

Committee: Council

Date: 07 July 2021

Wards: All

Subject: Member Code of Conduct

Lead officer: Louise Round, Managing Director, South London Legal Partnership

Lead member: Councillor Tobin Byers

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Recommendations:

- A. To adopt the revised Code of Conduct for Members attached as Appendix A with effect from 30 September 2021;
 - B. To note that the Monitoring Officer will arrange training sessions for councillors on the requirement of the revised Code of Conduct; and
 - C. To agree that the revised process for dealing with complaints that members have breached the Code of Conduct attached as Appendix B shall apply to all complaints made on or after 8 July 2021.
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1 PURPOSE OF REPORT AND EXECUTIVE SUMMARY

- 1.1. At its meeting in July 2020 the Committee established a member working group to carry out a review of the Council's constitution. The working group met on several occasions and a number of changes are proposed to various parts of the Constitution. A separate report on those changes appears elsewhere on this agenda. The Standards and General Purposes Committee also considered whether to adopt a new code of conduct for councillors, based on the model code of conduct agreed by the Local Government Association (LGA), as amended following consideration by the working group to take account of local circumstances. That Committee agreed at its meeting on 11 March 2021 to recommend to Council that it adopt the revised code of conduct attached as appendix A.
- 1.2. At its meeting on 28 June, the Committee also considered the process for handling complaints that councillors have breached the code of conduct and agreed to recommend the revised process attached as appendix B.

2 DETAILS

- 2.1. Following extensive consultation, the LGA published its long awaited model code of conduct in December last year. They embarked upon the exercise as a result of a recommendation from the Committee on Standards in Public Life. The report from that committee made a number of other

recommendations in relation to ethical standards in local government, including that consideration be given to strengthening the sanctions available to councils in cases where councillors are found to be in breach of a code of conduct. However, this would require primary legislation and there is no indication from the Government that this is likely to be forthcoming.

- 2.2. Merton's current code of conduct (Appendix C) is a very light touch document, comprising primarily of the Nolan Principles and having no specific requirements beyond behaving in a way consistent with those principles and with the Council's policies and procedure. The requirement under sections 30 and 31 of the Localism Act 2011 to declare interests and to refrain from taking part in decisions where the councillor has a disclosable pecuniary interest (DPI) as defined by the Relevant Authorities (Disclosable Pecuniary Interests) Regulations 2011, is contained in the addendum to the Code. The addendum does not set out the definition of DPs or the other non-pecuniary interests which the Council has decided should be registered. Those other interests simply appear on the website on the councillor pages. Similarly, although councillors do register any gifts or hospitality offered to them, and the Standards and General Purposes Committee receives an annual report on this issue, the requirement to do so is not referred to in the Code of Conduct itself.
- 2.3. The working group agreed that such a broad brush approach to a code of conduct is not helpful as there is a risk either that nothing amounts to a breach of the Code or conversely that nearly every minor issue could be interpreted as a breach of the Nolan Principles and therefore a breach of the Code. It is generally accepted that those principles provide context and can be an aid to interpretation, rather than amounting to obligations which are enforceable against individual councillors.
- 2.4. The current Code also contains nothing by way of guidance for councillors to support them to behave in accordance with it. By contrast, the LGA code helpfully sets out explanatory guidance under each obligation.
- 2.5. The working group, which included the Council's two independent persons, considered that although the LGA code was cumbersome in certain respects, broadly speaking it was a useful document and certainly represents an improvement on the current Code. The draft code attached as appendix A is substantially the same as the LGA code with some amendments for clarity's sake.
- 2.6. The Localism Act 2011 requires councils to adopt codes of conduct dealing with the conduct that is expected of members and co-opted members of the authority when they are acting in that capacity. There has been much debate about how to decide when a councillor is acting as an elected member as opposed to in their private capacity. It is not always easy to draw a clear line, especially when social media is being used, although the Council has already agreed social media guidance for councillors. The LGA code recommends the following wording which was agreed by the working group:

This Code of Conduct applies to you when:

- *you are acting in your capacity as a councillor and/or as a representative of your council;*
- *you are claiming to act as a councillor and/or as a representative of your council; or*
- *your actions would give the impression to a reasonable member of the public with knowledge of all the facts that you are acting as a councillor*

2.7. Most of the provisions of the new Code are self-explanatory but the proposed requirements in relation to the declaration of interests at meetings are a bit more complex and can be summarised as follows:

2.7.1 As well as DPis, the proposed new Code defines “other registrable interests” as follows:

“You also have a registrable interest in any business of your authority where it relates to or is likely to affect:

a) any body to which you are nominated or appointed by your authority; or
b) any body of which you are in a position of general control or management and which:

- i) exercises functions of a public nature;
- ii) is directed to charitable purposes; or
- iii) has one of its principal purposes the influence of public opinion of policy (including any political party or trade union)”

2.7.2 Although not incorporated in the current code, the Council’s website indicates that the following interests are required to be registered and declared so the proposals above are slightly wider than the current position:

“trade union membership;

any position of management or control that the councillor holds in any third party organisation within the borough”

Interests at Meetings

2.7.3 If a matter being discussed at a meeting directly relates to a councillor’s DPI, this must be declared and the councillor must leave the room while the matter is being discussed. * Failure to do so is a criminal offence.

*Note: the interests of a councillor's spouse or civil partner or person living with the councillor as their spouse or civil partner are treated as though they are the interests of the councillor him or herself.

- 2.7.4 If the matter *directly relates* to one of the councillor's other registrable interests as defined in the Code or otherwise directly relates to their financial interests or well-being, they must declare it but can only speak on the matter if members of the public are also allowed to speak on the matter. This is to ensure that a councillor is not in a worse position than an ordinary member of the public. The councillor cannot vote on the matter but does not need to leave the room while the matter is under consideration.
- 2.7.5 If the matter simply *affects* the councillor's other registrable interests, or financial interest or well-being, as opposed to being specifically about one of those things, or it directly relates to or affects a friend, relative or close associate, the ability of the councillor to take part in the discussion of the matter will depend on whether they (or their friend, relative or close associate) are affected more than other residents in the ward or borough, where it is a borough wide issue. If not, then the councillor can participate in the usual way. If they are, then the test of whether the councillor can take part depends on what used to be known as the "prejudicial interest" test. In other words, the councillor must consider whether "a reasonable member of the public knowing all the facts would believe that interest would affect [their] view of the wider public interest". If not, the councillor may speak and vote in the usual way. If so, they may speak if members of the public may also speak but cannot vote. This may appear quite complex but it attempts to distinguish between those cases where the impact on a member or those close to them is direct and obvious and those where the connection is more remote.
- 2.7.6 As is currently the case, if interests are sensitive, a councillor only needs to declare the existence of the interest and not the detail behind it. The Monitoring Officer has authority to grant dispensations in some circumstances to allow councillors to vote where this otherwise would not be possible. The most obvious example would be where so many members were disqualified from voting that it would not be possible to convene a quorate meeting of the relevant decision making body.
- 2.8. If Council agrees to adopt the new code of conduct, it will clearly be important to ensure that all councillors are familiar with its requirements. The Monitoring Officer will arrange training for councillors on the new provisions which will include a reminder of the process for dealing with complaints when they are made against councillors. For that reason it is being suggested that the revised code does not come into force until 30 September in order to allow as many councillors as possible to have received that training in advance.

Relationship with Other Protocols

- 2.9. The current Code of Conduct is contained in Part 5a of the constitution together with its addendum which partly deals with the requirement to declare interests. Although the existing Code of Conduct is relatively light on detail, over the past few years the Council has adopted number of protocols designed to supplement its provisions. These are:
- 2.9.1 Part 5b - The Code of Conduct for Employees
 - 2.9.2 Part 5c - The Member/Officer Protocol
 - 2.9.3 Part 5d - The Monitoring Officer Protocol
 - 2.9.4 Part 5e - The Protocol on the Use of Council Resources and Facilities
 - 2.9.5 Part 5f - The Planning Protocol
- 2.10. Parts 5b and 5d relate to solely to officers and are not affected by these proposals. It is intended that if Council agrees to adopt it, the proposed new code takes the place of Part 5a and its addendum and that Parts 5c, 5d and 5e remain in place as they provide additional guidance for members. They would not require substantive changes if the proposed Code is adopted although it may be necessary to make some consequential changes to ensure consistency of language. These protocols will be reviewed in due course.

Complaints Process and Hearings Procedure

- 2.11. As part of the overall review of the constitution, the process which applies should someone wish to complain that there has been a breach of the code of conduct has also been considered and some changes proposed. A copy of the revised process is attached as appendix B and the changes are summarised below.

Capacity (paragraph 4.2)

- 2.12. As stated above, the new proposed code of conduct will only apply to conduct by a councillor when acting in that capacity or claiming to act in that capacity or giving the impression they are acting in that capacity. The complaints process has been amended to make this clear because as currently drafted that limitation on its application is not expressly stated.

Filter Process (paragraphs 4.4 – 4.11)

Under the existing procedure, when a complaint is received the Monitoring Officer will carry out an initial assessment to decide whether or not code is triggered by the complaint and if so, whether it should be referred for formal investigation. Such an investigation would be carried out either by a member of the South London Legal Partnership, or in appropriate cases by an independent external investigator. Even if the Monitoring Officer concludes that if the facts alleged are found to be true they might amount to a breach of the code, this does not automatically mean that the matter will proceed to the investigation stage. Paragraph 4.8 of the procedure sets out a number of

factors to be taken into account by the Monitoring Officer in reaching a decision on whether to investigate.

These include considering whether an investigation is proportionate and in the public interest, the availability of alternative means of resolving the complaint, the timing of any complaint and whether the conduct complained of is something which would more appropriately be judged by the electorate at the next election.

- 2.13. Some additional wording is being suggested to clarify some of the existing criteria. For the existing criterion which relates to complaints which are substantially similar to one which has previously been dealt with, additional wording is being suggested to exclude complaints from investigation where they are already subject to a separate process. On the question of timing, wording has been included to provide that cases relating to conduct which happened more than three months previously will not normally be investigated unless there is good reason for the delay.

- 2.14. Two new criteria are being proposed as follows:
 - 2.14.1 Subject-matter – complaints which are really about Council services, its policies or performance will be referred to the relevant service area in accordance with the Council’s complaints procedure;
 - 2.14.2 Member complaints – Complaints by members against another member will not usually be investigated if the Monitoring Officer considers that the complaint is of a kind which could be more appropriately addressed through political group processes, political party complaints procedures or informal mediation.

- 2.15. The first proposed change is self-explanatory but the second was the subject of some debate at the working group who recognised that ideally complaints between members should be resolved through discussions between and within the political groups but felt that it would be wrong to have an absolute bar on using the formal complaint processes for such issues. They also argued that there may be cases where complaints originate from one member but relate to matters other than the conduct of one member towards another member, for instance a failure to declare an interest, or misuse of council resources. Members should not be precluded from making complaints about such matters and this is reflected in the wording.

- 2.16. There was also some discussion about whether complaints by officers against members should be excluded from this process and dealt with under the member/officer protocol set out in part 5C of the constitution. This suggestion was welcomed in principle but at the moment the member/officer protocol does not cover the question of complaints by officers and so it was agreed that this suggestion should be revisited in conjunction with a refresh of the member/officer protocol.

Consultation with Independent Person (paragraph 4.5)

- 2.17. Under the current procedure, the Monitoring Officer is *required* to consult the Independent Person when considering the filter criteria in deciding whether to proceed to an investigation or to seek an informal resolution. This is not a legal requirement and the working group agreed that this should not be an absolute requirement at this stage, although the discretion to consult is retained. The Monitoring Officer is required to consult the Independent Person if she is minded to refer the matter for formal investigation.

Hearings (paragraph 7)

- 2.18. If an investigation is undertaken and the outcome of that investigation is that there is no breach of the code of conduct, then there is no requirement for a hearing and the matter is simply reported to the Standards and General Purposes Committee for information. However, if the conclusion of the investigating officer is that there has been a breach then the process currently requires that the report is submitted to the Standards and General Purposes Committee to decide whether there should be a hearing. The working group agreed that this stage should be omitted as it is hard to see how the Committee could do anything other than refer the matter to a hearing unless it sought to challenge the contents of the report. If it did that, it would effectively be conducting a hearing in any event in which case any further hearing would either be superfluous or at risk of challenge if any of the same members who had first considered the matter were to be involved in the hearing. If this recommendation is accepted, on receipt of a report concluding that there had been a breach, the matter would proceed straight to a hearing.
- 2.19. The current process includes provision to appoint a subcommittee to deal with a hearing but this is on a case by case basis. The working group agreed that the nature of hearings would be such as to be more appropriately dealt with by a smaller group of members than the full complement of the Standards and General Purposes Committee. Therefore, the default position should be a hearing by a hearings subcommittee. There would still be power for the full committee to conduct hearings but this would be by exception.
- 2.20. If this approach is agreed, it would be sensible to appoint a hearings subcommittee on a standing basis, given that matters may be referred straight to hearing as describe above, rather than have to convene a full meeting of the committee to appoint a subcommittee on a case by case basis. Accordingly, if full council agrees this proposed change, the next meeting of the Standards and General Purposes Committee should appoint a hearings subcommittee. Such a subcommittee will be subject to the proportionality requirements contained in the Local Government and

Housing Act 1989. The subcommittee does not have to be drawn from among the membership of its parent committee.

Hearings Procedure

- 2.21. The procedure for dealing with hearings is set out in the schedule to the complaints process. Some minor drafting changes have been made to this but the only actual change to the process is to give the chair of the hearing the power to vary the order of proceedings, in particular to combine the two stages of making findings of fact and considering whether the facts as found amount to a breach of the Code of Conduct.

3 CONSULTATION UNDERTAKEN OR PROPOSED

- 3.1. As stated above, the LGA model code has been subject to consultation at national level and the version being proposed for adoption together with revised complaints process has been agreed by a cross party working group of Merton councillors and the Standards and General Purposes Committee

4 TIMETABLE

- 4.1. If Council agrees the adoption of the proposed new code, it will come into force on 30 September 2021 in order to allow time for members to be trained on its requirements. There is no need to wait until then for the revised process to come into effect as this is not dependent on the code. It is therefore suggested that it apply to all complaints received on or after 8 July 2021.

5 FINANCIAL, RESOURCE AND PROPERTY IMPLICATIONS

- 5.1. None

6 LEGAL AND STATUTORY IMPLICATIONS

- 6.1. The legal implications are contained in the body of the report.

7 HUMAN RIGHTS, EQUALITIES AND COMMUNITY COHESION IMPLICATIONS

- 7.1. The proposed new code contains express provisions requiring members to treat people fairly and with respect and to refrain from bullying and discrimination. These specific requirements, if adopted, would be new and would be line with the Council's overall approach to qualities.

8 CRIME AND DISORDER IMPLICATIONS

- 8.1. None

9 RISK MANAGEMENT AND HEALTH AND SAFETY IMPLICATIONS

- 9.1. None

10 APPENDICES – THE FOLLOWING DOCUMENTS ARE TO BE PUBLISHED WITH THIS REPORT AND FORM PART OF THE REPORT

- Appendix A – proposed new code of conduct

- Appendix B – revised process for dealing with complaints against members
- Appendix C - Merton's current code of conduct

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BACKGROUND PAPERS

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