

Public Services Ombudsman for Wales

Summary Report of Consultation on Revised Guidance on the Local Government Member Code of Conduct

1. Background

1.1 The Local Government Act 2000 (“the 2000 Act”) created a new ethical framework for local government in Wales. It included powers for the Welsh Parliament (as it is now known) to issue a model Code of Conduct for members and co-opted members (with voting rights) of ‘relevant authorities’ in Wales. For this purpose, a relevant authority is a county or county borough council, a community council, a fire and rescue authority, a national park authority and (by virtue of regulations¹ made by the UK Government in 2012) a police and crime panel.

1.2 The current model Code of Conduct is set out in the Local Authorities (Model Code of Conduct) (Wales) Order 2008, as amended by the Local Authorities (Model Code of Conduct) (Wales) (Amendment) Order 2016.

Public Services Ombudsman for Wales’ Powers

1.3 Section 68 of the 2000 Act empowers the Public Services Ombudsman for Wales (“the Ombudsman”) to issue guidance to relevant authorities on matters relating to the conduct of members and co-opted members of those authorities. The Ombudsman has issued two sets of guidance under these powers to assist members in understanding their obligations under the Code of Conduct. Both sets of guidance are fundamentally the same in respect of the interpretation of the Code, but one version is tailored specifically to the context within which community councillors operate.

1.4 Guidance issued under these powers, most recently in 2016, is subject to periodic review in light of the operation of the Code, emerging case-law and changes to the Code itself. The current guidance has been reviewed and updated primarily to include more recent decisions of standards committees and the Adjudication Panel for Wales (“the Adjudication Panel”). The opportunity has also been taken to clarify and, in some cases, strengthen the wording of the guidance, for example, in relation to bullying and harassment of fellow members and officers and the disclosure of interests.

1.5 Section 69 of the 2000 Act empowers the Ombudsman to investigate allegations by any person that a member has failed to comply with their relevant authority’s Code of Conduct. The Ombudsman may also investigate potential breaches of the Code that have come to the Ombudsman’s attention during the course of an investigation. The Ombudsman has regard to the content of his guidance on the Code when exercising these powers. The guidance may also be taken into account by standards committees and the Adjudication Panel when exercising their respective functions.

¹ Police and Crime Panels (Application of Local Authority Enactments) Regulations 2012, SI 2012 No. 2734

2. Engagement

2.1 During the course of the review, informal engagement was undertaken with local government representative bodies and key stakeholders to enable them to input their views at an early stage. Subsequently, draft revised guidance was published for consultation between 3 February and 21 March 2021. A number of responses were received after the deadline, but were taken into account.

2.2 A total of 29 responses were received, broken down as follows:

County / County Borough Councils (includes standards committees' responses)	9
Community Council	11
Fire and Rescue Authorities (standards committee response)	1
Councillors / Officers	6
Representative / Professional Bodies	1
Others	1

2.3 This report is a summary of the responses received. It does not capture every point made, but all responses have been fully considered in the course of finalising the guidance.

3. Summary of Responses

3.1 In general, those responding to the consultation welcomed the revised guidance, which was described as being clear and easily understood. Responses welcomed the greater clarity on the operation and interpretation of certain aspects of the Code, as well as the additional illustrative examples taken from recent cases considered by standards committees and the Adjudication Panel.

3.2 It was suggested in two responses that the guidance for community councillors was too long and may deter such councillors from reading it in the detail required.
Response: Members are required to give a written undertaking to observe the Code when taking office. All members, new and old, have a responsibility to read and understand their obligations under the Code. The Ombudsman's guidance is intended as a reference document which members may turn to from time-to-time when they need guidance on specific aspects of the Code. As such, it supplements the training on the Code offered to members through local arrangements.

3.3 A summary of the main comments received on specific aspects of the draft guidance are addressed in section 4 below.

3.4 A number of those responding took the opportunity to raise concerns about wider aspects of the operation of statutory ethical framework and member conduct issues more generally. As such, they were not directly relevant to the content of the Ombudsman's guidance on the Code, but nonetheless are addressed in the following paragraphs of this section.

Two-stage Public Interest Test

3.5 The guidance describes the ‘two-stage’ test adopted by the Ombudsman when determining whether to investigate an allegation that a member has failed to comply with the Code of Conduct.

3.6 One response to the consultation expressed concern that the Ombudsman handled complaints through desk exercises with no detailed investigation being undertaken. The validity of the two-stage test was questioned. The first stage was considered to be objective and based on reasonably clear criteria. However, the second stage ‘public interest’ test was considered to be subjective and based on the Ombudsman’s opinion. It was suggested that the test should be applied by a wider “audience” appointed for the purpose, such as the standards committee of the principal council for the area. Another response said the low number of referrals to standards committees as a proportion of the complaints received by the Ombudsman had an adverse impact on the ability of standards committees to maintain public confidence in members. The exercise of the Ombudsman’s discretion more towards referral than at present would be welcome.

3.7 **Response:** The Ombudsman has wide discretion under the 2000 Act to determine whether it is appropriate to investigate a complaint made to his office. All too often, it has been necessary for the Ombudsman and his predecessors to express concern about the number of low-level, tit-for-tat complaints by members which border on frivolity, or which are motivated by political rivalry or personality clashes, rather than true Code of Conduct issues. The two-stage test was first introduced in 2015 and is kept under review. The purpose of the test is to provide greater clarity, and a degree of certainty and consistency, in the exercise of the Ombudsman’s discretion as to whether an investigation is in the public interest. This ensures that finite resources are targeted towards the more serious allegations received by the Ombudsman. Often, cases are not taken forward because they fail to satisfy the first stage test due to a lack of direct evidence that a breach may have taken place. This has been a particular feature of complaints received about members of community and town councils. The Ombudsman continues to work with One Voice Wales and the Society of Local Council Clerks on the development of guidance being prepared by them on how to formulate an effective complaint. The involvement of standards committees in applying the test is impractical, not least as it may be perceived as prejudicing their later consideration of any report of a subsequent investigation. It may also require primary legislation to make this a function of such a committee or other persons. The Ombudsman has powers under section 70 of the 2000 Act to refer complaints for local investigation by monitoring officers. However, some monitoring officers have raised concerns about the exercise of these powers due to the lack of available resources to undertake local investigations effectively.

Impact of Inappropriate Behaviour at Meetings

3.8 Several responses expressed concern about the extent of bullying, lack of respect or otherwise generally disruptive behaviour by some members at meetings of community and town councils, in particular. Conduct perceived as bullying or harassment in the past has had an adverse impact on the ability of some councils to retain members and council officers. Less serious, but nonetheless disruptive

behaviour by members, which falls short of a failure to comply with the Code, can also frustrate the effective conduct of council business.

3.9 Response: The Ombudsman takes seriously any allegation that a member has bullied or harassed another member or officer. The guidance makes it clear that members must show other members and officers the same courtesy and consideration that they show others in their daily lives. Bullying and harassment, or lack of respect will not be tolerated. The guidance for members of community and town councillors emphasises the need for effective relations between members and officers, within a culture of mutual respect and consideration. Guidance being prepared by One Voice Wales and the Society of Local Council Clerks aims to help councils in avoiding or tackling bullying, harassment and inappropriate behaviour, including advice on formulating an effective complaint.

3.10 In seeking to reduce the incidence of bullying or otherwise inappropriate behaviour, with the assistance of monitoring officers, the Ombudsman has engaged with a number of councils that have given rise to a disproportionate number of complaints in the past. The adoption of a Local Resolution Protocol has the potential to provide a means for resolving issues locally before they get out of hand. The Ombudsman was pleased to work with One Voice Wales on the development of a model protocol to provide guidance relevant to community and town councils in formulating and operating such protocols. Ultimately, however, the success of any approach relies on the co-operation and actions of individual members and the Code of Conduct regime is in place to deal with instances of serious misconduct.

Interim Suspension

3.11 One town councillor suggested that the introduction of a process enabling the immediate suspension for up to six months of a member accused of bullying, pending the outcome of an investigation, would lead to a rapid improvement in behaviour generally. **Response:** The ethical framework already enables the Ombudsman to make an interim report to the Adjudication Panel in cases where there is prima facie of a serious breach that could lead to the disqualification of the member concerned, if proved, and it is in the public interest to suspend or partially suspend the member immediately. Any change to these powers would require primary legislation, which is a matter for the Welsh Government.

Welsh Government Review of the Ethical Framework

3.12 It was questioned whether it was appropriate to review the guidance at a time when the Welsh Government had announced a review of the ethical framework. **Response:** The review of the guidance was underway and nearing completion before the Welsh Government's wider review was announced. The Ombudsman looks forward to contributing to that review and will consider whether any revisions to the Code of Conduct guidance are required when its outcome is known.

Local Government and Elections (Wales) Act 2021

3.13 A number of responses suggested that reference should be made in the guidance to the provisions of the above Act, which introduce new duties on standards

committees and political group leaders in relation to conduct matters. **Response:** The new legislation was not enacted until 20 January 2021 and the relevant provisions do not come into force until 5 May 2022. Now that the content and timing of the new legislation has been confirmed, the guidance has been amended to include references to the new duties.

4. Comments on the Draft Guidance

4.1 General Points

Case Examples

4.1.1 It was noted that summaries of Adjudication Panel cases are contained in the guidance. It was suggested that the name of the member and their authority, the sanction imposed, tribunal reference number and weblink to the decision should be included. **Response:** It is not the Ombudsman's practice effectively to 'name and shame' in this guidance. The examples illustrate particular aspects of the Code featuring in any given case and, taken individually, do not necessarily provide a full picture of the circumstances of the case, especially one involving breaches of multiple paragraphs of the Code. Consequently, it would be misleading to reference the sanction imposed, which will reflect the full circumstances of the case involved, including mitigating or aggravating factors. The examples include cases heard by standards committees. While the Adjudication Panel publishes its decision reports on its website, the decisions of standards committees are published for a limited period only. Weblinks would, therefore, require ongoing monitoring and maintenance. Members seeking further advice about aspects of the Code are encouraged to consult the relevant monitoring officer or clerk.

Training

4.1.2 A number of responses welcomed the strengthening of the reference to the Ombudsman 'expecting' members to undertake training on the Code of Conduct, including refresher training for experienced members. Whilst one response, from an authority's group leaders, considered this a retrograde and derogatory step, others suggested the guidance should go further and state that members 'must' undertake training, with refresher training taking place within prescribed intervals. A number of responses noted that a requirement to undertake training had been built into the Code adopted by their council. **Response:** The Ombudsman has no powers to require members to undertake training. Provisions in the Local Government and Elections (Wales) Act 2021, when in force, will place a requirement on community and town councils to prepare a training plan. This will provide the means for identifying such members' training needs and opportunities, including on the Code of Conduct. Guidance on sanctions issued by the President of the Adjudication Panel indicates that a refusal, or failure, to attend available training on the Code will be regarded by tribunals as an aggravating factor when assessing the sanction to be applied to a member found to have breached the Code.

4.1.3 It was also suggested that in the case of community councils, the guidance should include an expectation that training will be provided by the clerk or One Voice

Wales, given the limited resources of monitoring officers. **Response:** Standards committees have a statutory obligation to provide or secure training for members of community councils in their area. How this is achieved should be subject to local agreement in light of local needs and resources and may include a mix of training delivered by the clerk, monitoring officer, One Voice Wales or other providers.

4.1.4 Another response questioned why an online form of training and assessment, such as that provided for school governors, is not available. **Response:** This is not a matter for the Ombudsman. As noted above, training is provided through a range of means and could include online training modules. The introduction of a standard online training and assessment system, such as that suggested, would be a matter for the Welsh Government to consider.

4.2 Preface

Complaint data

4.2.1 It was suggested that the point made about complaints to the Ombudsman being dominated by certain types of breach could be illustrated with a simple graphic or table. **Response:** The data would be time sensitive and would not add much to the point that is being made. As noted in the consultation response, up to date data is published each year in the Ombudsman's annual report.

Sanctions

4.2.2 One response suggested that the Preface should briefly reference the sanctions available for breaches of the Code. **Response:** The sanctions available to standards committees and the Adjudication Panel are set out under the relevant sub-headings in the 'Introduction'. However, a general reference to these powers has been added to the Preface.

4.3 Introduction

Respective roles

4.3.1 The explanation of the respective roles of the Ombudsman, standards committees, Adjudication Panel and (in the community council version) the clerk and monitoring officer was welcomed, but it was considered this could be improved with a diagram illustrating the relationship and the route for making representations that a member had broken the Code. **Response:** A diagram has been appended to the guidance.

Model Code

4.3.2 It was suggested that the Code, or a summary, could usefully be appended to the guidance. **Response:** The guidance already highlights (in bold) the key features of the model Code under each paragraph. To add the model Code would add to the size of document. Although there is very limited scope to divert from the model Code,

Members should refer to the Code of Conduct adopted by their particular council. This should be available from the monitoring officer or clerk to the community / town council. The Code may also form part of a council's constitution document.

Public Interest Test – Criteria

4.3.3 In relation to the criteria for assessing the public interest under the two-stage test, it was suggested that emphasis should be placed on the need for there to be 'evidence' of similar previous behaviour. Taking account of previous complaints where there is lack of evidence or where a complaint was dismissed would be against natural justice. **Response:** Added emphasis has been given to the reference to 'evidence' in the guidance. It has also been clarified that account would be taken of previous referrals to a standards committee or the Adjudication Panel where the member was found to have failed to comply with the Code.

Local Resolution Process

4.3.4 It was suggested that the section on Local Resolution Processes in the community council version of the guidance would benefit from an explanation or example of how it could be put into practice. It was also suggested that such councils should be required to adopt a local process. **Response:** The section on local resolution is subsidiary to the main purpose of the guidance, which is to assist members in understanding their obligations under the Code. The guidance describes the main benefits of local resolution. A model protocol and further guidance is available from One Voice Wales. The Ombudsman has worked closely with monitoring officers and One Voice Wales on the development of local resolution processes, but has no power to require councils to adopt such a process.

4.3.5 Concern was expressed about the role of the clerk in local resolution, including in circumstances where the clerk and chair of the council are in dispute. Clarification was sought on the circumstances when a clerk should report concerns to the Ombudsman, the formal process to be instigated by the clerk and the role of the monitoring officer. **Response:** The model protocol published by One Voice Wales is intended to assist councils in adopting a local process which meets a council's particular needs. The model describes circumstances in which it would be appropriate to refer matters direct to the Ombudsman, such as complaints by the clerk. In relation to the handling of a particular issue of concern, further advice should be sought from One Voice Wales, the monitoring officer of the relevant principal council or from the Ombudsman's office.

4.3.6 It was also suggested that extending local resolution processes to officers would be helpful in dealing with misunderstandings and disagreements with members. **Response:** This is a matter for individual councils. Some councils have adopted this approach alongside their 'member: officer relations protocol'. It is also a feature of the One Voice Wales model protocol for community and town councils.

Principles of Conduct

4.3.7 The reference to the Principles of Conduct and their relationship with the Code was thought to be confusing and potentially contradictory. **Response:** The guidance has been amended to clarify the relationship.

4.4 General Obligations

Treating Others with Respect

4.4.1 It was suggested that the expectation that a member would need to have a 'thick skin' when engaging in political debate should be varied in accordance with the seniority of the member, for example, county councillors should be expected to have thicker skins than community councillors. **Response:** The guidance reflects the legal precedents set by the High Court, including in a judgment concerned with the actions of a community councillor towards his fellow members (one of whom was performing the role of clerk).

Disrepute

4.4.2 One response pointed to the significance of the disrepute provisions in paragraph 6(1)(a) of the Code, given that they apply to a member in both their official and private capacity. It was considered that there should be a better explanation of what "reasonably be regarded" means in paragraph 6(1)(a) and that the guidance should draw a distinction between conduct that brings the office of member or the authority into disrepute. The guidance should better explain the criteria used to establish a breach, including the nature of the misconduct and the seniority of the member involved. It was suggested that misconduct by senior members (e.g. the Leader) is more likely to bring the authority as a body into disrepute than similar conduct by a member who holds no leadership positions. **Response:** The Ombudsman considers that the test of reasonableness is the same as that for considering whether a member has a prejudicial interest in a matter under paragraph 12(1) of the Code, i.e. would a reasonable member of the public (the person on the 'Dunvant Omnibus') in possession of all the facts, reasonably perceive that the member had brought disrepute upon themselves or the authority. Whilst a finding of breach will always be fact sensitive, the point about the seniority of the member is accepted and the guidance now reflects this.

Reporting Breaches of the Code

4.4.3 Concern was expressed about the suggestion that monitoring officers may refer complaints to the Ombudsman on behalf of members, as this could lead to a conflict of interest. **Response:** This aspect of the guidance is not new. The guidance acknowledges that this course of action may be taken in exceptional circumstances, but in most cases the member will be advised to refer a complaint themselves.

4.4.4 Guidance was also sought on when a member should self-refer themselves to the Ombudsman in respect of an alleged criminal offence. **Response:** There is no express obligation for a member to self-refer themselves to the Ombudsman due to a potential breach of the Code. The Ombudsman is happy to maintain dialogue with monitoring officers on this aspect of the ethical framework generally and in relation to specific cases.

Reasons for Decisions

4.4.5 The guidance on paragraph 8(b) of the Code states that, as a matter of good practice, where a member disagrees with officer advice, they should give clear reasons and, if they vote against the advice, ensure those reasons are recorded in the relevant minutes. This was questioned by two community councils. They considered that such an approach was reasonable if it applied to a decision of a council as a whole, but was undesirable if applied to individual councillors. It was considered that minutes could become a verbatim record of meetings, contrary to advice that minutes should record decisions of the council and not individual's reasons for voting one way or another (ref: Local Council Administration 12th Edition). **Response:** The 'Good Councillor Guide', published in Wales, states '*It is not necessary to note who said what [at a meeting], although the discussion can be summarised and decisions must be precisely recorded.*' Whilst it is accepted that a balance needs to be struck, this aspect of the guidance on the Code is not new and it is not known to have caused difficulties in the past.

Gifts and Hospitality

4.4.6 It was suggested this section was insufficiently detailed and gave the wrong impression that members should never accept gifts or hospitality. **Response:** The guidance is consistent with the provisions of the Code. Members should consult their authority's own gifts and hospitality policy for further advice.

4.5 Personal and Prejudicial Interests

Role of the Clerk / Monitoring Officer

4.5.1 Two responses from community and town councils were concerned about the advice that a member with any doubts about whether they had a personal or prejudicial interest should seek advice from their clerk. It was felt that this could put the clerk in a difficult position and shares a responsibility that lies entirely with the member concerned. Another suggested that monitoring officers do not have the resources to provide advice to community councillors. **Response:** The approach advocated in the guidance is not new. It reflects the reality in many councils where the clerk (as the proper officer) endeavours to provide advice to members on a whole range of issues. In some cases, it may be necessary to seek the professional advice of the principal council's monitoring officer. That said, the Ombudsman is aware that while monitoring offices endeavour to provide support, they are constrained by available resources. The guidance has been amended to indicate that the clerk may be able to offer advice, but if guidance is needed from the monitoring officer, this should be sought in good time prior to a meeting at which the related business is to be discussed. In any event, the guidance makes it clear that the member concerned remains ultimately responsible for the course of action they take.

Remote Attendance at Meetings

4.5.2 It was suggested that the guidance should be modified to reflect that council meetings are being held remotely, which presents practical difficulties for members to submit signed, written disclosures of interests. **Response:** The guidance reflects the

current requirement of the Code that a member declaring an interest at a meeting for the first time must confirm it in writing before, or immediately after the close of, the meeting in accordance with any requirements of the authority's monitoring officer or clerk. Authorities will need to obtain their own advice, but in the short term it may be possible, for example, for the declaration to be confirmed in an email. Councils may wish to raise this with the Welsh Government during its review of the ethical framework.

4.5.3 A number of responses suggested the section on withdrawing from a meeting needed to reflect circumstances in which members attended meetings remotely over the internet. It said that it could be problematic for members logging out to know when to log back in again. **Response:** The guidance reflects the requirements of the Code. The Ombudsman acknowledges the issue identified, but considers it should be possible to address it through a technological solution. For example, a member declaring a prejudicial interest could be placed in a virtual waiting room by a meeting administrator for the duration of the business giving rise to the interest.

Definition of 'Close Personal Associate'

4.5.4 One response noted that the Code does not define what is meant by a 'close personal associate' and suggested that further clarification was required, for example, in relation to close relatives who are estranged. **Response:** The approach taken in the Code recognises that the presence of a close personal association with another person will depend on the nature of the actual relationship. For example, it is recognised that a member who is estranged from a close relative may have no knowledge of their business or other interests. The guidance already sought to address this, but has been modified to make it clearer.

Dispensations

4.5.5 One response questioned the revised wording in the guidance relating to the broad power of a standards committee to grant a dispensation '*if the Committee considers it otherwise appropriate in all the circumstances.*' It was also thought the example given – relating to a member's disability – seemed to be restricting the legislative intent. **Response:** The revised wording brings the guidance into line with the wording used in the relevant regulations. When amending the regulations to include the new criteria, the Welsh Government signalled that the power could be used in the way that is described in the example included in the guidance. This does not inhibit the use of the power in other appropriate circumstances.

4.6 Registration of Personal Interests

Register of Interests

4.6.1 It was suggested that as it is not compulsory for community and town councillors to register certain pecuniary and other interests upon taking up office, the guidance should make it clear that the requirement on such a council to maintain and publish a register of interests could, in practice, mean the council publishes a register that is initially blank. **Response:** This raises a somewhat hypothetical, and potentially arguable, point about the interpretation of Section 81 of the 2000 Act. A council would

need to take its own advice on the issue. It is not a matter for the Ombudsman's guidance on the Code.

4.6.2 Another response suggested that the requirement to register pecuniary and certain other interests within 28 days of taking up office should be extended to members of community councillors. **Response:** This is a matter for the Welsh Government. This has never been a feature of the model Code in Wales since its introduction. The issue was considered afresh when the last substantive review of the Code was undertaken in 2007/08. In general, it was considered disproportionate to apply that requirement to community and town councillors, given the scale of the resources for which they are responsible.

4.6.3 One response suggested that there should be a standard template for registers of interest and a requirement for an annual review and monitoring system, overseen by standards committees. **Response:** These are not matters for the Ombudsman. It may be necessary for the Welsh Government to legislate to introduce a statutory standard form, but monitoring officers and standards committees could themselves develop a standard approach, should they collectively see merit in this. Section 81 of the 2000 Act requires the monitoring officer or community council clerk, as appropriate, to establish and maintain the register. Whilst it is important that registers are reviewed and updated regularly, the Ombudsman has no power to require the adoption of an annual review and monitoring system.

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