



Consultation Analysis: Councillors' Code of Conduct revision



PEOPLE, COMMUNITIES AND PLACES

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Introduction

Background

Section 1 of the Ethical Standards in Public Life etc. (Scotland) Act 2000 requires the Scottish Ministers to issue a Code of Conduct for Councillors (the Code).

The Code sets out the standards that all councillors must comply with when carrying out their council duties. The Code is supported by [supplementary, independent guidance](#), published by the [Standards Commission for Scotland](#) ('the Standards Commission'), which provides more detail on what the Code means for councillors in practice. All local authority councillors in Scotland are obliged to comply with the Code and with any guidance on the Code issued by the Standards Commission.

The current version of the Code was originally issued in 2010 following a limited review of the Code that the Scottish Government carried out in 2009. A further amendment was published in 2018 which addressed the specific issue of councillors' membership on regional transport partnerships. The current version of the Code can be found [here](#).

The 2000 Act states that Ministers shall issue a councillors' code only after it has been laid before and approved by a resolution of the Scottish Parliament. The same applies to any revision or re-issue of the Code.

The [Ethical Standards Commissioner](#) ('the Commissioner') and the Standards Commission are two separate, independent statutory organisations.

The Commissioner is responsible for both public appointments and public standards. Where public standards are concerned, the Commissioner can investigate complaints about a councillor in respect of the Councillors' Code. Likewise, the Commissioner can also investigate complaints about a member of a devolved public body who is alleged to have contravened the appropriate public body's Code of Conduct.

The Standards Commission has responsibility for enforcing compliance with the Codes of Conduct and providing general guidance on their interpretation. Following initial investigation by the Commissioner, the Standards Commission adjudicates on cases of alleged contravention of the Codes of Conduct. Where a hearing is held, the Standards Commission has the power to impose sanctions.

Purpose of this consultation

The Scottish Government considers that many developments have occurred over the last ten years since the Code was last substantially reviewed. It is important to take account of such changes and to provide users with the opportunity to comment on the review. We want to make the Code easier to understand and take account of developments in our society such as the role of social media. We also aim to

strengthen the Code to reinforce the importance of behaving in a respectful manner and to make it clear that bullying and harassment is completely unacceptable and should not be tolerated. We aim to produce a Code that is fit for purpose and will ensure the highest standards of conduct by our councillors to maintain and strengthen the trust of those they are elected to serve.

The revisions to the Code are intended to amend the Councillors' Code of Conduct to bring it up to date and make it more user friendly. They include:

- A general rewrite changing the Code to the first person and adopting plain English wherever possible. This makes it easier to understand and encourages councillors to take ownership.
- A greater emphasis on addressing discrimination and unacceptable behaviour.
- Stronger rules around accepting gifts, both to protect councillors and to build confidence in their impartiality amongst the general public.
- A substantial rewrite of Section 5 establishing three clear and distinct stages to determine a declaration – Connection – Interest – Participation.
- Significant liberalisation of the guidance/rules around being a council-appointed representative on an outside body. The exceptions to this are for quasi-judicial matters and other situations where such appointments would create a clear conflict of interest
- Increased clarity on the rules around access and lobbying.
- A substantial rework of Section 7 in order to provide a more generic approach that can cover all types of applications and decisions, and not be so heavily focussed on planning matters.

As such, on 19 October 2020, we launched a consultation on possible revisions to the Councillors' Code of Conduct, to seek views on current proposals for a revised Code.¹ Whilst not part of this consultation, the Standards Commission intends to review and revise its supplementary guidance to the Code.

The consultation contained 10 questions in total. Respondents were asked whether they agreed with the need to review the Code. They were invited to comment on each individual section of the revised draft Code. Finally, they were asked to comment on the clarity of the revised Code, and given an opportunity to make any final comments on the proposed revisions to the Code.

Methodology and responses received

The consultation closed on 8 February 2021. Fifty-one (51) responses were received. This included two duplicate responses and one empty response, all of which were removed from the analysis leaving a total of 48 responses for analysis.

¹ For more information on the consultation, including the consultation paper, see the [Scottish Government](#) and [Citizen Space](#) websites.

The remaining 48 responses were analysed using MS Excel. In addition to the analysis of the closed questions, a thematic analysis of the open-ended responses was conducted in order to identify the key themes emerging in relation to each question.

It is not possible to reflect every point of detail that respondents submitted in this consultation analysis, since detailed and specific comments were received on many different paragraphs within the Code. This analysis focuses mainly on points where multiple respondents made comments, and which thus emerged as themes of broader interest. However, all detailed submissions have been fully reviewed and considered by the teams responsible for the development of the revised Code.

Of the 48 responses which were analysed, 21 (44%) were received from organisations and 27 (56%) from individuals. Individual respondents were not asked to give details of their relationship with the Code, although it is clear from the responses that at least some of them have first hand experience of the existing Code through their role as councillors.

Of the organisational responses, 13 (62% of the organisational responses and 27% of all the responses) came from councils, community councils or council political groupings provided information about their organisation. Seven (33% of organisational responses and 15% of all responses) organisational responses came from national bodies, including some tasked with representing councils, and others representing the interests of stakeholders who work extensively with councils.

It is important to note that the views of respondents to the consultation are not necessarily representative of those of the wider population of interest – including councillors, council staff and their representatives, and the electorate more broadly. This is because individuals and organisations who have a keen interest in any given topic, those who hold strong views, and those who have the capacity to respond are more likely to take part in a consultation than those who do not. As such, the responses to any consultation are a self-selecting group which may be biased in certain ways that we do not know. Reflecting this, the analysis is primarily qualitative in nature. We do not try to identify the percentage of respondents who held particular views but instead focus on understanding which topics were of particular interest or concern to the respondents, and the range and strength of views expressed in relation to those topics.

Need to review and update the current Code

Question 1: Do you agree that there is a need to revise the Councillors' Code of Conduct?

Forty-six of the 48 respondents (96%) provided an answer to Question 1. Of these, the vast majority (43 respondents, or 90%) of respondents agreed that there is a need to revise the Code. Three respondents (6%) considered that there was no need to revise the Code, and two (4%) did not provide an answer to this question.

The most frequent reason that respondents gave for why the revision is needed was to improve the clarity of the Code. Several respondents felt that the current Code is unclear, confusing and complex to apply. They view the revision as an opportunity to improve the clarity of the Code and the supporting guidance.

“The current Code is densely written, difficult to understand and complicated to apply to specific circumstances without having to find a path through definitions and different inter-dependent sections. It has acquired copious and complicated shades of meaning through the creation and amendment of guidance and advice notes which should be rationalised and the more significant translated into the Code itself, or at least the statutory guidance. It does not properly account for changes of circumstances and context, including the widespread use of different social media platforms and the Article 10 right to political expression.”

Respondents also felt that a lot has changed since 2010 when the Code was last substantially updated and that the existing code is now somewhat outdated.

In particular, respondents noted the rise in importance of social media platforms as a means of communication, and the need for inclusion of new guidance on social media for councillors. Bullying and harassment was another theme where respondents agreed that more up-to-date guidance is needed.

Respondents also noted the increasing complexity of the councillor's role, and the need for a Code and guidance that reflects this more adequately.

“As set out in the consultation, much has changed across society in the last ten years. The Code should be a living document and reflect those changes and developments in order that it stays relevant. The roles and responsibilities of local government have become increasingly complex and it is essential that there is a clear framework to support Elected Members in fulfilling the different roles that they are required to undertake.”

There was a small number of respondents who felt there was no need to update the Code, or who did not answer the yes/no question but gave a comment

instead. Generally these respondents either considered that the existing Code is clear enough, or that the review should have been less wide-ranging and more focused on a smaller number of areas.

Section 1: Introduction to the Code

Question 2: Do you have any comments on the changes proposed for Section 1: Introduction to the Code of Conduct?

Of all 48 respondents, 22 (46%) made a comment on Section 1 of the revised Code of Conduct. Of the remaining respondents, one did not answer, and 25 (52%) said they had no comments on the section.

Several respondents commented on the tone of the revised Code, particularly the use of the first person which is a major change from the existing Code. Most respondents who commented on this welcomed the use of the first person, although a small number felt that this was patronising.

“The use of plain English and the presentation of the Code in the first person is welcomed as a means of increasing councillor engagement and understanding of the provisions of the Code and their personal responsibility to comply with these provisions.”

There was some concern that the move towards clarity and simplicity may have resulted in reduced recognition of the complexity involved in making judgements relating to some of the matters raised in the Code.

Some respondents also felt that in general the bar is set too high in the Code, and that the standards being demanded here for councillors are unrealistic and go beyond what is required of other elected representatives.

On Paragraph 1.5, respondents raised concerns around the width of the application of the requirements here, and in particular how ‘could be reasonably perceived as acting as a Councillor’ might be defined. Respondents noted that councillors have the right to act in a private or political capacity and that this should be made clear in the Code. Some respondents noted that this is articulated in the Code of Conduct for Members of the Scottish Parliament, and that the Councillors’ Code of Conduct could adopt a similar approach.

Respondents also had concerns that basing this requirement on the perceptions of others is too subjective, and should be subject to the full objective test found elsewhere in the Code.

“Councillors have concerns that the Code may be considered to apply to them in circumstances where it was not their intent to act in their capacity as a Councillor... A Councillor cannot know how they are being perceived by a third party and this seems to impose a restriction on the expression of views that is not the case for other elected representatives.”

Several respondents commented on Paragraph 1.8, where they felt that the standard of being 'above reproach' was an unreasonably high standard for Councillors to meet. Respondents pointed out that most Councillors face some level of expression of disapproval or complaint, and that the Code needs to include an additional paragraph setting out how this can be objectively tested. There was a suggestion to include some of the wording from the Guidance in the Code to make this point clearer.

"The phrase "above reproach" sets an unreasonable standard for Councillors. Councillors will often be the subject of complaints for any number of reasons and there is no test of reasonableness in this section. Generally, the view was expressed by Councillors that the Code seeks to impose a higher standard of behaviour on them than is expected of other representatives and it is questioned whether this is appropriate."

A small number of respondents also commented on Paragraph 1.9. One respondent felt that the change from 'should' to 'will' seek advice was too restrictive, and asked what the sanction would be if a Councillor did not seek advice. Another respondent noted that senior/experienced Councillors could be a source of advice.

Section 2: Key principles of the Code of Conduct

Question 3: Do you have any comments on the changes proposed for Section 2: Key Principles of the Code of Conduct?

Of all 48 respondents, 23 (48%) made a comment on Section 2 of the revised Code of Conduct. Of the remaining respondents, two did not answer, and 23 (48%) said they had no comments on the section and two did not answer. This may indicate that the majority of respondents were content with the changes proposed to this section. However, a degree of caution is required here as it may also be the case that respondents did not provide feedback for other reasons.

Some respondents commented on the statement that the principles should be used for guidance and interpretation only. For clarity, they felt that the statement within the Code should be expanded to include wording from the Guidance to the effect that a breach of the principles does not in itself constitute evidence of a breach of the Code.

Many of the comments on this section related to the principle of Duty as set out in Paragraph 2.1 of the Code. Several respondents commented on the requirement in the principle that 'I have a duty to act in the interests of the Council as a whole', expressing the view that councillors' primary duty is to their constituents and not to the Council.

"Councillors are elected to their role by the public and serve the public first and foremost. The current proposals over-emphasise the Councillor's duty to the Council rather than to representing their constituents. As drafted, the Code assumes the public interest and a Council's interests are synonymous, but it is often demonstrated that this is not the case."

The same respondent also pointed out a potential conflict between the duty to take decisions solely in terms of the public interest, the duty to act in the interests of the Council as a whole, and the duty of leadership: to maintain and strengthen public trust and confidence in the Council and Councillors. They also felt that the Code could be interpreted to prevent the scrutiny and holding to account of officers.

Also commenting on this section, another respondent felt that the need to represent the interests of *all* constituents should be emphasised.

Respondents commented on the principle of Respect. One suggested that it should reference online and social media communications, while another considered that the wording of the principle on respect is too simplistic and should include some qualifying language to reflect situations where a Councillor might need to defend themselves or someone else against the actions of a third party.

One respondent thought that the restriction in the Openness section might potentially be mis-used by some Councillors “to hide behind mistakes and unfair decisions”.

Another respondent felt that there should be a duty on Councillors to challenge failings in the Council’s performance. The same respondent also considered that:

“There should be a principle of committing to democratic decision-making, transparency and accountability, and local government that is directed by the authority’s local elected representatives. Absent such provisions there is a real danger the code serves to insulate bureaucracy from democratic elements.”

Relatedly, another respondent felt that Section 2 could be open to challenge under Article 10 of the European Convention on Human Rights, in relation to free speech.

Two respondents were concerned that Paragraph 2.2 from the existing Code has been removed. This says that Councillors should apply the principles of the Code to a wide range of informal interactions. Both respondents felt that it would be helpful to retain this paragraph.

Another respondent felt that useful detail had been lost in this simplified version of the Code, particularly in relation to planning matters which were previously covered in more detail. They suggested that some of this detail could be included in the Annex.

One respondent suggested that there should be an additional principle on training and awareness, requiring Councillors to undertake appropriate training for their role.

Section 3: General conduct

Question 4: Do you have any comments on the changes proposed for Section 3: General Conduct?

Of the 48 respondents, 18 (38%) said that they had no comments to make on the changes proposed for Section 3 of the Code. Twenty-eight (58%) respondents made comments on the changes, and two (4%) did not answer.

Several respondents commented that the revised section is now written more clearly and is well laid out.

Comments on Paragraph 3.1 welcomed the inclusion of social media and online activity. However, there was concern that the revised Paragraph 3.1 could be interpreted as applying to councillors when they are not engaged in council business, and that the code should do more to make a clear distinction between a councillor's public and private life.

“Whilst many elected members are content with the revised wording, for others this is a cause of significant concern as it has the potential to blur the lines between a Councillor's public and private life.”

Some respondents also felt that there should be more detail in the Code and in the Guidance to support councillors in understanding their duties in relation to social media and in particular in relation to their activities in a personal capacity.

“Use of social media is increasing all the time, partly driven by the Coronavirus restrictions. The reference to it in paragraph 3.1 is very brief. It would be helpful to have more information, for example on being aware of the nature of the medium (e.g. whether it is a closed or public group on which posts are being made, and being aware of the membership of groups); perhaps that will be provided in formal guidance in due course.”

For Paragraph 3.2, some respondents suggested doing more to link the wording of the Code with legislation covering equality duties.

Several respondents commented on Paragraphs 3.3-3.5, which deal with bullying, harassment and sexual harassment. In general, respondents felt that the new Code was an improvement on the previous version, particularly the explicit references to harassment and sexual harassment. One respondent felt that the Code needs to go further:

“Whilst this section is an improvement on the previous code of conduct, it is still inadequate. Bullying, harassment and sexual harassment must be defined for clarity. There must be mandatory training and yearly refreshers for all councillors on all aspects of bullying, harassment and sexual harassment.

It is not good enough to leave training and updating knowledge to individual members. This section lacks any information on support for elected members who are subjected to bullying, harassment, and sexual harassment from other elected members.

With increased attention to this area, it's disappointing that this falls way short."

There were some suggestions for minor amendments to wording or for inclusion in the guidance. In particular, it was suggested that Paragraph 3.4 be expanded to include situations where harassment or bullying consists of deliberately or unreasonably excluding an individual from important discussions, activities, information or services. Two respondents noted that Paragraph 3.4 of the current Code included a helpful distinction between the roles of members and officers which they felt should be retained in this version for clarity.

A number of respondents commented on Paragraphs 3.6-3.8. Some respondents were concerned about the requirement that councillors should not get involved in operational matters, feeling that councillors need some level of engagement with operational issues in order to do their job properly. Several respondents also felt strongly that Paragraph 3.7 was now too restrictive, which might prevent councillors from undertaking their scrutiny role.

"The restriction on comment about performance of officers is too strict. The line between justified criticism arising from members' scrutiny role and personalised or offensive comment must be more nuanced and acknowledge the value and requirement for constructive criticism."

"Section 3.7 is dangerous. It insulates chief executives, executive directors and other extremely powerful officials from scrutiny and democratic oversight. A distinction should be made between the vast majority of employees, who should never be criticised by councillors, from the extremely highly salaried executive leadership team. They ought to be accountable for their actions and it is entirely reasonable that councillors be able to speak in committee or full council meetings about concerns. The very broad protection against criticism afforded by this section makes councillors extremely worried about speaking honestly when they have concerns. It has a chilling effect that renders administration, opposition and backbenchers powerless. I know of cases where council leaders and conveners have been ignored by executives, but have been unable to do much about it and unable to speak publicly about the lack of democracy. This needs to change."

"Councillors considered that the restriction on comment about performance of officers is now too restrictive. The inclusion of reference to a 'group of employees' is a particular concern. They considered that the scrutiny role carried out by Councillors is vital

and valuable and, as long as comments are not personalised or offensive, they should be entitled to comment on the delivery of services, which are, of course, delivered by Council employees. If they are not able to raise any concerns about staff performance (as per the draft Code) they are, in effect, unable to comment on service performance.”

“The Code draws too stark a distinction between strategic and operational and unreasonably constrains a councillor’s ability to hold Council officers to account. The Public expects their Elected Representatives to uphold standards and solve problems on their behalf.... In any transparent democracy, it is essential that those who bear responsibility for the delivery of a service can be held to account in a public forum and, where necessary, criticized for poor performance. The test the code should apply is whether that criticism has been in a respectful manner, not whether there has been criticism at all.”

Several respondents made comments in relation to Paragraphs 3.12-3.20, which relate to Gifts and Hospitality. Generally, respondents felt that the revisions to the section had added clarity and were helpful. However, some respondents felt strongly that the new Code was potentially too restrictive and might exclude some forms of hospitality which would normally be associated with a councillor’s duties, and which could reasonably be regarded as appropriate.

“The change in approach to gifts and hospitality is certainly clearer and the removal of the need to register gifts and hospitality that have been accepted will remove an administrative burden on both Councillors and officers. However, Councillors had concerns that the absolute prohibition on accepting hospitality may be too strict and may restrict their ability to participate in community life. For example, Councillors are regularly invited to join community groups at events or lunches. These groups are also likely to be in receipt of funding from the Council so it is not clear whether accepting this hospitality would be permitted (under para 3.20) or not (under 3.17).”

“We believe that this version is more restrictive, unclear and open to interpretation than the previous version.

The guidance note says that hospitality cannot be accepted ‘unless such an invitation has been made to the council and they have been asked by the council to attend on its behalf’. We are unsure what this means, or how this would be determined. Surely any invitation that a Councillor receives, by being a Councillor, is someone asking them to attend on behalf of the Council. If this is not the case, how would any invitations or events be considered? It is not the case that all hospitality is bad, a lot of Councillors sit on local groups where events are put on, or sit of boards of, for example, the SEC or EIC where attendance at events as a Board member would be expected.

This section requires full explanation on how these restrictions would work...

We are keen to strike the balance between legitimate receipt of gifts and hospitality in undertaking our duties and providing a register for the public to be able to access information about what gifts and hospitality have been received. We agree that transparency in this area is important. We do not think a solution is to remove the gifts and hospitality register and not allow Councillors to attend events.”

Some respondents noted that the provisions for Councillors and MSPs in relation to gifts and hospitality are different, and should be harmonised.

“Concern also exists around the perceived inequity between expectations of Councillors compared to MSPs in terms of permitted acceptance of gifts and hospitality and further clarity is sought on this. Whilst an initial plan for a concurrent review [of the] Councillor and MSP Codes of Conduct was not achievable in practice, a commitment to revisiting potential harmonisation between the two Codes would be welcomed, particularly around gifts and hospitality, but not limited to this area.”

There was a request that the Code provide more clarity on whether or not the Council should maintain a register of gifts (Paragraphs 3.18 and 3.20). One respondent asked how the requirements in relation to gifts and hospitality could practically be monitored.

There were some comments in relation to the paragraphs on Confidentiality (Paragraphs 3.21-3.24). One respondent found the definition of confidential information very helpful. However, another had concerns about potential scenarios that might give rise to contradictions in the effects of the provisions in practice.

A small number of respondents commented on Paragraph 3.28, where councillors should advise employees of any connection they have to a matter on which they are seeking advice. One respondent suggests that more clarification is needed as to what constitutes a connection – and that perhaps a ‘declaration of interest’ might be a better approach. Another respondent commented that it is unclear what officers should do with such information or how they are expected to respond to it.

Section 4: Registration of interests

Question 5: Do you have any comments on the changes proposed for Section 4: Registration of Interests?

Of the 48 respondents, 23 (48%) said that they had no comments to make on the changes proposed for Section 3 of the Code. Twenty-two (46%) respondents did want to make comments on the changes, and three (6%) did not answer.

Several respondents supported the removal of the requirement for councillors to make their address publicly available, on the grounds of safety for councillors and their families (Paragraph 4.19). One respondent felt that this provision does not yet go far enough:

“The recognition of the safety and security issues of Councillors is welcomed at Section 4.19 however some Elected Members feel that the wording does not go far enough, and that no property or land information should be in the public domain. Instead it should be held securely by the Monitoring Officer. Given the public role Elected Members have, some still feel their homes could be potentially identified, even with the reduced ward area information.”

Two respondents felt that there were some potential contradictions between the wording of Paragraph 4.4 and that in 4.5:

“There is some confusion when comparing the wording of Section 4.4 (f) which requires an Elected Member to register any remuneration received from a body to which they are appointed or nominated to by the Council; and Section 4.5 which states ‘I do not have to register any work I carry out on behalf of the Council in my capacity as councillor’. Some clarity on this wording would be helpful.”

The majority of the remaining comments related to Paragraph 4.20, which deals with the definition of what constitutes a registrable interest in shares or securities. One respondent felt that Paragraph 4.20(b) should simply be removed. Another felt that it was unreasonable to expect councillors to track the value of shares as they go up or down, to ensure that the Code is not breached. And another felt that the allowance is too high and should be lowered. A more detailed response considers that the wording in both the current Code and the Draft Model Code was clearer Specifically:

“The current wording is not clear if £25,000 is the total cumulative shareholding or only related to the declared interest. The current wording or draft wording for the model Code provides more clarity.”

Two respondents asked for more clarity and detailed examples of non-financial interests to be provided for Paragraph 4.24. One respondent suggested that 'memberships' should be added as a category of interest in its own right.

"Councillors should be required to register any membership of or affiliation with a group or organisation, formal or informal, which might reasonably be expected to seek to influence council policy and decisions.

This type of activity appears to be growing in prevalence and the likelihood of perceived or actual influence is significant enough to merit the issue of memberships being separated out from the catch-all 'non-financial interests' category."

Section 5: Declaration of interests

Question 6: Do you have any comments on the changes proposed for Section 5: Declaration of Interests?

Twenty (20) respondents (42%) provided feedback on the changes made to Section 5 in the revised Code; 26 respondents (54%) said they did not want to make any comment, and two did not answer.

Several respondents commented that the approach and the wording in the revised Code are simpler and clearer than the previous version.

“The new approach and the new wording are huge improvements on the existing rules – shorter, simpler, clearer language, easier to apply to circumstances.”

Several respondents said they liked the three-stage process for the declaration of interests, and thought that this would be a helpful tool to guide councillors through the declaration of interest process. Some respondents thought the process could be described more clearly, with additional detail, a flow chart or examples to support understanding.

“More generally, there is scope to state more clearly the connection-interest-participation stages, for example to clarify stages of: what is the connection; what is the level of interest; and what is the appropriate action eg. to participate or withdraw.”

A number of respondents commented in relation to the relaxation of requirements relating to outside bodies, covered in Paragraph 5.3 of the revised Code. Whilst some considered the liberalisation to be helpful, other respondents felt that these requirements should not be relaxed, because this might have a negative impact on public confidence in councils.

“There is considerable concern about the relaxation on the requirements for outside bodies at 5.3.f where a Councillor is appointed or nominated to that body by the Council. An example is being able to take part in a funding application for an outside body to which a Councillor is appointed to, which would be permitted under the new provisions. Elected Members feel uncomfortable with the public perception around such a situation and the dilution of the Code with regards to outside bodies.”

“[Our organisation] has a large number of councillors who sit on outside bodies for a variety of reasons, sometimes historic and sometimes required by the relevant organisation’s articles of association. This means that there will be instances where conflicts of interest could be perceived to exist and there being no requirement to declare an interest could undermine public confidence in the Council’s decision making and of the integrity of individual councillors and the Council. For example, under the revised Code councillors could take part in a decision to provide grant funding to an organisation that they are a director of without declaring any interest whatsoever. This could significantly undermine the grant process and undermine confidence in the impartiality of the Council. Although grant funding is noted within the explanatory note, the content of current proposals and any guidance would be unlikely [to] negate the perception and practical consequences.”

The same respondent felt it was unclear what the benefits were of the liberalisation of the Code in relation to this provision, and that these were outweighed by the risks.

“It is unclear what the benefits are of taking such a liberalised approach for either the Council, councillors or the public and officers suggest this is amended. Specifically, removing the need for declarations to be made at the point of decision (and placing reliance on the public to access the register of interest) creates obstacles to transparent decision making. [We] believe that the current system, whereby declarations are made but a councillor can still vote, is a far clearer process which ensures transparency at the point of decision and should be retained.”

Similarly, another respondent requested an extension to the wording on quasi-judicial/regulatory connections which would have the effect of reducing the liberalisation of the requirement:

“At paragraph 5.3(f), it would be helpful if the quasi-judicial/regulatory connection was extended to include financial decisions, issues relating to a contract or service agreement that the council has in place, or intends to put in place, with the other body, and significant decisions involving the operating model of the other body. It is noted that the relevant Explanatory Note does make reference to funding decisions but it is not clear if these are part of the liberalisation referred to or whether these are to be regarded as creating an actual conflict.”

One respondent requested more guidance in relation to dual roles and associated conflicts. Another has highlighted a possible divergence between the exceptions in the Code – where making funding decisions about an outside body might be

considered exempt from having to declare an interest – and the advice from other bodies such as the Accounts Commission and the Standards Commission which have highlighted the risks of conflicts in areas such as funding and scrutiny.

On Paragraph 5.3(e), one respondent suggested that this should be expanded to include situations when the Council is considering appointments to positions of additional responsibility – not just to decisions relating to remuneration.

Other comments relating to Section 5 included points in relation to Paragraph 5.5, with one respondent suggesting that the requirement for the Councillor to remove themselves entirely from a public meeting where they declare an interest for an item to be “unnecessary and undemocratic”. Alternative suggestions were for the Councillor to remain but not take part in the decision, or for the decision about whether a Councillor should leave or not to be at the chair’s discretion.

Finally, a few respondents felt that the references to the ‘objective test’ (Paragraph 5.4) needed to be made clearer and more explicit, could easily be missed in the current wording, and should perhaps be a clause in their own right.

Section 6: Lobbying and access

Question 7: Do you have any comments on the changes proposed for Section 6: Lobbying and Access?

Twenty-two respondents (46%) made comments on the changes proposed for Section 6, with 26 (54%) choosing not to comment.

Whilst some felt that the revised wording was clearer, one respondent felt that this section is currently more densely worded and looks different to the other sections in how it is laid out.

Comments were received relating to several paragraphs of the section, as well as relating to the explanatory notes that were provided within the consultation copy of the draft Code.

On Paragraph 6.1, two respondents noted that lobbying is not just for financial gain or advantage – and suggested that the wording should be clarified to ensure that the text makes it clear that any kind of advantage is meant here.

On Paragraph 6.2, one respondent felt that the objective test should go beyond members of the public to include others such as representatives of organisations and groups who are customers of the council.

On Paragraph 6.3, a few respondents commented on the statement that Councillors are not expected to respond to constituents in all cases. This was generally welcomed – for example, one respondent said that:

“It is helpful that the Code now provides that there may be circumstances in which it is best not to respond to a constituent, and that councillors are not obliged by the Code to respond to every contact.”

Another felt that

“Having clarity that there is no duty to respond affords protection for Elected Members and enables the use of their own judgement and discretion. Guidance on how this should be approached in practice would be helpful to assist Elected Members in understanding when a nil response would be appropriate and to manage the expectations of constituents. It is recognised that there will be particular circumstances where it would be generally not be appropriate to respond, for example in the case of persistent complainers or abusive behaviour. However there is also a balance to be struck in ensuring that a lack of response does not become commonplace given the duty Elected Members have to their constituents.”

One respondent felt that enquiries should at least be acknowledged, unless malicious/vexatious.

There were a few comments relating to Paragraph 6.4 on Community Engagement. Some respondents felt it was unclear what constitutes work 'in public', particularly during the current situation but also more generally, since some community engagement will typically take place in meetings that are not public, as well as in correspondence and by telephone. Another respondent was concerned to ensure that the requirements of the Code would not impede the proper sharing of information during community engagement.

On Paragraph 6.5, one respondent felt that 'seeking to do business' is too vague and should be more clear/specific. Another suggested a fourth option to add to the list of potential councillor actions to reflect a situation where a councillor does not publicly support the position of someone who is lobbying them.

Two respondents noted that Paragraph 6.6 should be clarified as to whether it relates specifically to regulatory or quasi-judicial matters.

In relation to Paragraph 6.8, one respondent felt that the difference between publicly supporting an issue and lobbying or influencing of officers/other councillors is not clear in the Code, and that this would benefit from further clarification.

Two respondents commented on Paragraph 6.9, which they felt to be too restrictive in certain respects.

Overall, a small number respondents felt that the tone and direction of the changes were unbalanced and do not reflect their view that lobbying has a legitimate role to play in the democratic system.

"The existing statements about appropriate participation and that lobbying is an essential part of the democratic system were useful, but appear not to have been retained. The overall tone of the proposed wording seems more cautious, and may deter Councillors from being involved in such activity."

"It is not always that case that "lobbying" is problematic - sometimes it is useful to meet with experts or business working in the council area to get their input in to the work of the Council and what updates they think would be helpful. That does not mean that Councillors are working to their bidding, but under the current draft, these types of meetings would automatically be seen as suspicious, even when they are not.

This collaborative approach to working with stakeholders is important and building partnerships and relationships is a key part of the role of a Councillor which is being undermined in the Code."

In particular, some respondents felt that the revised Code unfairly singles out applicants (particularly developers) in comparison with others who might be supporters or objectors to an application. This was particularly noted in relation to the language of the explanatory notes.

“Our members have strong concerns about the language used in the Explanatory Notes supporting Section 6. While our members agree with the general principles, they are concerned about the suggestion that developers and their agents may give selective information in favour of their proposals. They are also concerned at the weight given to councillors being aware that commercial developers and their agents are motivated by financial gain.”

“[Organisation] objects to the unbalanced manner in which consultation explains the need for caution in relation to lobbying and access. The Code itself must be very carefully scrutinized. All bias against applicants (and in consequence in favour of everyone else) must be removed as part of the wording changes that are being made.

The opening paragraph of the Explanatory Note on changes proposed for Section 6 correctly identifies those who might lobby Councillors in relation to an application for a consent from the Council might do so either in opposition to an application or in support of it. However, not all parts of Section 6 currently include that same balance.

Even with in the Explanatory Note to this section there is a significant imbalance between what is said of applicants / developers compared to wider stakeholders.”

Section 7: Taking decisions on quasi-judicial or regulatory applications

Question 8: Do you agree to the changes proposed for Section 7: Taking Decisions on Quasi-Judicial or Regulatory Applications?

Twenty respondents (42%) provided comments on the changes proposed in Section 7 of the revised Code. Twenty eight (58%) did not comment.

Overall, several respondents expressed support for the adoption of a more generic approach to this part of the Code, and the move away from being very focused on planning matters. One respondent was concerned about the potential dilution of the Code in relation to planning issues and interests, and suggested that that planning scenarios should be added into the associated guidance to the Code. In general, respondents found the revised Section 7 to be clearer, more consistent and more comprehensive in its approach.

There were a few specific suggestions in relation to different paragraphs in this section.

For Paragraph 7.3, one respondent considered that a further explanation of what is meant by 'quasi judicial' would be helpful. Other respondents suggested language clarifications or improvements.

Comments in relation to Paragraph 7.4 included the need to clarify Paragraph 7.4(a), and whether this would require attendance at every stage of the decision-making process. Another comment suggested that the objective test should be referenced in relation to the requirement that a Councillor 'be seen to act fairly' at 7.4(a).

One respondent made comments in relation to requirements in Paragraphs 7.4(e) and 7.4(f) that Councillors seek or take advice from Council Officers:

"It is vital that Councillors are seen to respect and adhere to this part of the Code at all times. [We] suggest a firmer and less stakeholder-dependent means of monitoring and policing this is required. It is not uncommon for Councillors to take a planning decision that is contrary to officer advice. That is not inherently wrong, but there must always be clear evidence, before the decision is taken and demonstrated through committee discussions, that the decision is based on proper planning considerations.

Likewise, at 7.4 (f), wording should be added to make it absolutely clear that Councillors must 'seek advice from the relevant Council Officer if I am in doubt as to any material or relevant considerations before and not after a decision has been taken'."

A few respondents gave views in relation to Paragraph 7.8. In particular, the wording 'that suggests I have a closed mind' was considered to be too subjective and open to interpretation, and should either be rephrased or supported by examples. Another considered that:

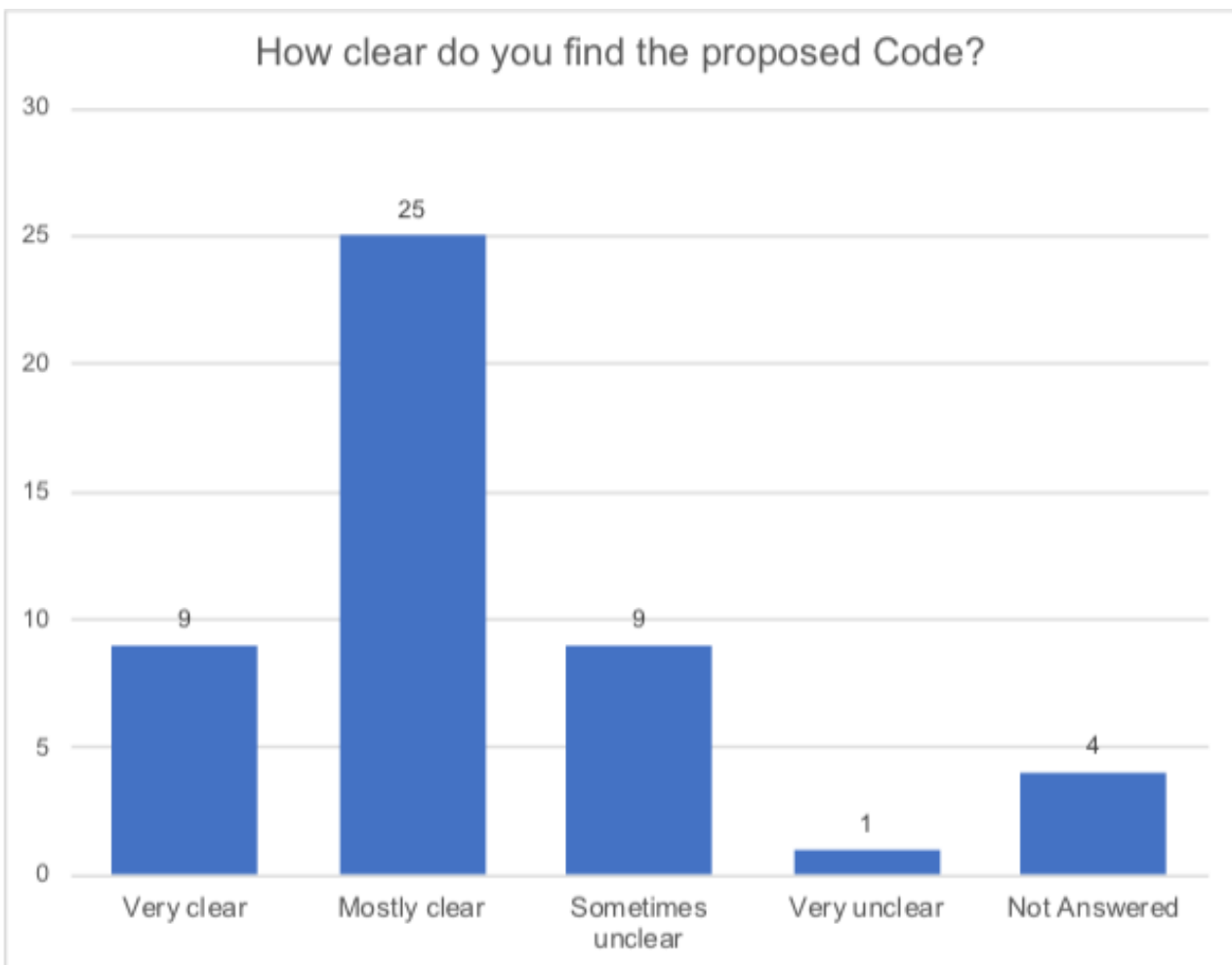
"The content is laudable in its intention, but we would question how determinable some of the matters covered are, and as a result how enforceable the provisions would be."

One respondent requested clarifications in relation to what would be considered to be lobbying or influencing in specific scenarios, in response to Paragraphs 7.11 and 7.13.

Clarity and ease of understanding of the Code

Question 9: Overall, how clear do you find the proposed revised Code? Please tell us where you think the clarity of the Code could be improved, and how.

Forty-four (92%) of the 48 respondents gave an indication of how clear they considered the revised Code to be. The results are shown in the figure below. Nine respondents (20% of those responding) thought that the Code was very clear, while 25 respondents (57% of those responding to this question) thought it was mostly clear. Overall, 34 respondents (77% of those who answered this question) thought the Code was mostly or very clear.



Twenty-five respondents also provided written comments on their views in relation to the clarity of the revised Code. Where those comments dealt with matters other than the clarity of the Code, we have considered them under the following section on Final Comments, restricting the analysis here to those comments which specifically focus on the clarity of the Code.

One respondent who rated the revised Code as 'very clear' commented that:

"The new Councillors' Code of Conduct is simpler, easier to understand and has been personalised. Duplication of text has also been removed all to the benefit of the document. The use of plain English also improves the content and impact of the document.

We consider that it can be improved with the addition of some graphics or dashboards to provide focus but generally the document reads well and is not over-complicated.

The relationship of the document to other supporting policies and websites should be made clear. For example, we note that the Standards Commission proposes to issue new guidance along with the revised Code and details of this revised guidance will be available on the Commission's website."

Other respondents also noted that the Guidance will be very important to ensuring that the Code is correctly interpreted.

Several respondents who felt that the Code was 'mostly clear' or 'sometimes unclear' highlighted the areas of Gifts and Hospitality (Section 3) and/or Declaration of Interests (Section 5) as being the parts of the Code that are not yet sufficiently clear.

"Overall, the revised Code is clear, however, the language and sentence structure of Section 5: Declaration of Interests remains overly complex and may benefit from further revision."

"Section 3 - General Conduct, Gifts and Hospitality

This section should receive a full re-draft. The current wording (and layout) is confusing and contradicts sections of the explanatory note. Fundamentally, there is a concern that the current wording may restrict councillors in carrying out their role."

"Overall, the language and approach and formatting are major improvements. The provisions regarding gifts and hospitality (3.12 to 3.19) and lobbying (section 6) are the exceptions, where some more simplification and streamlining would be worthwhile."

Other comments included that the use of simple language could be more consistent, and that definitions are not always consistent.

Final comments on the Code

Question 10: Do you have any other comments or suggestions about any aspect of the revised Code?

Twenty-eight respondents (58%) provided additional final comments or suggestions in relation to the Code. These were wide-ranging in scope. Many respondents took the opportunity here to restate the point or points that they felt most important from the main part of the consultation.

One respondent raised the issue of the written style of the Code here, suggesting that there is a mixed response to the use of the first person, and that the simplification of the Code has undermined the Code in some respects:

“Some Elected Members feel that it is helpful and that it will help them take ownership of the Code of Conduct. Others feel that the change is not helpful and has a much more severe tone. The way that the document is written with ‘I will/I will not’ is very personal and was also read by some as being patronising...

The attempt to simplify the Code of Conduct, for some, has left ambiguity in areas that used to be clear and a feeling that the simplification undermines the gravitas of the document....It feels less formal which dilutes its importance.”

A number of respondents used this space to comment on the Code Annexes, which were not asked about in any other question. Annex A – the Protocol for relations between Councillors and Employees – was a particular focus for these comments:

“[In] Annex A- there appears to be no regard given to the fact that elected members have a specific role to perform in relation to representing their area and what this means for their engagement with officers particularly around casework and supporting constituents.

I feel a section acknowledging this in the code of conduct and setting it as one of the fundamental roles of a Councillor would be beneficial. In my experience as a Councillor I regularly have to act to support constituents in complex matters such as social work issues or education issues. My attendance and interaction in these situations is often very limited to simply supporting constituents through complex processes but can often be viewed by council officers ... as a negative engagement..”

Other respondents expressed concerns about the balance in Annex A, provisions 24-25, noting that Councillors do sometimes need to express public criticism as part of holding council officials to account.

“A councillor needs to be able to communicate with the public via the press and/or digital media on a wide range of issues, including Council performance. This necessarily includes comment and/or criticism and provided this is couched in moderate language and reasonable tone, should be an accepted part of a councillor’s role.”

Various respondents touched on issues related to monitoring compliance with the Code, and what should happen in relation to complaints or breaches (Annex C).

Some respondents expressed concern that the revised Code may be likely to give rise to increased numbers of “vexatious” complaints against councillors, and that the demands of the Code and concern around inadvertently breaching it might be offputting to potential councillors, or constrain their activities in ways that would not be in the public interest.

“It is clear that behaviour that is perfectly reasonable, and actions that the public would reasonably expect their councillor to take or undertake on their behalf, and that are currently within the bounds of acceptable behaviour and (in some cases) afforded enhanced protection (eg. under Article 10 of the European Convention on Human Rights), could be made into automatic breaches of this new, draft Code.”

“Councillors were concerned that the Code is very restrictive and takes no account of the scenario where complaints are made for malicious or political reasons. The focus on what are perceived as ‘technical’ breaches is considered to be likely to dissuade people from standing for public office.”

Accordingly, some respondents felt that the processes for expressing and managing complaints against councillors need to be reviewed alongside the Code itself. This included concerns about: the increased scope for complaints against councillors and how these will be managed under the revised Code; the balance of the complaints process itself; and the practices surrounding interim suspensions.

“The processes and practices involved in investigating and adjudicating complaints also require to be reviewed. In particular, the balance is currently tipped substantially in favour of the complainant to the detriment of the respondent at present, and this can lead to prejudicial and unfair outcomes for the respondent, that are not in the public interest and could serve to undermine confidence in the ethical standards framework.”

Respondents who were concerned about these aspects of the Code also expressed some critique of the current role of the Ethical Standards Commissioner in its role to investigate/adjudicate on complaints:

“Improvements will be ineffective if the shortcomings of the Ethical Standards Commissioner and the investigative process is not addressed.”

“The current lack of oversight of the ESC unnecessarily undermines the confidence of councillors in the entire process.”

A few respondents noted that the guidance will be very important to the successful implementation of the revised Code, and would welcome opportunities to comments on/support the development of the accompanying guidance. There were also requests for a more streamlined approach to the production of guidance to the Code:

“The production by the Commission of an amalgamated Code, Guidance and cases for illustration should be repeated.”

“It would be helpful if the number of separate guidance and advice documents issued by the Commission could be reduced. One omnibus guidance document, updated from time to time, is a better option than a growing number of advice notes sitting alongside or below the guidance.”

Other more specific comments included that the Code should be extended to include community councils; that a clear public interest defence needs to be part of the Code at Paragraphs 3.21-3.23; that the potential bias in the Code in relation to the role of private businesses needs to be reviewed; and suggestions to reference other documents in relation to specific aspects of the code, such as the relationship between councillors and planners.

Conclusion

The information provided in the consultation responses was generally of a good standard, detailed and balanced. This likely reflects the fact that most respondents were already users of the current Code – for example, as councillors themselves, or as council representatives – and were therefore well-placed to comment on the changes made in the revised Code. Among the respondents, there was a clear acceptance of the need to review the Code and a general sense that society and practice have changed since the Code was last updated and that a review in relation to these changes is needed and timely.

Overall, the responses to the consultation indicate a good level of support for many of the changes proposed in the revised Code.

In particular, respondents welcomed focus on clarity, use of plain English, and simplifying of the language of the revised Code. Whilst there were differing views on the use of the first person, the majority of those who commented on this felt it was helpful, making the Code feel more personal.

Respondents welcomed the inclusion of new guidance in relation to bullying and harassment. Respondents also welcomed the strengthening of provisions in the Code relating to the use of social media.

There were some aspects of the Code where respondents were more critical, and felt that more work needed to be done either to make the Code clearer in certain respects, or to tackle perceived problems of balance or bias.

In particular, respondents expressed concern about the level of restrictiveness in the current version of the Code, and whether this could be interpreted or applied in ways that will impeded councillors from fulfilling their duties to the public – such as holding council officers to account – or to generate malicious complaints against councillors.

“The Code needs to better balance the aspiration for high and clearly articulated standards, and the reality of a [councillor’s] job. The theoretical standards articulated will lead to risk averse behaviour by [councillors], and diminish their ability to fulfil their role as leaders of the community.”

Other areas of the Code that attracted a higher rate of comment and feedback were the sections on Gifts and Hospitality and on Declaration of Interests, with various requests for review and revision to these as set out above.

Several respondents made comments in relation to the processes for monitoring and responding to complaints made against councillors, the institutions tasked with this, and the need to review these more fully. Relatedly, because the consultation did not ask explicitly for comments in relation to the Annexes, which include sections which set out processes dealing with complaints and breaches are set out,

there is a risk that these parts of the Code may not have been fully reviewed and considered by respondents.

Finally, several respondents noted that the development of clear and comprehensive guidance will be essential to the effectiveness of the revised Code, especially in view of the fact that some of the detail of the previous Code has been stripped out of this version for greater clarity. Respondents on this point were keen to review and comment on the guidance alongside the revised version of the Code.

Next steps

Following the consultation and the finalisation of this report, the Scottish Government will consider the key findings and decide what actions – if any – need to be taken forward in finalising the revised Code in response to the consultation feedback.

Thereafter, the Scottish Government will take the actions required to ensure the Code is laid before the Scottish Parliament for scrutiny and approval at the earliest possible date.

Once the Code has been approved by the Scottish Parliament we will publish it on the Scottish Government website. The independent Standards Commission will also publish new Guidance to help councillors interpret and adhere to the provisions in the Code of Conduct and to attain the highest possible standards of conduct.



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