



Proposed amendments to the Model Code of Conduct for Members of Devolved Public Bodies

RESPONDENT INFORMATION FORM

Please Note this form **must** be completed and returned with your response.

To find out how we handle your personal data, please see our privacy policy:
<https://www.gov.scot/privacy/>

Are you responding as an individual or an organisation?

- Individual
 Organisation

Full name or organisation's name

Commissioner for Ethical Standards in Public Life in Scotland

Phone number 0300 011 0550

Address

Thistle House, 91 Haymarket Terrace
Edinburgh

Postcode

EH12 5HE

Email

info@ethicalstandards.org.uk

The Scottish Government would like your permission to publish your consultation response. Please indicate your publishing preference:

- Publish response with name
 Publish response only (without name)
 Do not publish response

Information for organisations:

The option 'Publish response only (without name)' is available for individual respondents only. If this option is selected, the organisation name will still be published.

If you choose the option 'Do not publish response', your organisation name may still be listed as having responded to the consultation in, for example, the analysis report.

We will share your response internally with other Scottish Government policy teams who may be addressing the issues you discuss. They may wish to contact you again in the future, but we require your permission to do so. Are you content for Scottish Government to contact you again in relation to this consultation exercise?

Yes

No

CONSULTATION QUESTIONS

The consultation questions set out below focus on changes that have been made to the Model Code.

We are specifically seeking your views on the amendments that have been made to the Model Code. However, your views on any aspect of the revised Model Code are welcome. When making general comments please specify which sections of the Model Code you are commenting on. If your response refers to a particular paragraph, rather than the section as a whole, please provide a reference to that paragraph(s) following your response i.e. (paragraph 3.10).

General questions

1. Have you used the Code before?

Yes No

Comments

2. If Yes, in what capacity have you/do you use the Code? If you used the Code as a Board Member could you please name the public body?

Please provide your comment

I investigate complaints that members of the boards of regulated public bodies have not complied with their Public Body's Code of Conduct. I also provide regulatory oversight of ministerial appointments to the boards of public bodies, which the Scottish Ministers are expected to make in accordance with the Code of Practice for Ministerial Appointments to Public Bodies in Scotland. The latter Code requires the appointing minister to take steps to confirm that the applicant is a fit and proper person for the position to which they are to be appointed. This includes ensuring that the applicant agrees to apply the Principles of Public Life in Scotland and be bound by the Members' Code of Conduct for the body concerned. My statutory functions extend to ensuring that, so far as is reasonably practical, all categories of person are afforded an opportunity to be considered for such appointments. A strategic objective of my office is to secure effective boards, reflective of society. All of these functions are relevant to what has been proposed in the draft Code of Conduct.

I preface what follows by saying that I am wholly committed to the highest standards of conduct in public life in Scotland.

For any Code to be effective, my view is that it must be:

- readily understood by those who are expected to comply with it, those expected to investigate breaches of it and enforce its provisions, and ultimately, the public and;
- capable of being adhered to.

Whilst I understand and accept that the aims behind the revised draft Code are laudable, I regret to say that neither of these simple tests are met.

This is no small matter. In respect of appointments to boards, prospective applicants will not know what is genuinely expected of them. Those who are not already “in the system” will, quite understandably, be discouraged from applying for roles. Our boards will not, as a consequence, be able to draw on the rich and diverse talent that Scotland has to offer.

In respect of compliance on the part of current members, the standards of behaviour anticipated in the draft are often opaque and frequently wholly unrealistic. To use a simple example, members are expected to ensure that their “conduct is above reproach”. It is also unclear whether this applies also to their private life. In practical terms, any complaint made by anyone about any minor infraction on the part of a board member would, from a reading of what is on the face of the Code, represent a breach of its provisions.

Transparency must be central to the ethical standards framework and I fear that any attempt to introduce the Code as drafted has the propensity to bring that entire framework very quickly into disrepute. It is a matter of regret that I was not afforded the opportunity to provide my views before this version of the draft was published; it is possible that both current board members and members of the public may already be questioning these proposals with no small measure of concern.

3. Do you agree that there is a need to review and update the current Model Code?

Yes

No

Could you provide information to support your response?

A proportion of the complaints that I receive are about conduct that is not covered by the current Code, although the complainers believe that it is. Examples are as follows: -

a complainer may consider that a member has breached the Code even where that member was not acting in their capacity as a board member;

a complainer may consider that a member has breached the Code on the basis of an aspect of that member's quality of service or performance of their role;

a complainer may consider that an alleged breach of any of the key principles set out under section 2 is sufficient to be a breach of the Code;

a complainer may have misunderstood the tests for when a declaration of interests ought to be made.

If the Code were updated to be clear in relation to what amounts to an interest that requires declaration, that performance quality of the member's responsibilities is not within the remit of the Code, that a breach of the key principles by itself could not amount to a breach of the Code or provide clarity as to when a member's actions is governed by the Code, then these issues could be better understood and properly addressed. In responding to this consultation, my intention is to ensure that the Code is clear and transparent about the expectations placed on board members.

By way of background and for some informational context, my office conducted a survey for Board members in 2020 and, from the responses received, it appears the majority of respondents seemed to understand that their appointment to membership on a board (and any subsequent reappointment) was regulated by me (90.28%) and also that they could make a complaint to me via my office about a board member if they believed that the Public Body's Code of Conduct had been breached (84.84%). As such, I trust that I can provide helpful insight into the challenges of understanding parts of the Code and the practicalities of an investigation pursuant to an alleged breach.

I would further add, from my experience in handling complaints and investigations relating to alleged breaches under the Code, that all parties would benefit from a Code which is drafted with the practicalities and challenges of board membership in mind. A proportion of board members are unremunerated or do not otherwise financially benefit from their appointment. From a survey that I conducted in 2020, I am also aware that many board members are required to expend additional time in fulfilment of their roles well in excess of that advertised at the point of their original application. It is apparent that they are frequently not remunerated for this additional time spent. Placing a potentially disproportionate burden on current board members to comply with a Code without clarity on issues such as registration and declaration

of interests or whether service or performance in their role could amount to a breach of the Code is clearly likely to lead to the loss of members and to have a consequent impact on governance. It will clearly also have a negative impact on the willingness of people to put themselves forward. Our boards will be poorer for it; they will be less diverse and they will be less well-equipped than would otherwise be the case to face the significant challenges that lie ahead.

4. In Section 1, and throughout the Model Code, we have removed unnecessary information to make it easier to understand. Do you have any comments on the changes proposed for Section 1: Introduction to the Code?

Yes No

Please provide your comment

I note that references to board appointments, succession planning and diversity and equality issues and the contribution of these to good governance have been removed which I consider to be a retrograde step.

I note that the guidance paragraph has been removed inclusive of the requirement for members to review, regularly and at least annually, their personal circumstances. I am unclear about the reasons for this removal on the grounds given.

More problematic is the new content of section 1 itself. *** In general terms, it is not clear whether a breach of section 1 will represent a breach of the Code. If it will not, this has to be made clear on the face of the Code. To do otherwise would be misleading to the public, which would not be appropriate in the context of a statutory ethical standards framework.**

Additionally, this lack of clarity will prove to be problematic for board members, prospective complainers and for purposes of consideration as to whether a breach has occurred. All parties require to have clarity about the expectations placed on them. Here are a selection of examples demonstrating why the new content is potentially problematic:

1. *“1.4 The public has a high expectation of those who serve on the boards of public bodies and the way in which they should conduct themselves in undertaking their duties. I will meet those expectations by ensuring that my conduct is **above reproach**.”*

*“1.8 I will not, at any time, advocate or encourage any action contrary to this Code. I will meet the public’s expectations by ensuring that my conduct is **above reproach**.”*

I can foresee a considerable range of behaviours being interpreted by potential complainers as not meeting the “above reproach” test. If any behaviour can be criticised, no matter how innocuous, it could not be considered “above reproach” and would therefore represent a breach of the Code.

2. *“1.5 I will comply with the provisions of this Code in all situations where I am acting as a board member of my public body, have referred to myself as a board member or could reasonably be perceived as acting as a board member.”*

I presume that this was included to reflect the current situation inasmuch as a breach of the Code only occurs when an individual is, or could reasonably be construed as, acting in the capacity of a board member. However, as written, it places the obligation on members to comply with the Code in that capacity but does not remove the obligation to comply when they are *not* acting in that capacity. As a consequence of this drafting, to use a simple example, paragraph 1.4 (see above) would apply to an individual regardless of whether they were or could be construed to be acting in the capacity of a board member. This same issue applies to the rest of the content in section 1.

3. *“1.6 I will comply with the provisions of this Code in all my dealings with the public, employees and fellow board members, whether formal or informal.”*

As above. If an individual is, for example, slightly rude to another member of the public in an informal setting then their behaviour could be construed as a breach of both 1.4 and 1.6.

4. *“1.7 I understand that it is my personal responsibility to be familiar with the provisions of this Code and that I must also comply with the law and my public body’s rules, standing orders and regulations. I will also ensure that I am familiar with any guidance issued by the Standards Commission.”*

Unless clarified to remedy the situation as set out at * above, myriad behaviours could represent a breach of the Code in this case, ranging from minor traffic offences to minor infractions of the body’s rules, standing orders or regulations.

5. In Section 2, the Model Code has a new heading “My Responsibilities” which aims to ensure that members accept and endorse that it is their personal responsibility to be aware and comply with the provisions in their Board’s Code of Conduct. Do you have any comments on this change in Section 2: Key Principles?

Yes No

Please provide your comment

I have the same concerns here that I expressed in my prior answer about whether a breach of the provisions in this section also constitutes a breach of the Code. I note that the following sentence:

“2.1 The general principles upon which this Code is based should be used for guidance and interpretation only.”

Has been revised to:

“2.1 The key principles upon which this Model Code is based should be used for guidance and interpretation.”

The omission of the word “only” may be construed as changing in appearance or in fact the way in which the section is to be interpreted.

As with my prior comments, board members, members of the public and my own office should be clear on whether a breach of this section would also constitute a breach of the Code. From my response to question 3 above, you will understand that complaints that the principles of the Code have been breached are relatively common but not currently classified as sufficient as standalone complaints to constitute a breach in fact. I note also that the principles are open to very wide interpretation which would make it exceptionally challenging for all parties concerned to understand what is really expected of members. If a breach of section 2 alone will not constitute a breach of the Code, this should be stated transparently on the face of the Code itself. Alternatively, if the intention is that a breach of section 2 could potentially constitute a breach of the Code (which may be a possible interpretation upon removal of the word “only”), this should also be stated transparently on the face of the Code.

I note that the principle of Accountability has been revised to remove reference to the public and am unclear about the basis for this removal.

6. In Section 3, General Conduct, the respect provision has been extended to everyone that a member could come into contact or engage with when acting as such, e.g. employees of other public bodies as well as other board members and the general public. We have also included information relating to the use of social media and highlighted that bullying and harassment is totally unacceptable.

This section also covers Gifts and Hospitality. These provisions have been amended to make it clear that they should not be sought or accepted with the exception of minor gifts or hospitality that a member would normally be expected to be offered in their everyday role.

Do you have any comments on the proposed changes in Section 3?

Yes No

Please provide your comment

Please see my answer to question 3 in relation to my observations about whether the Code is applicable to individuals when they are not acting as board members. Section 3 places a number of obligations on individuals and the Code must be wholly clear about whether these obligations apply when they are not acting as board members. Currently, it is not.

I also have comments on some of these new obligations. A proportion of the issues they give rise to will have different ramifications, dependent on the circumstances in which they are applicable:

1. *“3.1 I will treat everyone with courtesy and respect. This can include in person, in writing, when at meetings, when I am representing my public body and when I am online using social media.”*

See my response to question 3 and in particular in relation to paragraphs 1.4 and 1.8.

Paragraph 3.1 includes the wording “when I am representing my public body”. The implication of its inclusion is that these requirements may well apply to individuals when not acting as board members. The term “courtesy and respect” is open to very broad interpretation as attested to by the complaints with which I deal and the Code does not provide any definition of the meaning of “courtesy and respect”. A strict interpretation of this provision would see individuals (either in the capacity of board members or not) being in breach of it by simply being perceived to be slightly rude to another individual. I note here also that no attempt has been made to incorporate reference here or elsewhere in the Code to the application of Article 10 of the ECHR. Serious consideration should be given to its inclusion, due to its ramifications for determinations on whether a given act might constitute a breach of the courtesy and respect provision.

2. *“3.2 I will not discriminate unlawfully on the basis of race, age, sex, sexual orientation, gender reassignment, disability, religion or belief, marital status or pregnancy/maternity; I will advance equality of opportunity; and will seek to foster good relations between different people.”*

The second part of this paragraph is potentially problematic as it concerns acts of omission as opposed to commission and the minimum requirements for the behaviours anticipated are not quantified. This means that they are different in kind from other acts of omission such as the failure to register an interest. As with my prior comments, my concern here lies with a lack of clarity about what might constitute a breach of the Code. What, for example, might a failure to “advance equality of opportunity” look like? My view is that the paragraph is problematic as a consequence of this lack of clarity.

Ideally, the following paragraphs in this section should be clear about their applicability depending on the capacity that individuals are acting in. To use a simple example, an individual may receive a gift in a personal capacity that could be construed as influencing their decision-making as a board member. Equally, an individual could request and receive a gift from another individual without that request and receipt having any impact on their ability to fulfil their board role or the public’s perception. See the wording of 3.12 for reference.

3. *“3.3 I accept that disrespect, bullying and harassment can be a one-off incident, part of a cumulative course of conduct, or a pattern of behaviour. I understand that how, and in what context, I exhibit certain behaviours can be as important as what I communicate, given that disrespect, bullying and harassment can be physical, verbal and non-verbal conduct.”*

The extension of bullying and harassment to be understood as part of a cumulative course of conduct or a pattern of behaviour, whilst sensible, should be carefully considered as guidance should be provided on the issue of whether incidents which separately cannot amount to a breach, could *cumulatively* be taken to be a breach of the Code.

I repeat my observation above that Article 10 of the ECHR should also be incorporated into the Code so that stakeholders may better understand that the actions of one person, whilst potentially interpreted as offensive to the complainer, may be within a protected fundamental right of that person.

4. *“3.4 I accept that it is my responsibility to understand what constitutes bullying and harassment (including sexual harassment) and I will utilise resources, including the Standards Commission’s guidance and advice notes, my public body’s policies and training material (where appropriate) to ensure that my knowledge and understanding is up to date.”*

The Standards Commission’s guidance and advice notes do not currently provide adequate coverage of sexual harassment. I appreciate the extension of bullying and harassment to “including sexual harassment” is a very recent development and as such coverage may not have been provided as yet in the relevant guidance and advice notes, but given that this paragraph now provides members must “ensure

[their] knowledge and understanding is up to date”, the relevant guidance and advice notes must similarly remain up to date, together with any training which may be provided. It may also be considered whether guidance may be provided in the Code itself for the benefit of clarity and enforcement.

I further observe that whilst bullying and harassment in this paragraph (and in the new paragraph 3.5) extends to cover sexual harassment, the same is not applied to the new paragraph 3.3 and query why this is the case.

5. *“3.5 I will not engage in any conduct that could amount to bullying or harassment (including sexual harassment). I accept that such conduct is completely unacceptable and will be considered to be a breach of this Code.”*

I repeat my observation that whilst bullying and harassment in this paragraph (and in the new paragraph 3.4) extends to cover sexual harassment, the same has not been applied to paragraph 3.3 and query why this is the case.

6. *“3.6 Except where it is written into my role as Board member, I will not become involved in operational management of my public body. I acknowledge and understand that operational management is the responsibility of the Chief Executive and Executive Team.”*

It is my understanding from my work and discussion with relevant stakeholders that the divide between operational management versus strategic decision-making between board members and officers of a public body can be a flashpoint from which complaints covering disrespect, bullying and harassment may also emerge. The relationship between operational and strategic roles would therefore benefit from clarity in the Code, and examples or illustrations of what may be operational management actions versus what may be strategic decisions would be welcome in the Code or in the relevant guidance, advice notes or training provided to board members and staff of a devolved body. This would assist with all persons to better understand their proper role, function and responsibilities to allow for appropriate behaviour.

I appreciate that some boards require members to engage in operational matters and I assume this situation is intended to be covered by the first part of this new paragraph 3.6 *“Except where it is written into my role as Board member...”*, but this indicates that where some boards require members to engage in operational matters, this must be expressly written in that member’s role description or terms of appointment, rather than merely implied. Again, clarification in this regard would be welcome.

7. *“3.7 I will not undermine any individual employee or group of employees, or raise concerns about their performance, conduct or capability in public. I will raise any concerns I have on such matters in private with senior management as appropriate.”*

I note that the term “in public” is very broad and can cover a variety of scenarios such as in published minutes of a board meeting, a comment on a social media platform, or being overheard whilst being in a public area. The Code would benefit

from examples or clarification on what “in public” means, and likewise, what “in private” means.

8. *“3.8 I will not take, or seek to take, unfair advantage of my position in my dealings with employees of my public body or bring any undue influence to bear on employees to take certain action. I will avoid asking or directing employees to do something which could compromise them or prevent them from undertaking their duties properly and appropriately.”*

I observe that, when applying the Code in relation to provisions dealing with undue influence or pressure applied to employees, it would benefit all stakeholders to have clarity that undue influence is required to be communicated and considered by the employee to equate to undue influence. (As opposed to a situation where the employee is required to have proceeded to act under the influence of the member concerned in order for there to be a finding of undue influence.)

As such, it may be appropriate to revisit this paragraph to clarify these issues.

9. *“3.9 I will respect and comply with rulings from the Chair during meetings of:
(a) my public body, its committees and
(b) any outside organisations that I have been appointed or nominated to by my public body or on which I represent my public body.”*

It may be suitable in paragraph 3.9(a) to clarify that the rulings from the Chair stem from the rules, regulations, or Standing Orders of the public body and at paragraph 3.9(b) to clarify that the rulings from the Chair will stem from the relevant rules, regulations or Standing Orders of that outside organisation.

10. *“3.10. I will respect the principle of collective decision-making and corporate responsibility. This means that once the Board has made a decision, I will support that decision, even if I did not agree with it or vote for it.”*

This paragraph 3.10 may benefit from a further clarification that where a Board has made a decision, the support for that decision is only required where the member is acting or perceived to be acting as a member and when in public – for instance, where a member is giving a statement to the press in their capacity as a board member. This paragraph 3.10 should not aim to inhibit or reduce private discussion by members in matters of decision-making and corporate responsibility, or seek to inhibit rights provided under the ECHR

11. *“3.11 I will comply with the rules, and the policies of my public body on the payment of remuneration, allowances and expenses.”*

I have no comments on this paragraph 3.11.

12. *New paragraphs 3.12 to 3.21 on Gifts and Hospitality*

At paragraph 3.13(a), I observe that (as it is currently drafted) there will be a requirement that an obligation must be ‘improper’ before it is viewed as a potential contravention. It may be considered that that the term ‘improper’ could be removed, as the spirit of the Code should be that any situation where a member accepts gifts or hospitality which places them (or which would reasonably be regarded by a

member of the public with knowledge of the relevant facts as placing them) under any obligation, is inappropriate.

13. *New paragraphs 3.22 to 3.24 on Confidentiality*

I have no comments on these new paragraphs.

14. *New paragraphs 3.25 to 3.27 on Dealings with and Responsibilities to my Public Body*

I repeat the comment above in relation to the insertion of 'improperly' at new paragraph 3.26(d) (*'improperly for private purposes'*). The current form of paragraph 3.26(d) implies that the private purpose must be 'improper' before being considered a breach of 3.26(d), when the spirit of the Code is perhaps intends that any use of a public body's resources for private purposes is inappropriate.

15. *New paragraphs 3.28 to 3.29 on Appointments to Outside Organisations*

I have no comments on these new paragraphs.

7. Section 4 has been amended to reflect the changes made throughout the Model Code and to make clearer what kind of information needs to be registered. Do you have any comments on the changes proposed for Section 4: Registration of Interests?

Yes No

Please provide your comment

I will consider each category of registrable interest in turn.

1. *New paragraphs 4.4 to 4.12 - Category One: Remuneration*

There is a typo in paragraph 4.7, which should be amended to state “*I must register any allowances I receive in relation to membership of any organisation. The fact that I receive such an allowance must be registered under Category One.*”

I have observed that complaints relating to failure to register interests tend to fall under what is set out in new paragraph 4.8 i.e. “*When registering employment, I must give the name of the employer, the nature of its business, and the nature of the post I hold in the organisation.*” The issue is that the prescribed format of listing the name of the employer, the nature of the business, and the post that is held is not always followed across all Public Bodies. For instance, some registers may not show the full name of the employer but an abbreviation instead. This part would benefit from clarification that it is sufficient for the information shown to be understandable by a member of the public. Alternatively, this paragraph may benefit from a statement that showing an abbreviated format of the prescribed information is not, in itself, sufficient to be a breach of the Code.

The new paragraph 4.9 could also benefit from this same clarification.

The new paragraph 4.10 could benefit from clarification of what ‘regularity’ means. This may take the form of an additional sentence to this paragraph providing an example, similar to the example which I note has now been deleted (i.e. “*For example, if you write for a newspaper, you must give the name of the publication and the frequency of articles for which you are paid.*”) Alternatively, a similar example may be provided in any accompanying guidance to the revised Code.

The new paragraph 4.10 states that “*it is necessary to provide the registered name and number of the undertaking*” in which a directorship is held. It may be useful to clarify that the Code is referring to a registration number (i.e. a business license, Companies House registration number etc.), as the current reference to a ‘number’ is unclear.

2. *New paragraphs 4.13 to 4.14 – Category Two: Other Roles*

The new paragraph 4.14 may benefit from the same clarification of ‘number’ to ‘registration number’ as with the new paragraph 4.10 above.

3. *New paragraphs 4.15 to 4.16 – Category Three: Contracts*

I note the new paragraph 4.16 has changed the term “consideration” to “value”, which is a clearer term to use from the perspective of a member of the public. However, it has not been clarified what would suffice to be a “description” of the contract, which may take many different forms across Public Bodies. It may be useful for any accompanying guidance on the revised Code to provide clarity on this point. Alternatively, as above, it may be helpful to consider whether failing to provide an adequately detailed description is, in itself, sufficient to be a breach of the Code.

4. *New paragraphs 4.17 to 4.18 – Category Four: Houses, Land and Buildings*

I note that the new paragraph 4.18 now contains a requirement that a member of the public have “knowledge of the relevant facts” as part of the test to be applied when considering whether to register any interest in property. This is an addition to the previous test which only covered “a member of the public, acting reasonably”. It is unclear whether the addition of knowledge of the relevant facts is to bring the Code in line with other ‘third party’ tests, but an explanation would be helpful to clarify why this test has changed.

5. *New paragraph 4.19 – Category Five: Interest in Shares and Securities*

A significant simplification of paragraph 4.19 has taken place, with the removal of a more technical description of the amount of shareholding required before triggering the need for registration in the Register of Interests. This is a welcome development. However, in paragraph 4.19(b), the description of shares and securities is extended to those owned by the member or which members ‘*have an interest in*’. The description of ‘interest’ may benefit from further clarification. I also note that the requirement for provision of the registered name of a company (in which a member is required to register an interest) is now deleted.

6. *New paragraph 4.20 – Category Six: Gifts and Hospitality*

I note that 4.20 as amended suggests that there is no longer a need to register gifts and hospitality:

“4.20 I understand the requirements of paragraphs 3.12 to 3.21 regarding gifts and hospitality. As I will not accept any gifts or hospitality, other than under the limited circumstances allowed, I understand there is no longer the need to register any.”

This appears **to contradict** the wording in paragraph 3.18 and potentially in paragraph 3.20:

“3.18 If I consider that declining an offer of a gift would cause offence, I will accept it and hand it over to my public body at the earliest possible opportunity and ask for it to be registered.”

“3.20 I will advise my public body’s Standards Officer if I am offered (but refuse) any gifts or hospitality of any significant value and / or if I am offered any gifts or hospitality from the same source on a repeated basis, so that my public body can monitor this.”

7. New paragraph 4.21 – Category Seven: Non-Financial Interests

I note that the test to be applied when considering whether to register a non-financial interest is now less express, as it is now reframed as a definition of a ‘non-financial interest’. ‘Votes’ now replace ‘decision-making’, and there is an additional part which extends non-financial interest to those which members of the public might reasonably think could influence actions, speeches or votes *“in appointments to Committees or memberships of other organisations.”* Consideration may be given to the implications of this, as a member of the public here does not have ‘knowledge of the relevant facts’ (in contrast with new paragraph 4.18 above) and the extension of actions to include ‘appointments to Committees or memberships of other organisations’ requires careful consideration as to its intended meaning and purpose (for instance, so that a member will not be placed under undue burden of registering extensive non-financial interests which have even a remote possibility of being seen to interfere with appointments or memberships to other organisations).

8. Do you have any comments on the changes proposed for Section 5: Declaration of Interests? The changes have been made to make it clearer that members need to take responsibility for declaring matters of interest.

Yes

No

Please provide your comment

I note that this section of the Code has been simplified considerably. A considerable amount of guidance about what might constitute a declareable interest was included in the prior version and has been removed. I trust that guidance issued by the Standards Commission will be made available as a resource to members to address this issue.

For instance, beginning with new paragraph 5.1, it would appear that the first consideration in this revised Code for whether an interest ought to be declared is whether a member has a 'connection' to that matter, which is not a term that was previously used and seems to extend the meaning of an 'interest' rather than maintain consistency with the term 'interest' used in Section 4 in relation to Register of Interests. Whilst the new paragraphs 5.2 to 5.4 explain that a 'connection' is 'any link between the matter being considered and me' and 'includes anything that I have registered as an interest', this revision implies that a 'connection' that requires declaration could potentially extend beyond a registered interest, a 'family relationship' or 'social or professional contract'. The immediate issues are that:

(1) there are now three possible items which require declaration: an interest (presumably one that is registered in accordance with Section 4), a 'connection', and a 'link', where a 'connection' and a 'link' are broad terms which can inadvertently overextend declaration requirements;

(2) the manner in which the new paragraph 5.2 is currently drafted potentially suggests a 'social' contract', the meaning of which is unclear;

(3) the 'family relationship' in the new paragraph 5.2 does not provide clarification for what may be considered 'family' for the purposes of declaring an interest – the previous Code at paragraph 5.12 (now deleted) suggests that 'family' should be considered as *immediate* family such as a spouse, a civil partner or co-habitee, or a close relative. The current new paragraph 5.2 does not provide this clarification, and as such it is hoped that explanation will be provided in any accompanying guidance or commentary but would seem to be more helpfully included within the Code itself.

The new paragraph 5.4 sets out the objective test which I observe remains unchanged save the introduction of the 'connection' which may be so significant that it would be considered as being likely to prejudice discussion or decision-making.

The new paragraph 5.5 states that 'I will not remain in the meeting nor participate in any way in those parts of the meetings. I observe that the term 'participate' is

sufficiently broad to be openly interpreted as covering discussion, voting, being in the meeting room, outside the meeting door or any other action that is possibly interpreted as being a part of or seen to be a part of a meeting. You may appreciate this broadens the possibilities of scenarios which this Code covers and may render a finding of breach of this part of the Code to be more frequent than intended.

I have no comments on the new paragraph 5.6, save that it may benefit from separation into two sentences so that it is clear that, for transparency reasons, a connection may be publicly stated even where the member does not consider it to be a registrable interest.

Some consideration may be given where the new paragraph 5.7 does not contain a timeframe which an application to the Standards Commission needs to be made before a dispensation is possible (other than broad reference to 'in advance' of a meeting). It also does not provide a timeframe to which the Standards Commission may adhere to in the consideration and granting (or refusal) of an application.

The new paragraph 5.8 sets out that a member will not accept a role or appointment if doing so means frequent declaration of interests at meetings in respect of the member's role as a board member. There remains no definition for what may constitute 'frequent', which would be hoped for in any accompanying guidance or commentary. The last sentence of the new paragraph adds 'existing personal involvement or affiliations', which are two terms which do not appear in Section 4 in relation to registrable interests or in Section 5 (until this paragraph), as previously it appears as a 'connection' or 'link'. I would suggest revising this last sentence to be in line with the terms used in other parts of Section 4 and 5 for consistency and clarity.

9. Public bodies aim to be open and accessible to the views and opinions of others, and to make their decisions based on the widest possible evidence and arguments. As a Member you will probably be approached by those wishing to make their views known. This is perfectly legitimate but care is needed. We have looked to simplify the Model Code in Section 6 covering Lobbying and Access. Do you think the proposed changes achieve this aim?

Yes No

Please provide your comment

It would appear that the introductory parts to Section 6 have been extensively revised. The new paragraphs 6.1 and 6.2 appear to set out the requirements relating to whether to respond to lobbying. The new paragraphs 6.1(b) and (c) may benefit from clarifying why ‘individuals and organisations’ are described as ‘local’ in 6.1(b) but ‘any’ in 6.1(c). I further observe that the new paragraph 6.2 specifically limits the objective test to perceived prejudice of a member’s (or their Public Body’s) decision-making role.

At the start of paragraphs 6.3 and 6.4, I think the obligation would be better stated as “I will not...” as opposed to “I must not...”.

I observe that the new paragraph 6.5 has removed reference to ‘another member of the public body’, which is a welcome change as it broadens the scope of the new provision. The new paragraph 6.6 also includes express reference to the Lobbying (Scotland) Act 2016, which extends the scope of this provision to consideration of the same in any investigation under this paragraph.

The new paragraph 6.8 now specifies guidance of the Chair, Chief Executive or Standards Officer of the Public Body must be sought in relation to any concerns. This is a new addition from the previous Code, which previously allowed the member to seek guidance from an unspecified range of persons related to the Public Body. Care should be given to whether this will unduly limit and burden the member in relation to the sources available to them for seeking guidance.

10. The information in Annex A has been extended to include information about the role of the Ethical Standards Commissioner and the sanctions available to the Standards Commission following a finding of a breach of the Code and what these mean. Do you have any comments on the changes proposed to Annex A?

Yes No

Please provide your comment

11. Overall, how clear and easy to understand do you find the revised Model Code?

Very clear
Mostly clear
Sometimes unclear
Very unclear

Please tell us where you think the clarity of the code could be improved, and how?

Please see my earlier responses.

12. Do you have any other comments on the proposed revisions to the Model Code?

Yes No

Please provide your comment

In my capacity as Commissioner I offered to review and provide comments on a final draft of this consultation document prior to its publication. As this opportunity was not afforded me, I have been obliged to set my concerns out in this response.