification for treating the word 'member' in paragraph 12 as meaning simply a member of the committee. Throughout the Code the word 'member' denotes a member of the Council. Where the Code refers to a member of a particular committee, it does so specifically as in paragraph 11 where there is a reference to committees 'of which he may also be a member'. Richards J also considered that the background material (i.e. the Widdicombe report, the Nolan report, and the

consultation paper which preceded the legislation) showed that a restrictive approach was intended.

Lord Justice Simon Brown quoted from the judgment of Richards J where he dealt with the submission that to construe the word 'member' in paragraph 12 as meaning a member of the Council would impose an unnecessary and disproportionate restriction on members' abilities to represent their constituents such as to make it unlawful to have promulgated a code in these terms. Richards J considered that: **2.44**

1. The relevant test was rationality rather than proportionality. The judge was not convinced that the concept of proportionality had replaced rationality as the correct test in domestic law.
2. It was clearly rational for the Secretary of State to adopt a code which required a councillor to withdraw from a meeting of a committee where a matter in which he had a prejudicial interest was being considered. (The judge remarked that he considered that the test of proportionality would also have been satisfied.)
3. The code reflected the outcome of a complex balancing exercise following extensive consultation and deliberation. The Secretary of State placed particular weight on the importance of maintaining public trust and confidence in the operation of the system. He was entitled to do so.
4. A councillor who is not a member of the relevant committee may still exert influence by virtue of his position as a councillor, and in such a situation there is still a real risk that public trust in the decision-making process could be impaired.
5. The highest standards in public life are properly viewed as promoting rather than offending the principles of local democracy. There is moreover no particular requirement that any particular councillor attends a particular meeting. The nature of committees is that they take decisions on behalf of the Council without every councillor being in attendance. Nor is the attendance of a particular councillor the only way in which the relevant community can be represented.

These conclusions were challenged in the Court of Appeal. It was argued that the judge had failed to give sufficient weight to the decision of the Court of Appeal in *R v Flintshire County Council, ex parte Armstrong-Braun* [2001] LGR 344 in which the court had struck down a standing order which would have prejudiced the rights of individual members. This was a weak argument, really amounting to no more than an assertion of the importance of local democracy. Simon Brown LJ could see no inconsistency between the two decisions. There was also an argument that in paragraph 11 of the code it was clear that the word 'member' was used in the more limited sense of a member of a committee. However, in the rest of the code, the word 'member' was used to describe a member of the council. In paragraph 11 the distinction was made clear by the language used. It referred to committees 'of which he may also be a member'.

The entitlement of a member to remain at a meeting in his personal capacity

Richards J at first instance said that this did not arise on the facts, since no such request was made. However, he expressed the view that the Code would not prevent this, since a councillor attending a meeting as a private citizen would not be undertaking activities in an **2.45**

official capacity. Simon Brown LJ considered that in reaching this conclusion, Richards J had erred in his approach:

A member of the authority attending a council meeting cannot in my judgment, simply by declaring that he attends in his private capacity, thereby divest himself of his official capacity as a councillor. He is still to be regarded as conducting the business of his office. Only by resigning can he shed that role.

Whether Mr Richardson's interest was properly to be regarded as prejudicial

2.46 The argument that Mr Richardson did not have a prejudicial interest relied on a passage from paragraph 118 of the Nolan report to the effect that:

If one hundred households are affected by a Council decision, then most people would agree that a councillor similarly affected has no special interest which might debar him or her from speaking or voting, providing the interest is declared.

A local petition against the development attracted 400 signatures. This was put forward as an argument that Mr Richardson had the same interest as his constituents, albeit to a greater degree than most. As Richards J pointed out though, the next sentence of the Nolan report went on to say 'if in a different decision ten households are affected, then in most circumstances a councillor might feel that taking part in a decision was inappropriate'. However, the test to be applied was that set out in the Code. Richards J stated that in his judgment 'a member of the public with knowledge of the relevant facts would reasonably have regarded Mr Richardson's interest as so significant that it was likely to prejudice his judgment of the public interest'. He also considered whether, if Mr Richardson had been a member of the committee and had participated in a decision to refuse planning permission the developer would have had good grounds for objecting that Mr Richardson's participation gave rise to the appearance of bias. He concluded that in these circumstances a fair minded observer would have concluded that there was a real possibility of bias.

2.47 The Court of Appeal upheld the judge's decision on this point, Simon Brown LJ describing it as 'self-evidently correct'. On the basis that he had concluded that Mr Richardson was unable to attend in a personal capacity, the final question did not arise. However, had it been an issue, Simon Brown LJ considered that it should have been resolved in favour of Mr Richardson on the basis that his statement at the outset of the meeting indicated that he considered himself as barred from the meeting in a personal role.

2.48 This case provides helpful guidance on what advice should be given about how to approach the issue of prejudicial interests.

1. It is clear that a fairly restrictive approach is required. When considering whether or not a personal interest is prejudicial, it is safer to assume that something is a prejudicial interest. Unless the group affected is very wide, the argument that a councillor is only one of a number of people affected by a particular decision will not remove the subject matter of that decision from the category of prejudicial interests.
2. It is for individual councillors to decide whether an interest is prejudicial or not. Although the issue was not considered in the case, it would seem inappropriate for the Council to issue instructions to individual councillors about what they can and cannot do. They can be given strong advice (as Mr Richardson was) and the consequences of

failing to heed that advice can and should be spelt out to them, but ultimately the decision is a matter for them.

3. Councillors cannot attend a meeting while an item in which they have a prejudicial interest is being considered, whether or not they are a member of the relevant committee. Nor are they able to attend in a personal capacity.

The test of what constitutes a personal or prejudicial interest is objective. In *Scrivens v Ethical Standards Office* [2005] EWHC 529 it was argued that a councillor was not failing to comply with the code if he reasonably but mistakenly concluded that he did not have a personal or prejudicial interest. This argument was rejected. The purpose of these rules was to maintain high standards in public life. Only the application of an objective test would be consistent with that object.

Ensuring compliance with the code

Along with the new Code of Conduct the LGA 2000 also introduced a new system for maintaining standards of conduct in local government. This includes both local and national elements. Locally, each local authority must have its own standards committee, independent of the executive, which is charged with ensuring the maintenance of high standards of conduct within that authority. Nationally, there is a standards board which gives guidance about standards of conduct to local authorities. Complaints can be made to the standards board about the conduct of individual members. These may be investigated by ethical standards officers. If they consider the matter serious enough following investigation, they can refer the matter to an adjudication panel. This panel then has the ability to impose sanctions including the suspension of the councillor from his authority. **2.49**

Standards committees

Under s. 3 of the LGA 2000, each relevant authority (i.e. each county council, district council, London borough, or (in Wales) county borough; (the position is slightly different for parish and community councils)) must establish a standards committee. (See below paragraphs 2.55 to 2.57.) Subject to the requirements of any Regulations each authority must fix for itself the number of members of their standards committee and their term of office. **2.50**

The standards committee of each relevant authority in England (and each police authority in Wales) must include at least two members of the authority and at least one person who is not a member, or officer of that or any other relevant authority. If the authority is operating executive arrangements (i.e. an elected mayor or a form of cabinet government: see chapter 4) then the standards committee must not include the elected mayor, the executive leader, or any member of the executive. This is to ensure that, the standards committee, while forming part of the authority, has a degree of independence from those who run it. **2.51**

Regulations may be made by the Secretary of State (the National Assembly in Wales) governing the size and composition of committees, public access to meetings, publicity and administrative arrangements. The Relevant Authorities (Standards Committees) Regulations 2001 SI No. 2812 provide as follows: **2.52**

An authority must ensure that:

- (a) if the committee has more than three members, at least 25 per cent of its membership must be made up of independent members
- (b) if the authority is operating executive arrangements under Part III of the Act, no more than one member of the Standards Committee is a member of the executive.

If it is a responsible authority (i.e. it has responsibility for parish councils) then the committee must include a member of one of the parish councils for which it is responsible but this person must not also be a member of the responsible authority.

Functions of standards committees

2.53 Standards committees of relevant authorities have the following general functions:

- (a) promoting and maintaining high standards of conduct by the members and co-opted members of the authority, and
- (b) assisting members and co-opted members of the authority to observe the authority's code of conduct.

They also have the following specific functions:

- (a) advising the authority on the adoption or revision of a code of conduct;
- (b) monitoring the operation of the authority's code of conduct; and
- (c) advising, training or arranging to train members and co-opted members of the authority on matters relating to the authority's code of conduct.

2.54 There are powers for the Secretary of State to make regulations and issue guidance on the exercise of functions by standards committees of relevant authorities in England and police authorities in Wales. The National Assembly for Wales has the same powers in relation to standards committees for relevant authorities in Wales.

Arrangements for parish councils

2.55 Parish councils (and community councils in Wales) do not have their own standards committees, forming part of their own structure. Instead, they are monitored by standards committees of the responsible district or unitary county council (county borough or county councils in Wales). In England the arrangements are as follows (the same provisions also apply to community councils in Wales with the appropriate county or county borough councils exercising responsibility for the community councils within their area):

The standards committee of the responsible district or unitary county council has the same functions in relation to the parish council and its members as it has for the district or county council and its members. It may set up a sub-committee for the purposes of dealing with the parish council matters. The parish council must be consulted before any decision is made about whether the functions are to be discharged by the committee or a sub-committee. The district or unitary authority must also consult the parish council about the number of members and term of office of any standards committee or sub-committee responsible for such parish council's standards.

If the standards committee itself decides to assume responsibility for parish council standards then it: **2.56**

- (a) must include at least one member of any of the parish councils for which it is the responsible authority, and
- (b) must ensure that at least one person falling within paragraph (a) above is present at any meeting where matters relating to those parish councils, or the members of those parish councils are being considered.

If a sub-committee is established by the relevant district or county to oversee parish council standards then it must include:

- (a) at least one person who is not a member or an officer of that (i.e. the responsible district council) or any other relevant authority, and
- (b) at least one member of any of the parish councils for which that district or county council is responsible.

A district or unitary council is responsible for a parish council for the purposes of these provisions if that parish is situated wholly within its area. If it is what is called a common parish council i.e. it includes electors from the area of more than one district, then it is the responsibility of the district council within the area of which the largest number of that parish's electorate resides.

Although these arrangements give local authorities responsibility for ensuring that standards of conduct within their area are maintained, and give standards committees responsibility for training and advising members, they do not set up a system whereby breaches of the code of conduct can be investigated locally and for the local imposition of sanctions against those who breach its provisions. Instead, a new national body was created for this purpose. **2.57**

The Standards Board for England

The board is established by s. 57 of the LGA 2000. Its membership, which must number at least three, is appointed by the Secretary of State. When exercising its functions it 'must have regard to the need to promote and maintain high standards of conduct by members and co-opted members of relevant authorities in England'. The board has the following functions: **2.58**

- (a) it must appoint ethical standards officers,
- (b) it may issue guidance to relevant authorities in England and police authorities in Wales on matters relating to the conduct of members and co-opted members of such authorities,
- (c) it may issue guidance to relevant authorities in England and police authorities in Wales in relation to the qualifications or experience which monitoring officers should possess,
- (d) it may arrange for any such guidance to be made public.

Anybody can report a member to the Standards Board for breach of the Code of Conduct. The allegation must be made in writing. If the Standards Board considers that an allegation should be investigated, it must refer the matter to one of its ethical standards officers for investigation. If it considers that it should not be investigated, then it must write to the

person who made the allegation, notifying that person of its decision and giving the reasons for it.

2.59 The Standards Board has since its creation in 2001 received a substantial number of trivial allegations, often by political opponents. It has taken the view that investigating these is a waste of its resources. It is now committed to focusing on allegations concerning serious misbehaviour with the potential to damage the reputation of local government. There are published criteria which need to be satisfied before an allegation will be referred for investigation. It must satisfy one of the following criteria:

- it is serious enough, if proven, to justify the range of sanctions available to the Adjudication Panel for England or local standards committee,
- it is part of a continuing pattern of less serious misconduct which is unreasonably disrupting the business of the authority and there is no other avenue left to deal with it short of investigation.

2.60 The Board has advised that an allegation within one of the following categories is unlikely to be referred for investigation:

- it is believed to be malicious, relatively minor, or tit for tat,
- the same, or substantially similar, complaint has already been the subject of an investigation or inquiry and there is nothing further to be gained by seeking the sanctions available to the Adjudication Panel for England or the local standards committee,
- the complaint concerns acts carried out in the member's private life which are unlikely to affect his or her fitness for public office,
- it appears that the grievance is really about dissatisfaction with a council decision,
- there is insufficient information currently available to justify a decision to refer the matter for investigation.

Investigations by ethical standards officers

2.61 If the complaint has overcome these hurdles, it will be investigated by an ethical standards officer. There are currently four such officers. The total complement of staff engaged on investigations is thirty. The functions of ethical standards officers are set out in s. 59 of the LGA 2000. They are to investigate:

- (a) cases referred to them by the Standards Board, and
- (b) other cases in which such officer considers that a member or co-opted member (or former member or co-opted member) of a relevant authority in England has failed, or may have failed, to comply with their authority's code of conduct and which have come to the attention of any such officer as a result of an investigation under paragraph (a).

An ethical standards officer cannot initiate an investigation without having been asked to do so by the Board. However, the effect of paragraph (b) above is that, if he uncovers further alleged misconduct during the course of an investigation, he can pursue an investigation into that further misconduct without having to go back to the Standards Board for authority.

2.62 An investigation has to result in one of four findings:

- (a) that there is no evidence of any failure to comply with the code of conduct of the relevant authority concerned,
- (b) that no action needs to be taken in respect of the matters which are the subject of the investigation,
- (c) that the matters which are the subject of the investigation should be referred to the monitoring officer of the relevant authority concerned, or
- (d) that the matters which are the subject of the investigation should be referred to the president of the Adjudication Panel for England for adjudication by a tribunal falling within section 76(1).

Ethical standards officers can cease an investigation at any stage or refer it to the authority's monitoring officer: s. 60(2).

There are provisions designed to ensure that ethical standards officers cannot be accused of bias or conflicts of interest. An ethical standards officer may not conduct an investigation into a member or co-opted member of an authority if he has within the previous five years been a member or an officer of that authority or member of a committee or sub-committee (including joint committees or sub-committees) of that authority. If an ethical standards officer has a direct or indirect interest in any matter which is, or is likely to be, the subject of an investigation, he must disclose that interest to the Board and take no part in the investigation. A breach of any of these provisions does not affect the validity of acts done by an ethical standards officer. **2.63**

Ethical standards officers can adopt such procedures for carrying out investigations as they consider appropriate. However, they must give any person who is the subject of an investigation an opportunity to comment on any allegation that he has failed or may have failed to comply with the relevant authority's code of conduct. (It is likely that, even if this statutory requirement did not exist, the outcome of an investigation which failed to observe this requirement could be the subject of legal challenge.) An investigation is not to affect: **2.64**

- (a) any action taken by the relevant authority concerned, or
- (b) any power or duty of the relevant authority concerned to take further action with respect to any matters which are the subject of the investigation.

For instance, it will not affect any legal proceedings in which the authority may be involved or any disciplinary action which they might take arising from the circumstances which gave rise to the investigation.

Under s. 62 ethical standards officers are given considerable powers to ensure that they are able to carry out their duties effectively. They can obtain all the documents they need. They have a right of access to every document relating to a relevant authority which appears to them necessary for the purposes of conducting the investigation. For this purpose 'documents' includes information held by a computer or in any other electronic form. They can compel witnesses to provide them with information and attend before them to answer questions. An ethical standards officer, or a person authorised by such an officer may: **2.65**

- (a) make such inquiries of any person as he thinks necessary,
- (b) require any person to give him such information or explanation as he thinks necessary, and

- (c) if he thinks necessary, require any person to attend before him in person for the purpose of making inquiries of that person or to require that person to give any information or explanation.

2.66 There is a general duty on local authorities to provide assistance to ethical standards officers. A relevant authority 'must provide an ethical standards officer, or a person authorised by such an officer with every facility and all information which he may reasonably require for the purposes of conducting an investigation under s. 59 in relation to a member or co-opted member (or former member or co-opted member) of the authority'.

2.67 There are additional powers to obtain documents and information under s. 62(4). Under this provision, an ethical standards officer, or a person authorised by him may require any person:

- (a) to furnish information concerning communications between the authority concerned and any government department, or
- (b) to produce any correspondence or other documents forming part of any such communications.

In relation to such information, no obligation in respect of secrecy imposed on 'persons in Her Majesty's service imposed by any rule of law or enactment shall apply'. Nor is the Crown entitled to claim privilege in relation to such documents. However, apart from these exceptions, which essentially appear to be designed to prevent non-disclosure of potentially embarrassing documents with blanket claims of official secrecy or privilege, there is a rule that 'no person may be compelled for the purposes of an investigation under s. 59 to give any evidence or produce any document which he could not be compelled to give or produce in civil proceedings before the High Court'. Failure to comply with the above requirements without reasonable excuse is a criminal offence, punishable by a sentence of up to six months imprisonment on summary conviction or up to two years' imprisonment on conviction on indictment.

2.68 In addition to his powers to compel witnesses and order disclosure of documents and information, an ethical standards officer may obtain advice from any suitably qualified person and pay that person such fees and allowances as he may determine with the approval of the Secretary of State. This means that during the course of an investigation, the officers have access to independent legal advice and technical advice if they require it.

2.69 The extensive powers to obtain documents and information under sections 61 and 62 are subject to strict rules about the circumstances in which such information can be disclosed. This is allowed only if one of five conditions is satisfied:

- (a) the disclosure is made for the purposes of enabling the Standards Board for England, an ethical standards officer, the Commission for Local Administration in Wales, a Local Commissioner in Wales or the president, deputy president, or any tribunal of either of the Adjudication Panels to perform their functions under Part III of the LGA 2000,
- (b) the person to whom the information relates has consented to its disclosure,
- (c) the information has previously been disclosed to the public with lawful authority,
- (d) the disclosure is for the purposes of criminal proceedings in any part of the United Kingdom and the information in question was not obtained under section 62(2) (see above),

- (e) the disclosure is made to the Audit Commission for the purposes of any functions of the Audit Commission or an auditor under the Audit Commission Act 1998.

The above provisions also apply to standards committees and appeal tribunals in the performance of any of their functions under the Local Authorities (Code of Conduct) (Local Determination) Regulations 2003 but for these bodies there are two other situations in which information may be disclosed: **2.70**

- (a) for the purpose of enabling a standards committee or standards sub-committee to perform any of its statutory functions under Part III LGA 2000 in connection with the investigation and consideration of an allegation of a breach of an authority's code of conduct,
- (b) for the purposes of enabling a tribunal drawn from members of the Adjudication Panel to consider any appeal from a finding of such a standards committee or sub-committee in connection with an allegation of a breach of an authority's code of conduct.

There is in addition power for the Secretary of State or a relevant authority (which includes all local authorities) to give a notice in writing to an ethical standards officer that disclosure of a specified document or information would be contrary to the public interest. If such a notice is served, then the ethical standards officer may not disclose the specified document or information. It is difficult to envisage the circumstances in which it is thought likely that this power would need to be used.

Once an ethical standards officer has carried out an investigation and decided which of the findings he is required to arrive at is appropriate, then depending on the outcome of the investigation, he may either have the option of producing a report or be under an obligation to produce a report. If the ethical standards officer decides that there is no evidence of failure to comply with the code or that no action should be taken, then he may, but does not have to, produce a report. If he does produce a report, then he must send a copy to the monitoring officer and may send a summary to any local newspapers. If he does not produce a report then he must notify the monitoring officer of the authority concerned of the outcome of the investigation. **2.71**

If, during the course of his investigation, an ethical standards officer concludes that the matters he is investigating relate partly to a matter which could be subject to an investigation by the local government ombudsman, he can consult the appropriate ombudsman, and, if he considers it necessary, inform the person who made the original allegation of the steps necessary to make a complaint to the Local Government Ombudsman. There is the same power for the local government ombudsman, when carrying out an investigation, to consult with the Standards Board and, if he considers it necessary, inform the complainant of the steps necessary to make an allegation to the Board. **2.72**

An ethical standards officer may decide, as a result of his investigation, to refer the matter to a monitoring officer. If so, he must produce a report on the outcome of his investigation and send a copy of this to the monitoring officer and the standards committee of the relevant authority. The final, and most serious potential result is to refer the matter to an Adjudication Panel. If he determines that the matter should be sent to an Adjudication Panel, he must produce a report on the outcome of his investigation and send a copy both to the monitoring officer of the authority concerned and to the president of the Adjudication Panel. **2.73**

2.74 If a member who was subject to an investigation has ceased to be a member of the authority where the allegations arose but is a member of an authority when the investigation is concluded, the reports must also go to the monitoring officer of the new authority. In addition, the ethical standards officer must:

- (a) inform any person who was the subject of an investigation, and
- (b) take reasonable steps to inform any person who made any allegation which gave rise to the investigation,

of the outcome of the investigation.

2.75 There is also power for an ethical standards officer to produce an interim report. If the prima facie evidence leads the ethical standards officer to conclude that:

- (a) the person who is the subject of the report has failed to comply with the code of conduct,
- (b) the nature of that failure is such that disqualification is likely to result, and
- (c) that it is in the public interest to suspend or partially suspend that person immediately,

then the interim report can include a recommendation for such suspension. The period may not exceed six months or the remainder of the member's term of office, if shorter. If such a recommendation is made, it must be referred to the president of the Adjudication Panel so that the issue can be decided by a tribunal.

Investigations referred to monitoring officers

2.76 Under s. 66 LGA 2000 there is power for the Secretary of State to make regulations as to how investigations referred to monitoring officers should be dealt with. These are the Local Authorities (Code of Conduct) (Local Determination) Regulations 2003. They set out the procedure for dealing with hearings before standards committees and appeals from the decisions of these committees. When a matter has been referred to a monitoring officer he must send a copy of the report to the member concerned and arrange for the standards committee to meet to consider it. The standards committee must then arrange a hearing. The hearing must take place within three months of the receipt of the report by the monitoring officer. A period of at least fourteen days must elapse between receipt of the report and the hearing unless the member concerned agrees to this period being shortened.

2.77 There are provisions designed to ensure that the hearing complies with the rules of natural justice. The member must be given an opportunity to present evidence in support of his case, to call witnesses, and to make representations either orally, either himself or through a representative or, if he chooses, in writing. The representative can be counsel, a solicitor or, if the committee agrees, any person he chooses to represent him. The standards committee may itself arrange for the attendance of witnesses. Following a hearing, the standards committee must make one of the following findings:

- (a) that the member had not failed to comply with the code of conduct;
- (b) that the member had failed to comply with the code of conduct but that no action needs to be taken;
- (c) that the member had failed to comply with the code of conduct and that a sanction should be imposed.

If the person is no longer a member of an authority the committee must censure him. If the person is a member then one of the following sanctions can be imposed: **2.78**

- (a) censure of that member;
- (b) restriction for a maximum period of three months of that member's access to the premises of the authority and that member's use of the resources of the authority (but this must be a reasonable and proportionate restriction to the nature of the breach and must not unduly restrict the member's ability to perform his functions and duties as a member);
- (c) partial suspension for a maximum period of three months;
- (d) partial suspension for a maximum period of three months or until such time as he submits a written apology or undertakes any training or conciliation specified by the standards committee;
- (e) suspension for a maximum period of three months;
- (f) suspension for a maximum period of three months or until such time as he submits a written apology or undertakes any training or conciliation specified by the standards committee.

Partial suspension means that a member is prevented from exercising particular functions or having particular responsibilities: s. 83(7). The standards committee have to produce a written notice of their finding and, unless it was a finding that it was no breach and the member requests that it is not published, they must arrange for it to be published in a local newspaper.

There is a right to apply for permission to appeal to an Adjudication Panel. The application must be made to the president of the Adjudication Panel within 21 days of receipt of the finding of the standards committee. In deciding whether to grant the member the right of appeal the president has to have regard to whether there is a reasonable prospect of the appeal being successful (either in whole or in part). If the right to appeal is granted the matter is sent to an appeals tribunal appointed by the president of the Adjudication Panel from members of the Adjudication Panel. If the member consents, the appeal may be dealt with by way of written representations. The appeals tribunal may uphold or reverse the finding of the standards committee. If they uphold the finding, in whole or in part, they may confirm the sanction imposed or impose a different sanction. **2.79**

Hearings by case tribunals

An allegation is only considered by a case tribunal if an ethical standards officer considers that it should, following an investigation, be referred to the Adjudication Panel. There are two Adjudication Panels, one for England and one for Wales. The members of the Adjudication Panel for England are appointed by the Lord Chancellor. The members of the Adjudication Panel for Wales are appointed by the National Assembly for Wales. Case tribunals are selected by the president of the relevant Adjudication Panel. They must consist of at least three members. If a tribunal is convened to consider an interim report then it is known as an interim case tribunal. **2.80**

There are rules to ensure compliance with the rules of natural justice and guard against allegations of bias. A member of an Adjudication Panel who has sat as a member of an **2.81**

interim tribunal cannot sit as a member of a case tribunal considering the same allegations. A member of an Adjudication Panel cannot sit on any case tribunal if he has within the previous five years been a member or officer (or a member of any committee, sub-committee, joint committee; or joint sub-committee) of the authority which the allegations concern. If a member of the Adjudication Panel is directly or indirectly interested in a matter which is to be referred to a case tribunal, he must disclose the nature of his interest to the president or deputy president of the Panel and cannot sit on any case tribunal or interim case tribunal carrying out an adjudication in respect of that matter.

2.82 A person who is the subject of an adjudication conducted by a tribunal or interim case tribunal may appear before that tribunal in person or be represented by counsel or a solicitor or any other person he wishes to represent him. Adjudications must be carried out in accordance with any regulations made by the Secretary of State or the National Assembly for Wales. No regulations have been made for England though the Adjudication Panel has published procedures. Regulations for Wales were made by the Adjudications by Case Tribunals and Interim Case Tribunals (Wales) Regulations 2001 (SI No. 2001/2288). The presidents of the Adjudication Panels also have power to give directions as to the practice and procedure to be followed by case tribunals and interim case tribunals.

2.83 An interim case tribunal can decide to suspend or partially suspend a member for a period of up to six months or (if shorter) the remainder of that person's term of office. There is a right of appeal to the High Court against the suspension or partial suspension or against the length of the suspension or partial suspension.

A case tribunal can suspend or partially suspend a person from being a member of the relevant authority. It can also disqualify a person from being a member of that or any other authority. The suspension may be for a maximum period of one year, or the remainder of that member's term of office, if shorter. The disqualification is for a maximum period of five years. There is a right of appeal to the High Court.

2.84 A case tribunal which decides that a member has failed to comply with the code of conduct must produce a notice to that effect. It must specify the details of the failure and any sanction imposed. It must be sent to the standards committee of the authority concerned and a copy sent to the Standards Board for England if the authority concerned is in England or the Commission for Local Administration in Wales if the authority concerned is in Wales. A copy must also be given to any person who is the subject of a decision to which the notice relates. It must also be published in a newspaper local to the authority concerned.

2.85 Case tribunals which have carried out an adjudication can make recommendations to the relevant authority about any matters relating to:

- (a) the exercise of the authority's functions,
- (b) the authority's code of conduct, or
- (c) the authority's standards committee.

2.86 An authority which receives recommendations must prepare a report within three months giving details of what action the authority has taken or are proposing to take as a result of the recommendations. The report must be sent to the Standards Board for England or the Local

Commissioner for Wales as applicable. If the Board or Commissioner is not satisfied with the report they can require the authority to publish a statement giving details of the case tribunal's recommendations and the authority's reasons for not fully implementing them.

The following two cases give an indication of the way in which the courts will approach appeals against decisions of case tribunals. **2.87**

In *Murphy v Ethical Standards Officer* [2004] EWHC 2377 (Admin) a councillor had spoken at a council meeting about an ombudsman report which had criticised him. He had been advised that he should declare an interest and withdraw from the meeting for that item. A case tribunal found that he had failed to comply with the provisions of the authority's code of conduct and suspended him from acting as a councillor for one year. The court considered that the suspension of one year was disproportionate. Councillor Murphy's interest in the report was known to everyone and he had received conflicting and confusing advice. A four month suspension was substituted.

In *Hathaway v Ethical Standards Officer* LTL 13/5/2004 the court declined to interfere with a one year suspension following a conviction for assault even though the effect of the suspension was that, since he would be unable to stand at the next election, he would be debarred from acting as a councillor for at least three years.

KEY DOCUMENTS

Relevant Authorities (Standards Committees) Regulations 2001 (SI No. 2001/2812)

Local Authorities (Model Code of Conduct) (England) Order 2001 (SI No. 2001/3575)

Parish Councils (Model Code of Conduct) Order 2001 (SI No. 2001/3576)

Local Authorities (Code of Conduct) (Local Determination) Regulations 2003

(SI No. 2004/2617)

Adjudications by Case Tribunals and Interim Case Tribunals (Wales) Regulations 2001

(SI No. 2001/2288)

Guidance on the code of conduct and standards for councillors can be found on the

Standards Board website: <<http://www.standardsboard.gov.uk>>

The adjudication panel has its own website: <<http://www.adjudicationpanel.co.uk>>

