

Hoey Ainscough Associates Ltd

Supporting Local Governance

A REPORT FOR WYCOMBE DISTRICT COUNCIL ON LOCAL STANDARDS ARRANGEMENTS

Purpose of paper

1. We have been asked by Wycombe DC to give them some background information from a national perspective on Codes of Conduct and arrangements for case handling to help them with their review of their local arrangements.

About us

2. Hoey Ainscough Associates Ltd was set up in April 2012 to support local authorities in managing their arrangements for handling councillor conduct issues. The company was co-founded by Paul Hoey, who had been director of strategy at Standards for England from 2001 until its closure in 2012, and Natalie Ainscough who had worked as his deputy.
3. We have now worked with over 250 authorities in one form or another through reviews of local arrangements, provision of training, investigative support and wider governance advice. We also run a support helpline and website for subscribing authorities and run national and regional conferences on standards issues. We also advise the Committee on Standards in Public Life on local government issues and provide expert advice on local standards issues to a range of national bodies.
4. We have divided this paper into two sections. The first will look at the Code of Conduct, giving some national context, highlighting trends and examples of good and bad practice to help Wycombe in its considerations; and the second will do likewise for case handling procedures.

A. THE CODE OF CONDUCT

Types of Codes

5. Prior to the Localism Act 2011, all councils had to adopt a national Code of Conduct. Although councils were in theory allowed to make local additions, in practice none did. The Localism Act abolished this national Code and, although it retained a requirement for councils to have a code, what was to be included in this code was left to local discretion, provided it included statutory requirements relating to Disclosable Pecuniary Interests (DPIs) and was consistent with the seven principles of public life (the so-called Nolan principles).
6. To help councils develop their own codes, both the LGA and DCLG produced model codes which councils could adopt. These were very similar to each other but very different from the previous national Code and can be classed as 'principles-based' rather than 'rules-based' codes (see below). The National Association of Local Councils (which represents the parish council sector) also produced a model code which was based more on the old national Code.
7. In our experience councils have therefore gone down one of three routes. They have either adopted more-or-less wholesale the LGA or DCLG model code; they have rejected that model and adopted something very similar to the old Code/NALC model; or have adopted a locally-written hybrid which takes elements of the old Code and the LGA-type model.
8. This third hybrid approach is probably the most common and seems from our reading to be the approach taken by Wycombe. The second most common route would be a code which is largely based on the old Code; and simply adopting the LGA/DCLG model largely unamended is in our experience the least common option. It is hard to make generalisations without having done a rigorous survey but the LGA/DCLG model seems to be more common at County Council level than elsewhere and at certain London boroughs; while districts have tended to go more for an 'old Code' or hybrid approach. At County-level in particular this may reflect the different role of a County Council. The LGA/DCLG model is much lighter on declarations of interest, whereas districts tend to include more interests than the statutory minimum required, which may reflect their role as a planning and licensing authority.
9. It is also our experience that generally people have sought to have consistency across a geographical area such as a county or across the districts in a county. This is a sensible approach. Where there have been different codes at different tiers it can cause confusion for members sitting on more than one level as well as confusion for the public. It can also make the matter of dealing with a case locally more complex – for example we were recently asked to investigate a parish case, where the Monitoring Officer/standards committee had not realised that the parish had adopted a

different code from the district and this led to some confusion as to what actual breach of the code was being alleged.

10. Our search of council websites has shown that the district councils in Buckinghamshire are broadly working to similar codes (though there is some divergence in wording around interests which we will highlight below) and we believe this is a sensible approach to be encouraged. However, the County Council appears to have adopted the DCLG model without amendment. We have not looked at the parishes within the area due to resource constraints but we would suggest that a common approach with the parishes should be agreed where possible if it is not already. We would therefore recommend that, if Wycombe does propose changes to their code they should ensure that parishes in the area are aware of these changes (and ideally invited to comment on them). From work we have done, we believe there is a common approach across both Cumbria and Cornwall, for example, at all levels of local government including parishes and this has made guidance, training and enforcement a lot simpler. On the other hand, we also did some work with Gloucestershire where there was significant divergence between the local parish code, district codes and county code, particularly around the approach to declarations of interest and this meant duplication of training etc. particularly for members on more than one authority as well as confusion for members as to what interests they needed to declare at which council they sat on.

Issues arising from local codes

11. In this section, we want to highlight some of the issues we have seen in local codes and some of the matters we think a council needs to consider when reviewing its own code. For the purposes of this paper we are splitting codes into two separate parts – behaviours (the way people behave, interact and work on a day-to-day basis) and interests (the rules for registering and declaring interests) as they are two distinct elements of any code and are better considered separately.

Behaviours

12. Traditionally, codes of conduct tend to set out a series of 'do's' and 'don't's' as setting the standards for conduct – for example – do treat people with respect, do not disclose confidential information etc. This applies to codes across most professions and workplaces and was true of the old national Code. While some of these terms can be difficult to measure (for example, what constitutes disrespectful language) they tend to have some concrete standard against which one can judge an action – for example, there will be some clear understanding of what is and is not confidential information, what is and is not permissible use of council resources etc. These are usually reinforced by further guidance to members with examples.
13. The LGA/DCLG model codes moved away from this approach towards a more 'principles based' approach, based to some extent on the Code which

applies to MPs. These tend to give statements of principles about the way one should behave rather than measurable standards – for example, you should act in the public interest, you should be accountable for your decisions etc. These tend to be more subjective measures – one person’s view of what is in the public interest may be different from somebody else’s for example – but are designed to give an indication of the type of behaviour that should be modelled.

14. Our experience, both from training members and overseeing investigations into complaints is that a rules-based approach is simpler to understand and enforce. A principles-based approach can both lead to greater argument as to whether a particular behaviour about which somebody has complained can be judged against a particular principle; and also that, paradoxically, they can be so broad that complaints which are actually about service delivery or a particular decision can be made by complainants as breaches of the code.
15. As examples of this, if there is no explicit reference in certain codes to ‘treating others with respect’ or something equivalent, it can be difficult to judge certain offensive comments or bullying behaviour as coming within the scope of the code – instead it becomes an argument about, for example, whether the behaviour amounted to a failure to demonstrate leadership, which is much harder to define through examples or guidance. A particular glaring gap in the LGA/DCLG code we have identified is the failure to say anything about the need to respect confidentiality, which has led to councillors not being bound under the code to any duty not to disclose confidential information.
16. On the other hand, we have seen complaints made by people who have felt aggrieved because a councillor has failed to support them in supporting or opposing particular applications (often on contentious local matters) and are thus accused of not ‘taking decisions in the public interest’ or ‘not representing the views of their constituents’ and it can be difficult to explain to complainants why the code of conduct is not an appropriate mechanism to deal with such issues.
17. Those who have supported this principles-based approach and wanted to see a move away from the old Code’s more defined rules argue, however, that having narrow rules constrains councillors and can be used to gag them or generate complaints against them. For example, provisions relating to disrespect or bringing the authority into disrepute were seen as being so broad as to generate too many complaints and be used for vexatious or politically-motivated complaints that any criticism by a member of another person would lead to an accusation of disrespectful behaviour. Where councils have kept some but not all of the rules from the old Code, the ones most commonly dropped have been these broad ones relating to disrepute and disrespect.
18. The Wycombe code seems to strike an appropriate balance between keeping the old rules-based approach while importing some of the more general principles-based statements. We think this seems a reasonable position to

have and would not recommend the need for any changes, though if the Council does wish to review the provisions in greater detail, we always recommend it should consider the types of behaviour it believes should fall foul of the code and then see whether they are in fact captured by a particular provision in a clear way which members and the public alike could understand and measure.

Interests

19. It is first worth reiterating the principle behind why those taking public decisions need a mechanism for registering and declaring interests and, where appropriate, recusing themselves from decision-making. As guardians of the public purse they must be seen to be taking decisions based on merit and in the public interest and be seen to avoid biased decisions (whether actual or perceived) because they or somebody close to them has a stake in the outcome of a decision. While broad statements of principle as above – such as decisions must be taken on merit or in the public interest – articulate these principles clearly, they do not lay down rules as to what an individual is expected to do when such a conflict may occur. In our experience members do not find this helpful and tend to want more detailed guidance about what to do in a given circumstance. For example, is it acceptable simply to register the conflict in some way, are they allowed to contribute to any debate, are they allowed actually to be involved in the final decision? With only statements of principles rather than rules, different members can (for good or bad reasons) make their own decisions on when and when not to participate. This can lead to inconsistency within the same authority, confusion for the public and can generate more complaints because of the lack of clarity over the rules.
20. Rules to guide members were therefore developed through codes over many years to seek to define what constitutes an interest and what a member should do when they have one. These rules can broadly be categorised as what interests need to be registered, which also need to be declared at a meeting and which are so significant that they should limit or prohibit participation in decision-making.
21. An interest may arise because of an interest the member themselves might have (for example, the decision is about their own property or a business they run) or an interest of somebody close to them (for example a son's or best friend's planning application) or an interest of an organisation that they sit on (for example an awarding of a contract to a housing trust on whose board they sit).
22. The old Code set out detailed provisions designed to cover these various scenarios. Some felt the rules were over-complex and difficult to understand. The Localism Act sought to simplify these rules and slim down the categories of interests caught. Thus the Localism Act interests – DPIs – only cover the interests of a councillor and their spouse (rather than, for example, other family members). These DPIs have to be put on a public register and

automatically prohibit participation in decision-making (rather than, for example, taking a graduated approach depending on the closeness of the interest). These are the only interests which councils have to include in their code, though there is no restriction on including other types of interests.

23. Although the DCLG/LGA code only included DPIs with no explicit procedures set out for registering or declaring any other interests, very few councils have stuck solely to DPIs. Most have extended interests both to include a few other categories which need to be registered – typically membership of outside bodies; and have extended the need to declare interests to matters relating to a wider group of people than simply the member and their spouse – other family members and close associates for example.
24. Where councils have only included DPIs and we have done member training, members have universally expressed surprise when we have pointed out as an example that under their code there would be no explicit requirement to declare an interest in a son's planning application. Indeed we have found in those councils that members have in fact been declaring these interests and withdrawing anyway. While such codes do contain general statements about balancing public and private interests they do not set out how a member should strike such a balance and therefore leave it open to each member to take a different approach. We would therefore always recommend that councils include interests other than DPIs in their code, as they are such narrow interests and do not cover the bulk of conflicts of interest that arise. Nearly all councillors, regardless of their code, continue to declare these wider interests but there is always a risk that a rogue member will not declare the interest because they are not explicitly obliged to, thereby risking a challenge of bias against a decision and damaging public confidence in the council's decision-making processes.
25. Wycombe, in common with the other Bucks districts, has extended its code to cover other interests. This is true for the vast majority of councils. The County only includes DPIs.
26. What we find from those councils that have included other interests, however, is wide variation on what these interests are called (which is of course entirely a matter for local discretion and convenience, though we occasionally see codes where the same interest are given different names in different parts of the code because of inconsistent drafting). And of greater significance, variation as to what the effect of having such an interest has on a member's participation in decision-making.
27. Councils seem roughly split into two fairly even camps. Those who have stuck closely to the old Code tests – that is broadly, that you need to declare an interest if a matter relates to or affects an interest of a family member or close associate, and then if it affects them more than the majority of people in the area would be affected, you do not take part in the decision-making. The second camp simply requires the member to declare the interest but then participate fully. Thus, in the case of consideration of a son's planning application the first camp would require the member to withdraw from the

consideration; the second camp would require the member to declare the interest but they are then allowed to participate in the decision.

28. From our reading, the Wycombe code falls into this second camp while the other Bucks districts all fall into the first camp. We would recommend that you consider whether Wycombe's interests provisions should be brought into line with the other districts to restrict participation in certain circumstances where other interests are engaged.
29. There are two other points we would wish to make with regard to registration and declaration of interests which the Council may wish to consider. The first relates to what actually gives rise to a DPI. The legislation simply states that where a member 'has a DPI in any matter to be considered' they must not take part in the decision. However, this wording does not make clear what type of matter would give rise to a DPI. As an example, does it have to be a matter which directly relates to the interest (e.g. a planning application made by the member on their own property) or something which relates to or affects the interest (e.g. a planning application next door to the member's property).
30. Common consensus seems to be that it has directly to relate to the interest, rather than simply affecting it. However, interpretation of this does vary from authority to authority (and even within one area a dual or triple-hatted member may receive a different interpretation from each authority). Most authorities have simply replicated the wording of the legislation and then advise members on a case-to-case basis. The Wycombe Code has interpreted the legislation (at 3.4) as an item of business which affects or relates to the subject matter of that interest. Until such time as any case law develops (and there is currently a prosecution pending for non-declaration of a DPI in Dorset) what a DPI actually is will remain for local interpretation, but you may wish to ensure that there is a consistent approach to interpretation across the County to aid both members and the public.
31. Our final point in this section relates to the register of gifts and hospitality. Under the old national Code members had to register any gifts or hospitality received above the value of £25. There is no longer any statutory requirement to register gifts and hospitality, though again the vast majority of councils (though not all) have retained a requirement. Some have left the limit at £25, most seem to have raised the limit either to £50 (like Wycombe) or else to £100.

B. CASE HANDLING PROCESS

32. Under the Localism Act, councils must have in place arrangements under which allegations can be investigated, and arrangements under which decisions on allegations can be made. However, what the details of these arrangements are are a matter entirely for local choice. In addition, each council must appoint at least one Independent Person as part of the process.

33. In practice, all councils have to have arrangements to cover the same steps. Those are: to make an initial decision about whether any action is needed on an allegation; if so to investigate it or dispose of it in some other way; if necessary to make arrangements to hold a hearing following an investigation; and if necessary to impose some form of sanction. We will therefore examine each of those steps in turn to see where Wycombe's arrangements sit in comparison to experiences elsewhere and some of the issues to be considered.

Initial assessment

34. All councils have to have an arrangement in place to make an initial decision on an allegation. There are in reality only two possible ways of doing this in common with most non-executive council functions – having a committee make the decision; or delegating the decision to an officer.

35. Although a few councils have retained a committee to make all such decisions, the vast majority of councils have, like Wycombe, delegated the decision to the Monitoring Officer. A very small handful of councils pass complaints to the group leaders collectively to decide how they should be disposed of.

36. While in theory delegating the decision to an officer could lead to (real or perceived) political pressure being put on an officer to take a particular decision, in reality this tends not to be a problem. Most authorities do retain a power for the MO to refer the matter to a committee if, for example, it is a politically high-profile case. Wycombe's process does not seem to contain such a provision although a number of authorities have found it a useful long-stop to include, for example should it be a case where the Chief Executive has made a formal complaint or it is a complaint against one of the Group Leaders. We believe in general, however, that delegation to an officer is by far the most efficient way of making this initial decision. Matters referred to a committee are often subject to delay due to the need to convene a committee and can risk becoming (or being perceived as) more politicised and we have seen no evidence that the outcome of the decision differs from those authorities where it has been delegated to the MO.

37. Once a complaint has been received most authorities will notify a member that a complaint has been received and will invite comments, as Wycombe does. A few will not notify a member at this stage. Some of the reasons why councils have chosen not to notify a member may be that they fear that this can unnecessarily escalate the significance of the matter (for example, by risking a tit-for-tat complaint being made) or pressure being put on the officer to come to a particular decision. However, not doing so can limit the scope for a very early resolution (as envisaged at Stage One of Wycombe's assessment process) or else run the risk of a member learning about a complaint via the media which can also risk unnecessarily escalating the

situation. We therefore think on balance it is better that a member is notified up front as Wycombe does.

38. Like Wycombe, most authorities (though not all) say that the MO should seek the advice of the Independent Person (IP) before reaching a decision (Stage Two of Wycombe's process). A recent survey we did of IPs attending regional workshops we ran showed that around 90% of IPs were consulted at this stage and we think this is entirely appropriate that there is some independent guarantee that the MO has made a reasonable decision and has not been subject to undue influence.
39. Again like Wycombe, nearly all authorities envisage three outcomes at this stage – no further action, an investigation or some attempt at more informal resolution. Only a handful do not include informal resolution at this early stage but simply decide whether or not something merits further investigation. We would always encourage early informal resolution where possible and appropriate.
40. Some councils say that informal resolution will only be an option if the complainant is satisfied with that as an outcome. We do not believe that is appropriate as it can mean that money is spent on unnecessary investigations, when the outcome (due to the range of sanctions) is likely anyway to be the same or similar – that is an apology will be requested.
41. A minority of councils allow an appeal by the complainant against an MO's decision not to take any further action – typically to a committee of members. This again seems an unnecessary delay to us, given the need for proportionality and we have not seen an example of an appeal being upheld. One council we have worked with, for example, had an appeals mechanism in place and had received appeals by complainants against the majority of non-referral decisions made by the MO which meant that its appeals sub-committee had been meeting frequently. However, it had not upheld a single appeal as in each case it concluded the MO had made the right decision. It has therefore recently removed the right of appeal as a delay, as it was building up false expectations and because it was actually making complainants feel more aggrieved that the council was simply 'closing ranks' to support its officer. We would therefore recommend that Wycombe continue not to allow appeal at stage two.
42. However, the committee does need to reassure itself that the MO is broadly making the right decisions – that is, investigating matters the committee believes merit investigation and not taking forward matters the committee believes would not warrant an investigation. We suggest to councils (depending on the volume of cases locally) that the committee, or the chair and deputy, meet with the MO and IP once every six months or annually to review those decisions (anonymised if appropriate) not to overturn individual cases but to satisfy itself that the line is consistently being drawn in the right place.

Investigations

43. Where a matter is referred for an investigation, the process tends to be the same in all authorities – that is, the MO either investigates the matter or has the power to delegate or outsource it. The biggest issue with investigations tends to be the length of time taken to investigate a matter. This can be because it is given a low priority because of other pressures on officer time, but more often because of a lack of cooperation with the investigator from the councillor (or occasionally complainant). There is therefore an increasing trend to be explicit in processes that an investigation will be completed within a fixed timescale unless the MO (sometimes in consultation with the IP) grants an extension in exceptional defined circumstances. In some authorities, the IP is invited to comment on the draft report as a further way of giving independent validation that the report appears fair and proportionate.
44. Once an investigation has been completed, most councils (like Wycombe) allow the MO to decide how the matter should be disposed of – that is, whether the file should be closed (because there is no breach or it is insufficiently serious) or should go for a hearing. Again like Wycombe most authorities again allow the option of some form of informal resolution as an alternative to a hearing at this stage, and again like Wycombe, the IP is usually involved in that consideration. The Wycombe process does seem to allow the complainant to say that an informal resolution is inadequate, in which case the MO must refer the matter for a hearing. This is common, although others leave the discretion with the MO if he or she believes that a hearing is unlikely to impose a different solution (for example, the informal resolution has been the offer of an apology and the MO judges that the committee is also likely to ask for an apology). We would recommend that the MO is given discretion to take on board the view of the complainant but not to allow the complainant a veto, as a way of managing expectations as to final outcome and avoiding necessary costs of having to convene a hearing.
45. In some councils, where an MO concludes that there has been no breach, an appeal to the standards committee is allowed. The same considerations apply as to whether this is a necessary step as to an earlier appeal against a decision to take no action on a complaint.

Hearings

46. Wycombe's process for hearings seems typical of most authorities. There are some points to note for consideration. Wycombe is clear that the composition of the panel will consist of members from at least two different groups. Some councils do not do this. The standards committee (and any sub-committee) is, by law, treated as an 'ordinary' committee of the authority and as such subject to political proportionality rules (unless these have been waived by the council). Some authorities therefore have committees which reflect the political balance of the council, and this can lead to a large proportion of ruling

group members. That has caused some difficulties in terms of media and public perception, so attempts to have a more cross-party committee are to be welcomed.

47. While by law only elected members of the authority can vote on the committee, some authorities have been concerned that they will seem too partisan in the eyes of the public so have co-opted lay members on to their panels who, while not voting, are able to take part in deliberations. These tend to be separate individuals from the IP who has a more formal role to give independent views to the committee. Wycombe may wish to consider the relationship between their committee and the role of the Independent Person to ensure the roles are distinct.
48. Similarly some councils, like Wycombe, have co-opted non-voting parish councillors to assist them in deliberations on parish council cases. We think this is to be encouraged, though this is in our experience the case only in a minority of councils.

Sanctions

49. The Localism Act does not set out which sanctions the council can impose where a member has been found in breach of the code but simply leaves it to the council to decide what action to take. In practice, however, the council can only take sanctions which it has a legal power to impose. Thus it cannot suspend a member for a period or disqualify a member from office. These powers had existed under the former framework and had been set out explicitly in legislation but those provisions were repealed and without that statutory basis, the council therefore no longer has those powers. The range of sanctions set out in Wycombe's proposals therefore seem very similar to those set out in most other councils' procedures and reflect those sanctions which it seems clear the council can lawfully impose without unnecessarily interfering with a member's rights, as an elected representative, to carry out their role on behalf of their electorate.
50. We have seen an increasing trend in the formal standards process and sanctions operating in parallel with internal party discipline where members are members of a political party or group – usually the withdrawal of the whip or expulsion from the party. The standards committee may therefore wish to be aware what actions have already been taken and may want to have discussions with group leaders about any appropriate action they would expect to be taken by a party, bearing in mind of course that some councillors will not be members of a group, particularly at parish level.
51. Given that the main emphasis placed by the Government is on councillors being held to account for their actions through the ballot box (hence the removal of suspension and disqualification powers) it is important that the public are able to make an informed choice where there has been a finding of misconduct. The council should therefore consider how it publicises any findings of misconduct. For example, would a media statement be made, or would the findings be clear on the Council website should somebody be looking for information about their local councillor.

Independent Persons

52. By law the council must appoint one or more Independent Person to assist them through this process. In our experience, most authorities have appointed two, some have simply appointed one, and a handful of authorities have appointed more than one. Two seems reasonable to allow for conflicts of interest, absences etc. More than two would only seem necessary where there might be a particularly large workload (for example some councils will have several hundred parish councils to oversee).
53. An IP has two statutory duties – the council must seek, and take account of, their views, on matters under investigation before reaching a decision; and the councillor who is the subject of the complaint may also seek their views. Nothing precludes the council from giving an IP additional roles, as Wycombe has done, however, for example in giving views to the MO at the assessment stage.
54. Where a council has more than one IP, they could either use one IP throughout the progression of a case or else divide different roles between the IPs – for example, one to advise the MO, one to give views to the committee and one to give views to the subject member. Most authorities seem to go down the route of one IP per case (around 80% in our survey) though a minority do give these differentiated roles. We think the one IP per case approach is the more sensible and manageable one as it allows a consistent check and balance throughout the process and avoids IPs being seen as ‘advocates’ for one side or another.
55. A few councils have said that the complainant may also seek the views of the IP along with the subject member. This is not necessary but has proved useful in a small number of cases to help understand some underlying issues. We would always advise that, if you consider this, it should only be where the IP or MO feels it would be beneficial to understanding of the case rather than an absolute right. In any case, we believe it is important that there is some written protocol between the IP and the council as to what they are expected to do and not do and what resources they are able to call on, for example, to help them in their role.

Conclusions

56. We would therefore summarise our key conclusions as follows:
- i) In terms of regulation of behaviour, the Wycombe code seems to cover the appropriate areas and is in line with the majority of codes around the country.
 - ii) In terms of interests, Wycombe should review those circumstances where they think members should be allowed to participate in decisions

and where they should withdraw where they have an interest other than a DPI.

- iii) With regard to case handling, the Wycombe process seems proportionate and in line with practice elsewhere. We would not recommend the need for any appeals, but the committee should consider how it wishes to 'quality assure' judgements made.
- iv) The range of sanctions seems in line with accepted practice elsewhere and represents the agreed range currently available to councils, but the committee may wish to discuss with the political groups the role of party discipline in supporting the standards process.
- v) The Wycombe approach to the role of the IP seems in line with best practice.

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