

## Advice notes

06 May 2022

### **Members' conduct and the registration and disclosure of their interests (England)**

This advice note was written by our in-house solicitors and last updated on 6 May 2022.

*The information and commentary in the note do not constitute legal advice for any individual case or matter. For specific advice on your circumstances, we strongly encourage you to seek tailored legal advice.*

### **Introduction**

The conduct and standards regime has undergone several changes in the last few years. This advice note will set out the main changes and developments.

### **The Localism Act 2011 – changes to the standards regime**

The Localism Act 2011 (the 2011 Act) introduced arrangements to regulate the conduct of members of local councils, the registration and disclosure of certain interests and how complaints about their conduct are handled. The 2011 Act created new criminal offences in respect of a member's failure to register and disclose certain interests and their participation in discussions and voting at meetings on matters where they hold such interests. The statutory provisions are contained in sections 26-34 of the 2011 Act and Schedule 4. Any statutory references in this Note are to the 2011 Act unless otherwise stated.

### **The statutory standards framework**

A local council must promote and maintain high standards of conduct by members of the authority (s.27(1)). In discharging this duty, they must adopt a code of conduct to apply to their members when acting in their official capacity (s.27(2)). Sections 28 (1) and (2) require a relevant authority's code of conduct to:

- Be consistent with the principles of selflessness, integrity, objectivity, accountability, openness, honesty, and leadership.
- Include provisions that the authority considers appropriate in respect of the registration and disclosure of pecuniary interests and interests other than pecuniary interests.

### **The Committee on Standards in Public Life report**

In January 2019, the Committee for Standards in Public Life (CoSIPL) published its long-awaited [report](#) on local government ethical standards and made several recommendations. Some required legislation to be enacted, and others could be affected by bodies such as local authorities. Chapter 5 of the report specifically considers local councils. Recommendation 1 was that the Local Government Association create an updated model code of conduct in consultation with representative bodies of councillors and officers of all tiers of local government. The new [code](#) was published in December 2020. The government [responded](#) to the CoSIPL report in March 2022. It has no current plans to make legislative changes as recommended by the CoSIPL. As such, the 2011 Act provisions remain.

## **The Model Code of Conduct 2020**

The LGA's Model Code of Conduct was issued in December 2020. NALC recognised the benefits of a single code after the regime's post-2011 experience, so it endorsed the new code and withdrew the NALC template code of conduct. [Guidance](#) to accompany the Code was issued by the LGA in July 2021 after consultation with NALC and other sector bodies. We will update as on the issue of any sector-specific guidance.

## **What are the main provisions of the 2011 Act for local councils?**

The provisions in the 2011 Act apply to both members and co-opted members of relevant authorities. A co-opted member is defined in s. 27 (4) as a person who is not a member of the relevant authority but who is either a member of any committee or sub-committee of the authority or a member of, and represents the authority on, any joint committee or joint sub-committee of the authority, and who is entitled to vote on any question that falls to be decided at any meeting of that committee or sub-committee. In the rest of this Note, a reference to a member of an authority includes a co-opted member of the authority unless otherwise expressed. This should not be confused with members co-opted onto councils, further leading to a casual vacancy and no call for an election to be held. "Relevant authorities" are defined in s. 27(6) include district, county, London Boroughs, parish councils, fire and rescue authorities, economic prosperity boards, National Park authorities, and the Broads Authority.

The 2011 Act provides no definition of pecuniary or non-pecuniary interests. It imposes mandatory obligations on members in respect of disclosable pecuniary interests (DPIs). These are defined in regulations and further explained below.

Members are subject to obligations at meetings in relation to holding DPIs in business that is under consideration. Members are subject to the statutory obligations about DPIs irrespective of the code of conduct adopted by their councils or the date that the code was adopted.

In accordance with s.28(13), a relevant authority's function of adopting, revising, or replacing a code of conduct may be discharged only by the authority, not by a committee or officer. A relevant authority must publicise its adoption, revision, or replacement of a code of conduct in such manner as it considers likely to bring the adoption, revision, or replacement of the code of conduct to the attention of persons who live in its area (s.28(12)).

Subject to the provisions of ss.28(1) and (2), the relevant authority is free to decide the form and content of the new code of conduct that it adopts.

S.27 (3) provides that a parish council may adopt the same code of conduct adopted by its principal authority (and see paragraph 5 above on the 2020 Code). Pursuant to s.29 (9), a principal authority for a parish council is the district council for its area.

## **Handling of code of conduct complaints**

The principal authority is exclusively responsible for receiving, investigating and deciding code of conduct complaints which relate to the members of parish councils in their area. Sections.28(6) and (9) require a principal authority to have in place arrangements to investigate and determine allegations that a member of a parish council in its area has failed to comply with their council's code of conduct.

Except for the appointment and role of at least one independent person, the 2011 Act does not prescribe the arrangements that principal authorities must have in place for the investigation and determination of code of conduct complaints. A principal authority may delegate the discharge of such functions to a committee or officers pursuant to s. 101(1) of the Local Government Act 1972 (the 1972 Act). A committee with responsibility for investigating and determining code of conduct matters would be appointed pursuant to s.102 of the 1972 Act. As with any committee of a principal authority, it will be subject to the rules for proportional representation of different political groups set out in ss.15–17 of the Local Government and Housing Act 1989 (unless the whole council votes to suspend the proportionality rules for that committee). As such, a principal authority committee is not required to include in its membership the members of any of the parish councils for which the principal authority is responsible. A principal authority may arrange for its Monitoring Officer to have certain responsibilities relating to the investigation of a code of conduct complaint or deciding whether a complaint that it receives merits being investigated.

The 2011 Act does not give a principal authority express power to undertake investigations or to conduct hearings (any such action may be implied). Similarly, it has no express powers to require access to documents and information or to require members or others to attend interviews/give evidence, or to require the member or others to attend a hearing.

A principal authority must appoint at least one independent person (s.28 (7)). The views of the independent person must be sought, and their views are considered before a principal authority takes a decision on a complaint it has decided to investigate. The views of the independent person may also be sought by the principal authority in other circumstances. The views of the independent person may also be sought by the member of the parish council who is the subject of an allegation for failure to comply with their authority's code of conduct.

Pursuant to s.28(8), an independent person cannot be a member, co-opted member, or an officer of the principal authority or of any parish council within the principal authority's area or a close friend or relative of such person. In addition, a person cannot be an independent person if, during the five years before their appointment, they have been a member or an officer of the principal authority or of any parish council within the principal authority's area. The independent person may be paid an allowance or expenses connected to their appointment. S.28 (8) (d) provides that a person does not cease to be independent merely because such payments are made.

### **Breach of code**

If the principal authority decides that a member of a parish council has breached its code of conduct, the principal authority cannot take action directly against the member of the parish council (s.28 (11)). The principal authority's powers are limited to censuring them subject to making recommendations that the parish council takes a course of action in respect of the member. Although any such recommendation is not binding on the parish council, the principal authority may recommend, for example, that the parish council removes its member from a committee or that it asks its member to attend training or to apologise.

S.28 (4) confirms that a council decision is not invalidated because "something that occurred in the process of making the decision involved a failure to comply with the code".

## **Register of interests**

The monitoring officer of the principal authority must establish and maintain a register of interests of the members of the parish councils in its area. Such interests include DPIs and any pecuniary interests and non-pecuniary interests included in the code of conduct adopted by a parish council (s.29).

The monitoring officer must ensure that the register of interests of the members of parish councils in the area is available for inspection at all reasonable hours at a place in the principal authority's area. The principal authority must also publish the register of interests of the members of the parish councils on its website (s.29 (6)). A parish council with a website must publish the register of interests of its members, and the monitoring officer must provide the parish council with any data that the parish council needs to comply with its duty to publish the register of interests on its website if it has one.

## **Disclosure of interests upon taking office**

Under s.30, a member of a parish council must, within 28 days of becoming a member, notify the Monitoring Officer of any DPIs. Upon the re-election of a member or upon the reappointment of a co-opted member, they must also, within 28 days, notify the monitoring officer of DPIs not already included in their register of interests. S.30(3) confirms that DPIs relate to certain interests of:

- The member.
- The member's spouse or civil partner.
- The person with whom the member lives as if they were a spouse or civil partner.

The nature of DPIs in respect of (i) – (iii) above are defined by the Relevant Authorities (Disclosable Pecuniary Interests) Regulations 2012 SI 2012/1464. The interests of the persons in (i) - (iii) above relate to their employment, office, trade, profession or vocation for profit or gain, sponsorship, contracts, beneficial interests in land, licences to occupy land, corporate tenancies, and securities. When notification of a DPI is received by the monitoring officer, it will be entered into the member's register of interests unless it is a sensitive interest. Failure to register a DPI in accordance with s.30 of the 2011 Act is a criminal offence (see also paragraph 35 below). Recommendation 18 of the CoSIPL report was that the criminal offences in the 2011 Act relating to DPIs should be abolished. The government in its response did not agree with the recommendation.

Under s. 32 (1), a member of a parish council may ask the monitoring officer to exclude from their register of interest-sensitive interests whether or not these are DPIs, the details of which, if disclosed, might lead to a threat of violence or intimidation to the member or to a person connected with them. The monitoring officer has the responsibility for deciding if a member's interests are sensitive interests which are excluded from their register of interests.

## **Disclosure of DPIs and other interests at meetings and limitations on voting**

S 31(4) provides that if a member of a parish council is aware that they have a DPI in a matter being considered at a meeting, they are barred from participating in any discussion or voting on it unless they have obtained a dispensation. Without a dispensation, a member's participation in the discussion or voting on a matter in

which they have a DPI is a criminal offence under s.34 of the 2011 Act. No criminal offence is committed by a member who participates in a discussion or votes at a meeting on the question of whether or not to grant them a dispensation which relieves them of the restrictions which apply to the matter in which they hold a DPI (s.33(4)).

Under ss. 31(2) and (3), if a member is aware of a DPI in a matter under consideration at a meeting but such interest is not already on the authority's register of interests or in the process of entry onto the register having been notified to the monitoring officer, the member must disclose the DPI to the meeting and register it within 28 days of the meeting at which the relevant business is considered. Failure to disclose or register the DPI is a criminal offence under s.34. A member with a sensitive interest that has not already been notified to the monitoring officer must simply confirm at the meeting that they have a DPI rather than giving details of that interest (s.32(3)).

S.31(10) provides that a relevant authority's standing orders may require a member with a DPI in a matter being considered at a meeting to withdraw from the meeting room while any discussion or vote on it takes place. A parish council is free to adopt such standing orders. A member with a DPI who fails to withdraw from a meeting as required by their council's standing orders does not commit a criminal offence. If a council wanted to sanction a member with a DPI for not leaving the meeting room as required by its standing orders, it may rely on its other standing orders to vote to exclude the member from the meeting.

The code of conduct adopted by a parish council may include obligations on members to disclose at meetings interests which are not DPIs. It is not a criminal offence for a member to fail to register or disclose interests which are not DPIs even if such obligations are imposed by their council's code of conduct. A council may make standing orders which apply when members hold interests which are not DPIs.

S. 106 of the Local Government Finance Act 1992 also prohibits a local councillor in council tax arrears for at least two months from voting on the setting of a precept or any recommendation, resolution or other decision which might affect the calculation of the precept. If a local councillor in such a position fails to notify the council of the facts or votes in a prohibited matter, then on prosecution and conviction, they can be subject to a fine of up to £1,000.

## **Dispensations**

S.33 provides that a parish council may grant a dispensation to a member, not exceeding a period of four years, with respect to the restrictions that apply to them at a meeting, which is considered a matter in which they hold a DPI. S.33 (2) confirms that a parish council may grant the dispensation if, having regard to all relevant circumstances, it considers that:

- Without the dispensation, the number of persons prohibited from participating in any business would be so great a proportion of the body transacting the business as to impede the transaction of the business.
- Granting the dispensation is in the interests of persons living in the council's area,
- It is otherwise appropriate to grant a dispensation.

By virtue of s. 33 (4) a member is free to participate and vote at a meeting on the question of granting themselves a dispensation which relieves them of the restrictions which apply to the matter in which they hold a DPI.

A member's request for a dispensation must be in writing and submitted to the parish council's proper officer. Dispensations may be granted by the full council, or it may arrange for this function to be discharged by a committee or a sub-committee or an officer pursuant to s. 101(1) of the 1972 Act. If a full council (or a committee or a sub-committee) has responsibility for considering/granting dispensations, it can deal with a member's written dispensation request at the meeting at which it is required by them. This arrangement would benefit members who realise that they need a dispensation only after they receive the agenda which confirms the business to be transacted. Dispensation requests may constitute a standing item of business for every council (or committee or sub-committee) meeting and should be dealt with after the names of those members present and absent (and approval, as appropriate, for absence) at the meeting have been recorded. Councils are recommended to adopt standing orders which confirm the procedure for the submission of dispensation requests whilst recognising there may be times when councillors do not realise, they have a DPI and require a dispensation until the day of or at the meeting.

Whilst a member must submit their request for a dispensation in writing to the proper officer, a council may prefer members to complete and submit a standard form. It is recommended that a member's request for a dispensation, whether or not using a standard form, includes the following information:

- The name of the applicant.
- The description (e.g. DPI or other) and the nature of the interest.
- Whether the dispensation is for the member to participate in a discussion only or a discussion and a vote.
- The date of the meeting or the period (not exceeding four years) for which the dispensation is sought.
- An explanation as to why the dispensation is sought.

### **Dispensations for certain DPIs and other interests**

There will be some business due to be decided at a parish council meeting, which most or all of the members present will have a DPI in (or another type of interest). For example, at a meeting setting the council's precept or deciding the council's response to a proposed development affecting the entire parish area, it is likely that many or all of the members live in the parish. In these examples, it is NALC's view that the members hold a DPI (arising from holding a beneficial interest in land or a licence to occupy land in the parish) and will, without a dispensation, be subject to the statutory restrictions which prevent them from participating in or voting at a meeting on such business. The statutory grounds would permit a parish council to grant a dispensation to members. If the function of granting dispensation requests has been delegated to an officer pursuant to s.101(1) of the 1972 Act, dispensation requests made by many or all members of a council can be handled with relative ease. If the function has not been delegated to an officer, then members are free to participate and vote on the question to grant themselves dispensations (see paragraphs 28-31 above). In the example of a parish council meeting which is setting

the precept, some monitoring officers share NALC's view that members hold a DPI. However, some monitoring officers do not share NALC's view. NALC understands that the informal government view is that members of a principal authority at a meeting which sets the council tax or members of a parish council at a meeting which sets the precept do not hold a DPI.

Notwithstanding different legal opinions as to whether or not a member holds a DPI in the examples given above, it is a criminal offence for a member to participate and vote at a meeting on a matter in which they are deemed to have a DPI. If a member is unsure if they hold a DPI in a matter being considered at a meeting and they want to participate in a discussion and vote on the matter, the safest course of action would be for them to seek a dispensation. A dispensation will ensure that the member is not at risk of prosecution.

Although some monitoring officers may hold a contrary opinion, it is NALC's view that a member of a parish council or another local authority who receives an allowance by virtue of their public office holds a DPI. This particularly applies to members of parish councils who are also members of principal authorities and automatically receive an allowance from the principal authority.

### **Criminal offences**

Under s.34, a failure to register a DPI within 28 days of election or co-option (or re-election or re-appointment), or the deliberate or reckless provision of false or misleading information on registration, or participation in discussion or voting in a meeting on a matter in which the member has a DPI will be criminal offences, potentially carrying a Scale 5 fine of £5,000 and/or disqualification for up to five years. Prosecution is at the instigation of the director of public prosecutions.