

## **APPENDIX 1**

<b>Committee:</b>	<b>Date:</b>
Establishment Committee	17 January 2017
<b>Subject:</b> Former Officers As Members	<b>Public</b>
<b>Report of:</b> The Comptroller & City Solicitor	<b>For Information</b>
<b>Report author:</b> Michael Cogher, The Comptroller & City Solicitor	

### **Summary**

This Report sets out, at the request of members, the main legal and governance issues which arise where former officers are elected as Corporation members. As will be seen, there is no legal bar on a former officers becoming members and existing governance arrangements under the Members' Code of Conduct and the Court's ability to choose committee membership should be sufficient to deal with any concerns members may have. Any attempt to impose contractual restrictions post termination would, as will be explained, be unlawful.

### **Recommendations**

That members note the contents of this report and the legal position.

## **2. The Legal Position**

- 2.1 In order to be a candidate in a Corporation or local authority election a prospective member needs to satisfy requirements for qualification and not be disqualified.
- 2.2 In the case of the Corporation, the City of London Municipal Elections Act 1849 contains the relevant statutory provision in respect of disqualifications for Corporation members and it contains no disqualification provisions for former officers. As the disqualification provisions derive from an Act they are not capable of modification through an Act of Common Council.
- 2.3 The issue of officers holding elected office in local government was a significant issue in the 1980s, and became known as "twin tracking". The position was considered by the Widdecombe Committee which concluded:

"The overwhelming view in the evidence we have received has been that officers should continue to serve the council as a whole... There

has been equally wide agreement that the public service tradition of a permanent corps of politically impartial officers should be retained”.

- 2.4 This resulted in the political restriction provisions of the Local Government and Housing Act 1989 (“the Act”) and associated regulations, which applies to the Corporation qua local authority. The Act and regulations prohibit holders of specified “politically restricted posts” (including all Chief Officers and Deputy Chief Officers) from becoming or remaining a member of a local authority or Parliament. Moreover politically restricted officers may not whilst employed announce that they intend to stand for election as a member of any authority or Parliament, and certain other restrictions are imposed in relation to holding office in a political party (but not prohibiting membership), canvassing and political advocacy and publicity.
- 2.5 However, the provisions recognise that a politically restricted post-holder may resign in order to announce their candidature and whilst relevant serving officers are politically restricted in the interests of neutrality, there is no bar to former officers becoming members of their former authority.
- 2.6 It should also be noted a member of a local authority may not become a paid officer of that authority whilst a member or for 12 months after they cease to be a member (s.116 Local Government Act 1972) although this provision does not apply to the Corporation.
- 2.7 Nor may a paid officer of a local authority become a member of that authority under s.80 of the Local Government Act 1972. Again, this provision does not apply to the Corporation and it would appear that there is no statutory bar to a non-politically restricted officer from becoming a Corporation member. However, given this apparent lacuna and undesirability of such a contingency the Corporation would probably be able to fairly dismiss such an employee should the situation arise.

### **3. Conflicts of Interest**

- 3.1 Potential conflicts of one form or another are of course extremely common and the Corporation has systems in place to appropriately manage such conflicts. In broad terms potential conflicts can range in risk and severity and how they are judged, with some requiring formal action and others none at all.
- 3.2 For example, legal or formal conflicts may arise where clear pecuniary or non-pecuniary interests are engaged, where there is a real danger of bias, or where there are other formal requirements to deal with the conflict such as charity rules.

- 3.3 The Corporation manages such conflicts through its Members' Code of Conduct and Protocols. In many cases it will be possible for an officer e.g. a lawyer to determine whether a formal conflict arises or not.
- 3.4 However, other conflicts can be more subtle and less easy to determine. Often it will be for a member to determine themselves in accordance with the general (Nolan) Principles of Public Life (selflessness, integrity, objectivity, accountability and openness). In some cases a particular action by a member may not be a breach of a formal rule or the Nolan principles but may nonetheless be seen by others to be inappropriate or undesirable.
- 3.5 All members join the Court with their own outlook, motives and interests. However a former chief officer is likely to be in a unique position, having overseen a major Department for many years, particularly if it is one whose functions cuts across a large number of committees and activities.
- 3.6 There are clearly likely to be instances where, despite there being no strict legal bar, it could be seen as inappropriate for a former officer to be involved, particularly in matters relating to their former department.
- 3.7 For example, it is a fundamental principle of the scrutiny function that a member should not be involved in scrutinising a decision which they themselves participated in. Clearly Corporation committees exercise a joint executive and scrutiny role including monitoring performance and holding officers to account. It is also an accepted rule of good practice that a member should not sit on a committee where their interests are likely to prevent them from fully and properly participating in its business.
- 3.8 Thus it would probably not be appropriate for a former officer to be involved in scrutinising decisions and actions of their department which are connected with that persons "watch". Such an officer may also have a perceived conflict in any proposed changes such as a change in business strategy or in the organisation of the department.
- 3.9 That having been said it would not necessarily be unlawful or a breach of the Code for a member to do so. Each case would need to be analysed on its merits. It may however be difficult for such an officer to appear objective in matters relating to their department, whether they seek to support it or to challenge it in any given case and of course objectivity is one of the Nolan principles which falls to be considered under the Code of Conduct. There are of course softer management issues arising out of such a member's new relationship with their former colleagues.
- 3.10 The answers to these more nuanced problems rest with the Court which has the power to determine through committee membership arrangements, which committees such a member will sit on. This

enables the Court to deal with circumstances which, whilst not overtly unlawful or otherwise prohibited, do not “feel right” to the majority of members in all the circumstances.

- 3.11 Any alleged breach of the Code of Conduct arising will of course ultimately be a matter for the Corporation’s Standards arrangements in the event of a complaint.

#### **4. Contractual Restrictions**

- 4.1 It has been suggested that the Corporation should seek to impose contractual restrictions on officers from becoming members within a certain period of their employment ending. Such proposals would not, in the view of the Comptroller and City Solicitor, be enforceable or lawful.
- 4.2 Parliament has considered the issue of officers becoming members and determined that certain senior officers cannot stand in relevant elections whilst they are officers in the 1989 Act. It chose not to place any restrictions on former officers. Thus provided a former officer is qualified and not disqualified under electoral law they have a civil right to stand for election and hold office if successful. A contractual term which seeks to restrict such a civil right would, in the view of the City Solicitor, be void as a breach of public policy because such a contract would purport to remove legal rights conferred on individuals as citizens in a democratic society.
- 4.3 Furthermore, such an attempted restriction would, in the opinion of the City Solicitor, be a breach of Article 10 of the European Convention on Human Rights and Freedoms on the basis of the decision in *Ahmed and Others v. UK* [1999] IRLR.
- 4.4 In that case a number of local government officers affected by the restrictions outlined above brought proceedings in the European Court of Human Rights claiming that the restrictions of the 1989 Act infringed their convention rights.
- 4.5 Human Rights law recognises that convention rights can be restricted by a State where such restrictions are prescribed by law and are necessary and proportionate in the pursuit of legitimate aims e.g. the prevention of crime and disorder.

Thus Article 10 provides as far as is relevant:-

“1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authorities and regardless of frontiers...

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others....”

- 4.6 In Ahmed it was recognised by the European Court of Human Rights and the parties that the political restrictions imposed by the 1989 Act and regulations were an interference with the officers’ Article 10 Rights as their involvement in certain forms of political activities were curtailed. The question for the Court was therefore whether that interference was prescribed by law and necessary and proportionate to achieve a legitimate aim. The Court considered that the interference was prescribed by law (the 1989 Act) and that it was legitimate in all the circumstances to ensure confidence in public administration. The officers’ challenge therefore failed.
- 4.7 However, the corollary of the decision in Ahmed is that an attempt by a public authority to curtail an employees’ rights to engage in political activity under Article 10, other than by the proper application of legislation, would be an unlawful interference with the human rights of such employees and that the absence of statutory restrictions is fatal to such a suggestion.

**Michael Cogher**

Comptroller and City Solicitor

T: 020 7332 3699

E: [michael.cogher@cityoflondon.gov.uk](mailto:michael.cogher@cityoflondon.gov.uk)