

EXPLANATORY MEMORANDUM TO THE LOCAL AUTHORITIES (MODEL CODE OF CONDUCT) (WALES) (AMENDMENT) ORDER 2016

This Explanatory Memorandum has been prepared by the Welsh Government Department for Local Government and is laid before the National Assembly for Wales in conjunction with the above subordinate legislation and in accordance with Standing Order 27.1.

Minister's Declaration

In my view, this Explanatory Memorandum gives a fair and reasonable view of the expected impact of the Local Authorities (Model Code of Conduct) (Wales) (Amendment) Order 2016.

Leighton Andrews AM
Minister for Public Services
1 February 2016

1. Description

1.1 The Local Authorities (Model Code of Conduct) (Wales) (Amendment) Order 2016 (“the Order”) amends the Model Code of Conduct for local government members, as set out in the Schedule to the Local Authorities (Model Code of Conduct) (Wales) Order 2008.

1.2 The Order makes amendments to the Model Code of Conduct to facilitate the operation of new legislation introduced through the Local Government (Democracy) (Wales) Act 2013 (“the 2013 Act”) relating to public access to registers of members’ interests. A number of other changes are also made to facilitate the operation of local complaint resolution protocols and to clarify the original policy intent underlying the Model Code.

2. Matters of special interest to the Constitutional and Legislative Affairs Committee

2.1 None.

3. Legislative background

3.1 The powers enabling this Order to be made are contained in sections 50, 81 and 105 of the Local Government Act 2000 (“the 2000 Act”). Under section 106(2) of the 2000 Act, together with paragraphs 30 and 34 of Schedule 11 to the Government of Wales Act 2006, the Order is subject to annulment in pursuance of a resolution of the National Assembly for Wales (ie the negative resolution procedure).

4. Purpose and intended effect of the legislation

4.1 Overview

4.1.1 The purpose of this Order is to modify the Model Code of Conduct to:

- i. facilitate the operation by local authorities of local low-level member-on-member complaint resolution processes, as an alternative to the full investigatory role of the Public Services Ombudsman for Wales (“the Ombudsman”). It does this by removing the obligation on members of local authorities to report potential breaches of the Code of Conduct to the Ombudsman (in addition to the authority’s monitoring officer).
- ii. reflect changes introduced by section 58 of the 2013 Act which, among other things, amended section 81 of the 2000 Act to transfer responsibility for maintaining the register of interests of members of community councils from the monitoring officer of the county / county

borough council for the area to the ‘proper officer’ of each community council.

- iii. clarify that all personal interests disclosed under the provisions of the Model Code must be entered in the register of members’ interests. This is not a change of approach, but clarification of the existing underlying policy intent.
- iv. clarify the position in relation to a member’s participation in any business relating to constituency interests. Again, this does not change the approach, but amends the Model Code to reflect the intended policy outcome.
- v. make minor technical amendments to reflect changes in other legislation since the Model Code was made in 2008, eg the abolition of police authorities, which have no material effect on the operation of the Code.

4.2 Groups Affected by the Order

4.2.1 Those likely to be affected by the requirements of the Order:

- **Relevant local authorities**, ie county / county borough councils, community councils, fire and rescue authorities and national park authorities, who will be required to adopt and operate a revised Code of Conduct.
- **Members of relevant authorities** who will be required to observe their authorities’ revised Code of Conduct.
- **The Ombudsman** who may receive fewer, low-level, member-on-member allegations of breaches of the Code of Conduct.

4.3 Policy Objectives

4.3.1 The main policy objectives of the Order are set out below.

Obligation to Report Potential Breaches

4.3.2 Paragraph 6(1)(c) of the Model Code provides that a member must report to the Ombudsman and the authority’s monitoring officer any conduct by another member which they reasonably believe breaches the Code of Conduct.

4.3.3 The White Paper ‘Promoting Local Democracy’, published in 2012, (“the 2012 White Paper”) signalled the Welsh Ministers’ support for the introduction by relevant authorities of non-statutory local protocols for resolving low-level member-on-member complaints. The Ombudsman’s guidance on the Code of Conduct indicates that, typically, such complaints will be about alleged failure to show respect and consideration (paragraph 4(b) of the Code), or breach of the requirement not to make vexatious, malicious or frivolous complaints against another member (paragraph 6(1)(d) of the Code). Such complaints, particularly

when aired in the media, have potential to escalate and to bring disproportionate damage to relationships within an authority and to the authority's reputation.

4.3.4 Local complaints protocols facilitate the speedy and cost-effective resolution of low-level complaints, before matters escalate. Whilst it remains open to a member to refer low-level complaints to the Ombudsman, the Ombudsman has indicated that he is likely to refer the matter back for local resolution in the first instance.

4.3.5 The 2012 White Paper indicated that, to support the operation of local complaints protocols, the obligation on a member to report a potential breach to the Ombudsman would be removed from the Model Code. In part, this would remove the opportunity for a member to seek to thwart the operation of a local complaints protocol by citing the statutory obligation to report a matter to the Ombudsman.

4.3.6 The Order, therefore, omits from the Model Code the requirement to report a potential breach to the Ombudsman, but the requirement to report a breach to the monitoring officer is retained.

Registers of Members' Interests

4.3.7 Section 81 of the 2000 Act makes provision requiring the disclosure and registration of members' interests and related matters. Section 58 of the 2013 Act amended section 81, with effect from 1 May 2015, to:

- i. transfer responsibility for maintaining the register of interests of members of community councils from the monitoring officer of the county / county borough council for the area, to the 'proper officer' of each community council; and
- ii. require all relevant authorities in Wales to publish the register of members' interests electronically.

4.3.8 The Order makes a number of consequential textual changes to the Model Code of Conduct to reflect this change.

4.3.9 In addition, the Welsh Government is aware that confusion has arisen over the interpretation of paragraph 15(2) of the Code in respect of those personal interests which should be entered in the register. The Order amends paragraph 15 to put it beyond doubt that all personal interests disclosed under paragraph 11 of the Code, not just those financial and other interests falling within a category mentioned in paragraph 10(2)(a), should be entered in the register of members' interests. This is not a change of approach, but clarification of the existing underlying policy. There is no change to the exemption for members of community councils from the requirement to register interests falling within paragraph 10(2)(a) within 28 days of taking up office.

Constituency Interests

4.3.10 Paragraph 10(2)(b) of the Model Code provides that a member has a personal interest in a matter if a member of the public might reasonably perceive a conflict between their role in taking a decision on that matter on behalf of the authority as a whole, and their role in representing the interests of constituents in their ward or electoral division, as appropriate.

4.3.11 This aspect of the Code has given rise to unintended consequences in its practical application. The equivalent provision in the 2001 Model Code of Conduct was framed so as to apply to an executive member acting alone in taking a decision on behalf of the authority. The wider wording of the provision in the 2008 Code has been read by authorities as applying to members when acting collectively, e.g. on a planning or licensing committee, and has been seen as potentially precluding members from participating in any decisions affecting their ward.

4.3.12 The provision is also potentially in conflict with section 25 of the Localism Act 2011, which aims to clarify the law covering predetermination in England and Wales. In essence, the Localism Act seeks to clarify that simply expressing a prior view on a matter is not in itself evidence of predetermination.

4.3.13 The Order removes this provision from the Model Code.

4.4 Effect of the Order

Obligation to Report Potential Breaches

4.4.1 The Order omits reference to the Public Services Ombudsman for Wales from paragraph 6(1)(c) of the Model Code. Consequently, a member who is aware of a potential breach of their authority's code of conduct will be required only to report the matter to the authority's monitoring officer (this does not prevent a member from referring a matter to the Ombudsman where that may be appropriate). This will enable the monitoring officer to consider and advise on whether the matter is appropriate for consideration under the authority's local complaints resolution protocol, or should be referred to the Ombudsman for consideration. The monitoring officer would be under no obligation to refer the matter directly, but could advise the member making the complaint that this is the appropriate course of action.

Registers of Members' Interests

4.4.2 The Order amends the Model Code (see table below) to reflect the provisions of the 2013 Act, which transferred the functions described above from the principal authority's monitoring officer to the proper officer of the community council.

Paragraph	
11(4)	Requirement to give written notice of a personal interest

	disclosed for the first time.
15(2)	Requirement to register new or changed personal interests by giving written notification.
16(2)	Requirement to register information related to a personal interest which is no longer sensitive information.
17	Requirement to give written notification of any gift, hospitality etc.

4.4.3 The Order also substitutes a new paragraph 15 of the Model Code. This makes it clear that, in addition to those personal interests of a type specified within paragraph 10(2)(a) which must be registered within 28 days of a member taking up office or their becoming aware of a new or changed interest, any personal interest disclosed for the first time under paragraph 11 of the Code must also be entered in the register of interests. This does not remove the exemption for community councillors from the requirement to register certain financial and other interests within 28 days of taking up office. This is not a change of policy, but addresses a perceived ambiguity in the wording of the Code.

Constituency Interests

4.4.4 The Order omits paragraph 10(2)(b) from the Model Code. This clarifies that a member is not precluded from participating in the business of the authority simply because it relates to a constituency matter. However, a member taking a decision on a matter is required to keep an open mind until they are in full possession of all relevant facts and to act objectively and in the public interest in accordance with paragraph 8 of the Model Code.

Other Provisions

4.4.5 Paragraph 14(2) of the Model Code provides that a member with a prejudicial interest in any business of their authority may attend a meeting for the purpose of making representations, answering questions or giving evidence relating to that business, provided the public are also allowed to attend the meeting for the same purpose. The Order inserts new paragraphs 14(2A) and (2B) which enable a member, in the same circumstances, to instead submit written representations, in compliance with any procedure adopted by their authority for that purpose.

4.4.6 The opportunity is taken to make a number of minor textual amendments to the Model Code to reflect unrelated legislative changes since it was made, as follows:

- i. The now redundant reference to 'a police authority' is omitted from paragraph 3(a); and
- ii. References to sections of the Local Government Act 1972 and Local Government Act 2000 (dealing with allowances and payments) are

replaced by the current statutory reference in the Local Government (Wales) Measure 2011.

The changes outlined in paragraphs i) and ii) above have no material impact on the operation of the code.

5. Consultation

5.1 The Welsh Government undertook a technical consultation on the draft Order with relevant stakeholders from 30 November 2015 to 10 January 2016. This included statutory consultation with representatives of local government, the Auditor General for Wales and the Ombudsman, as required under sections 49(5) and 50(5) of the 2000 Act. The draft Order was also published on the consultation pages of the Welsh Government's website.

5.2 Consultation on the draft Order formed part of a combined consultation also covering the draft Local Government (Standards Committees, Investigations, Dispensations and Referral) (Wales) (Amendment) Regulations. Information about those Regulations and the consultation response can be found in the associated Explanatory Memorandum and Regulatory Impact Assessment.

5.3 A detailed analysis and report of the responses to the combined consultation will be available on the Welsh Government's website in due course.

5.4 A total of 10 responses to the consultation were received from:

Brecon Beacons National Park Authority / Pembrokeshire Coast National Park Authority (combined response)

City of Cardiff Council

Cyngor Cymuned Llanengan

Lawyers in Local Government

Neath Port Talbot County Borough Council

North Wales Fire and Rescue Authority

One Voice Wales

Powys County Council

Public Services Ombudsman for Wales

5.5 Those responding to the consultation were generally supportive. Insofar as the responses related to the proposed amendments to the Model Code of Conduct, the following main points were made:

Register of Members' Interests

5.5.1 The proposed amendments to paragraph 15 of the Model Code could be read as requiring a member to register a personal interest which it was not otherwise necessary for them to disclose, contrary to the stated policy intention.

5.5.2 The exemption for community councillors from the requirement to register certain financial and other interests, as described in paragraph 10(2)(a) of the Code, should be removed.

Obligation to Report Potential Breaches

5.5.3 No respondent disagreed with the removal of the obligation on a member to report a breach of their authority's code of conduct to the Ombudsman. Five respondents suggested the obligation to report a breach to the monitoring officer should also be removed.

Constituency Interests

5.5.4 All but one respondent agreed with the omission of paragraph 10(2)(b) of the Model Code. One respondent considered it was of benefit within the fire and rescue authority context, where difficult resourcing decisions can be highly emotive at a local level.

Other Comments

5.5.5 One respondent commented on:

- difficulties of enforcing the code of conduct at meetings at which officers are not present;
- the extent of the exemptions in the code from having a prejudicial interest for members who are appointed as LEA school governors and non-LEA school governors should be the same; and
- members with a prejudicial interest who are able to attend a meeting to make oral representations under paragraph 14(2) of the code should be able to make written representations in lieu of attending the meeting.

5.6 As a result of the consultation, the Order has been amended as follows:

Participation in Relation to Disclosed Interests

5.6.1 The Model Code is amended so that a member with a prejudicial interest who is able, in the circumstances described in paragraph 14(2) of the Code, to attend a meeting in order to make representations, answer questions or give evidence, may instead make written

representations in accordance with any procedure adopted by their authority for this purpose (see paragraph 4.4.5 above).

Registration of Personal Interests

5.6.2 The wording of the proposed amendment to paragraph 15 of the Model Code has been revisited to ensure that the intention is clear.

6. Regulatory Impact Assessment (RIA)

6.1 The Order primarily makes technical or factual amendments to the Model Code of Conduct to reflect changes in primary legislation, to remove or clarify a number of ambiguities as to the intended operation of the Model Code, or to facilitate the practical operation of existing local complaints processes. As such, the Order does not itself impose costs on local government or other bodies. Consequently, no RIA has been completed in accordance with the exemptions set out in the 'Welsh Ministers' Regulatory Impact Assessment Code for Subordinate Legislation.'

6.2 On adoption of the amendments to the model code, authorities are required by section 51 of the 2000 Act to publicise their amended code in one or more local newspapers. They will, therefore, incur a nominal cost (estimated to be in the range of £500-£1,000, potentially less in local community papers) in complying with that requirement.

6.3 The Order has no impact on statutory partners under sections 74-75 (voluntary and business sectors), or the statutory duties in sections 77-79 (equality, Welsh language and sustainable development) of the Government of Wales Act 2006.

7. Competition Assessment

7.1 A competition filter test has been applied to the draft Order. The result indicates there is unlikely to be any detrimental or beneficial effects on competition.

8. Post implementation review

8.1 The Welsh Government will monitor the impact of the Order through feedback from local government and other stakeholders.