



Public Agenda Item: **Yes**

Title: **Update on Standards**

Wards Affected: **None**

To: **Standards Committee**      On: **12 January 2012**

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## **1. Key points and Summary**

1.1 Members were presented with a report in November 2010 on the future of the Standards regime. As members will be aware the Localism Bill has now received royal assent as the Localism Act 2011. The new standards regime is partly laid out in the Act however the regulations to supplement the Act are awaited and these will also bring the relevant parts of the Act into force. This report aims to update members on the future of the Standards regime.

## **2. Current Understanding**

The government still intend that the new regime is to be in force for all English local authorities by 31 March 2012. Attached at Appendix A is a briefing note produced by Eversheds which provides a useful overview of the requirements of the new regime and the current position of local authorities in England. Attached at Appendix B is a draft code of conduct produced by the Association of County Secretaries and Solicitors (ACSeS) which was drafted before the full details that were eventually included in the Act became apparent. There is a meeting of the monitoring officers of all the Devon authorities in early February to discuss the adoption of a 'Devonwide' Code of Conduct which may (subject to the comments of the committee in respect of the attached draft code) follow the draft produced by ACSeS.

## **3. Actions**

Members are asked to comment on the amendments to the legislation and the draft code of conduct provided in order to help inform the Council in adopting its code of conduct.

**Anthony Butler**  
**Monitoring Officer**

## Appendix A

### **LA Law Localism Act 2011 - The new Standards regime – briefing note from Eversheds Solicitors**

During the passage of the Localism Bill, the issue of standards proved to be one of its most controversial aspects and one of the very last matters to be finalised before Royal Assent on 15th November 2011. The roots of this controversy go back to the introduction of a national regime under the Local Government Act 2000 when a mandatory Code of Conduct was introduced; the Standards Board for England was created and given custody of a national process. (In Wales responsibility was given to the Ombudsman). Many elected members resented what they saw as a stifling regime and there was particular concern about the apparent differences in the regime affecting local authority members and MPs. This view was reinforced by the scandal surrounding MPs expenses. Subsequent changes, to try to impart more local accountability, did not move the critics and this, coupled with a topical concern about the so called “gagging” of members wishing to speak on local issues, gave birth to the pressure reflected in the Coalition Agreement to scrap the system.

The new standards provisions relating to local authorities in England and police authorities in Wales are set out in Part 1 Chapter 7 Sections 26 – 37 of and Schedule 4 to, the Localism Act. These provisions apply to all “relevant authorities”, which are defined in section 27(6) to include both principal authorities and parish councils, fire and rescue authorities, economic prosperity boards, National Park authorities, the Broads Authority and Police Authorities in England and Wales, until abolition of the latter and replacement by Police and Crime Commissioners. The arrangements for Welsh local authorities will not change.

Local authority includes Police Authority but not the new Police Commissioner and Panel. The Police Reform and Social Responsibility Act 2011 at section 31 and Schedule 7, allows the Secretary of State to make provision by regulations relating to complaints and conduct matters of Police and Crime Commissioners; Deputy Police and Crime Commissioners; the Mayor’s Office for Policing and Crime, and the Deputy Mayor for Policing and Crime.

Every authority will be under a duty to promote and maintain high standards of conduct by elected and co-opted members of the authority.

The provisions apply to elected members and co-opted members when acting as members. There are no requirements in relation to private life, though disqualification as a result of a sentence of imprisonment for three months or more (whether suspended or not) in s 80 of the Local Government Act 1972 remains. The definition of “co-opted member” does not include non-voting members.

#### ***Transitional provisions***

The Secretary of State may make transitional provisions by statutory instrument, providing that matters under investigation by the Standards Board for England be transferred to the relevant local authority. The Government has now clarified the timetable for abolition of Standards for England in response to a parliamentary

question from Lord Greaves, (and circulated a letter with details to Monitoring Officers) although this is still subject to formal confirmation through regulations. It is the Government's intention that abolition will take effect on 31 March 2012. Prior to this, the regulatory role in handling cases and issuing guidance will stop from a date that will be set out in regulations but anticipated to be 31 January 2012. From this date, Standards for England will no longer have powers to accept new referrals from local standards committees or conduct investigations into complaints against members. Any existing referrals or investigations will be transferred back to the relevant authority for completion. However, any complaints which are being handled locally on that date will need to continue through to a conclusion; and similarly any matters relating to completed investigations or appeals that have been referred to the First Tier Tribunal will continue to conclusion.

DCLG have also advised in the last few days that they envisage that the remaining local elements of the current regime, including statutory standards committees with the power to suspend councillors, will be abolished on 1 July 2012.

From 1 July forward, all standards matters – including consideration and determination of outstanding complaints made during the period the Standards Board regime was operating - will be the responsibility of local authorities, to be handled under the new arrangements. 1 July will also see the new standards arrangements, which include a 'Nolan-based' code, the involvement of an independent person in allegations of misconduct, and a new criminal offence for failing to declare or register interests, coming into force.

DCLG believe that such a timetable would seem appropriate given the timing of councils' elections and annual meetings. It also recognises that local authorities will have to take action to implement the changes to the standards arrangements. For example, authorities will need sufficient time to adopt any new code and procedures. Moreover, they will need time to advertise for and then appoint an 'independent person' and put in place arrangements for handling allegations of breaches of their code. Finally, principal authorities will have to put in place, and agree, arrangements with parish councils for both a code and register of interest related activity.

### ***Standards Committees***

The special provisions for the establishment of statutory Standards Committees are removed in England. Any voluntary Standards Committee or Sub-committee established by the authority would be an ordinary committee or sub-committee established under s101 and s102 of the Local Government Act 1972. The role of independent members will change as the new Independent Persons would not be able to be voting members, unless the committee or sub-committee was merely advisory. Any such Standards Committee is now subject to the normal proportionality rules. Standards Committees would be subject to the same requirements on confidential and exempt information as any other Committee under ss.100A to K of and Sch.12A to the Local Government Act 1972. The Standards Committee would assist in discharging the duty of the authority to promote and maintain high standards of conduct and along with arrangements for regulation, albeit this is limited in scope.

## ***The Code***

Each authority is required to adopt a Code of Conduct, which can only apply to members and co-opted members when acting in their capacity as a member or co-opted member. Private life is not covered. The powers of the Secretary of State to specify general principles and issue a model code are revoked, along with the current 10 General Principles of Conduct and the Model Code, but the Act requires an authority's Code to be consistent with the seven Nolan principles of conduct in public life.

Authorities are free to determine what they put in or leave out of a Code though section 28(2) does require the inclusion of the provisions the authority considers appropriate in respect of the registration (in its register) and disclosure, of interests. Any decision to adopt a local Code must be taken at full Council, and all standards matters are to be non-executive functions.

The abolition of the Model Code means that different authorities may have different Codes. A councillor who is a member of more than one authority is likely to be subject to different Codes, according to which authority he/she is currently acting on. Different members of the same joint committee will be subject to the varied Codes of their different parent authorities.

The requirement for members to give an undertaking to comply with the Code of Conduct is removed although it might be considered reasonable to expect compliance from responsible members of a public body! The previous consequence of not being able to act as a member where the undertaking was not provided, has gone.

A relevant authority (other than a parish council) must have in place arrangements to deal with complaints of breach of its Code of Conduct, including arrangements for investigation of complaints and arrangements "*under which decisions on allegations can be made*". In the case of district and unitary authorities, this also applies to allegations in respect of parish councillors in their areas. It is likely that most authorities will decide that they need a Standards Committee of some nature to undertake these functions at member level, even if some sanctions, such as removal from Committees, will have to be applied by full Council.

District and unitary authorities are responsible for having arrangements in place to investigate and determine allegations against Parish Councillors but the Act does not provide how this might be done (other than requiring the views of an Independent Person). Specifically, Parish Councils are under no obligation to have regard to any findings of the district or unitary authority or its Standards Committee.

Authorities have discretion to set their own processes and to delegate more of the process. There is no requirement for a review stage. The statutory requirement for a hearing has gone and the authority can find that a member has broken the Code without even having conducted an investigation (although we would expect authorities to ensure that the principles of natural justice would be observed).

There is greater scope to enable the Monitoring Officer to seek local resolution of a complaint before a decision is taken as to whether the complaint merits investigation. This may enable the more minor or tit-for-tat complaints to be taken

out of the system without the full process previously required. We might see a return to the pre-2000 Act culture where Monitoring Officers and Chief Executives sorted things with the help of group leaders/whips.

The Act gives no explicit powers to undertake investigations or to conduct hearings (any such action required would be implied as appropriate). So there is no power to require access to documents or to require members or officers to attend interviews, and no power to require the member to attend a hearing.

The Act gives authorities no explicit powers to take any action in respect of a breach of the local Code. Authorities have been given no powers to impose alternative sanctions, such as requiring an apology or training. Accordingly, other than naming and shaming the individual member, it is unclear whether the authority can take any action, beyond administrative actions to secure that it can continue to discharge its functions effectively. This takes us back to reliance on *R v Broadland DC ex parte Lashley* [2001] All ER (D) 71 where the principle of local action through a common law standards committee and Council, to ensure no disruption to the proper administration of the Council's affairs, was upheld.

### ***The Independent Person***

Every principal authority must appoint one or more Independent Persons. Independent persons would be appointed by advertisement and application and there are very strict rules preventing a person from being appointed if they are a friend or relative of any member or officer of the authority or of any Parish Council within the authority's area. They can they be paid a fee and/or expenses and the Act provides that a person does not cease to be independent merely because such payments are made.

It is believed that a person cannot be appointed as an Independent Person if they have within the past 5 years been a co-opted voting member of a Committee of the authority. This means that all existing independent co-opted members of Standards Committees are ineligible to be appointed as Independent Persons. This has become something of an issue for local government lawyers who are debating whether this result was intended or even achieved by the wording of the Act. ACSes is seeking legal advice on this point.

The functions of the Independent Person are:

- The IP must be consulted and views taken into account before the authority takes a decision on any allegation it has decided to investigate.
- The IP may be consulted by the principal authority in circumstances where the authority is not taking a decision whether to investigate the allegation.
- The IP may be consulted by a member of the authority against whom an allegation has been made.
- The IP may be consulted by a parish councillor against whom an allegation has been made.

It is important to ensure that the impartiality of the Independent Person is not compromised by undertaking more than one of these roles where it would be inappropriate to do so. Hence the appointment of more than one is sensible.

### ***Interests***

The Monitoring Officer is required to establish a register of members' interests for each authority including for parish councils within their area. The content of any such register must be approved by full Council. It must contain "disclosable pecuniary interests" (to be defined in Regulations) but the Act also provides that an authority's Code must require registration of non-disclosable pecuniary interests and non-pecuniary interests, for which no definition is provided as yet. The absence of standard definitions of such interests, and the degree of local discretion creates scope for considerable local variation, so that a councillor may be subject to very different requirements in different capacities.

The Monitoring Officer is responsible for ensuring that each authority's register of interests is kept within the principal authority's area (e.g. at the principal authority's offices) and on the authority's website. For parish councils, the district or unitary authority's Monitoring Officer must ensure that every parish council's register is available for inspection within the principal authority's, rather than the parish council's area and, if the parish council has a website, the parish council must ensure that the register is accessible on that website.

Every elected or co-opted member is required to notify the Monitoring Officer (within 28 days of being elected or co-opted onto the authority) of all current "disclosable pecuniary interests" of which they are aware, and update the register within 28 days of being re-elected or re-appointed. The Secretary of State will prescribe by regulation what constitutes a "disclosable pecuniary interest". The Act provides that this will cover the interests not just of the member, but also of his/her spouse, civil partner or person with whom he/she lives as if they were spouses or civil partners, in so far as the member is aware of his/her partner's interests. That feels like a return to pre-2000!

A member may ask the Monitoring Officer to exclude from the public register any details which, if disclosed, might lead to a threat of violence or intimidation to the member or any person connected with the member, and allow the member merely to recite at the meeting that he /she has a disclosable pecuniary interest, rather than giving details of that interest. The scope of sensitive interests is slightly extended, from the member and members of his/her household, to cover "any person connected with the member".

Failure to register any such interest, failure to register within 28 days of election or co-option, or the provision of misleading information on registration without reasonable excuse, will be criminal offences, potentially carrying a Scale 5 fine and/or disqualification from being a councillor for up to five years. Prosecution is at the instigation of the Director of Public Prosecutions. Once a member has made the initial registration, there is no requirement to update such registrations for changes of circumstances, such as the acquisition of development land, unless and until a relevant item of business arises at a meeting which the member attends, (unlike the pre 2000 Act regime in s19 Local Government and Housing Act 1989 and the regulations under that Act).

The requirement for disclosure of interests at meetings applies to the same range of "disclosable pecuniary interests" as the initial registration requirement, plus any non-disclosable pecuniary interests and non-pecuniary interests which the authority's Code requires to be disclosed. The duty to disclose only arises if the member is aware of the interest. However, where the interest is already on the authority's register of interests, or is in the process of entry onto the register having been notified to the Monitoring Officer, the member is under no obligation to disclose the interest at the meeting, so members of the public attending meetings might well not be aware of a member's interests in a matter under debate unless he/she had also previously inspected the authority's register. Where it is an unregistered interest, the member is required both to disclose it at the meeting and to register it within 28 days of the meeting at which relevant business is considered.

The duty to disclose arises if the member attends the meeting, as opposed to the present code requirement to disclose "at the commencement of" consideration of the matter in which the member has an interest. In future the member cannot avoid the need to disclose merely by withdrawing during that part of the meeting when the particular item of business is considered. Failure to disclose a disclosable pecuniary interest is a criminal offence. There is no such sanction for failing to disclose non-disclosable pecuniary interests or non-pecuniary interests, even where disclosure is required by the authority's Code of Conduct.

Disclosure and withdrawal, is required to cover a member's disclosable pecuniary interest in any item of business at a meeting, or in any matter which he/she would deal with as a single executive member or ward councillor. If he/she has a disclosable pecuniary interest in such a matter, he/she is simply barred from participating in discussion or voting on the matter at the meeting, or (as a single member) taking any steps in respect of the matter, other than referring it to someone else for determination. Participation in the discussion of the matter, or taking steps in respect of the matter, in the face of these prohibitions is made a criminal offence. The equivalent of merely personal interests, requiring disclosure but not withdrawal, will be covered by the requirement for the authority's Code to make some provision for disclosure of non-disclosable pecuniary interests and of non-pecuniary interests.

The requirement for the member to withdraw from the meeting room may be dealt with in the authority's standing orders. Indeed, it is left open to authorities to make no provision for such members to withdraw, leaving them present and liable to influence other members during the discussion. This means that a member who fails to withdraw as required in standing orders does not commit any criminal offence and the sanction, if the member became disruptive, would be the standard provision enabling a meeting to vote to exclude such a member.

### ***Dispensations***

The previous grounds for dispensations, allowing members with a pecuniary interest to get the consent of Standards Committee to participate are extended by section 33. The ground that more than 50% of the members of the body were conflicted out remains, but now effectively restricted to a circumstance where the number of members unable to participate would make the meeting inquorate. The second ground, that exclusion would disturb the political composition of the

meeting and so affect the outcome of the vote remains but now dispensations may also be granted if:

- every member of the authority's executive is otherwise precluded from participating;
- it would be in the interests of persons living in the authority's area; and
- the authority considers that it is otherwise appropriate to grant a dispensation.

The authority may wish to delegate this function to its Standards Committee or an officer, but the process starts with a written request by a member or co-opted member, to the proper officer. An officer would therefore need to be designated for the purpose, and this could for example be the Monitoring Officer or the Head of Paid Service.

### ***Pre-determination***

Section 25 introduces provisions for dealing with allegations of bias or pre-determination or matters that otherwise raise an issue about the validity of a decision, where the decision-maker(s) had or appeared to have a closed mind (to any extent) when making the decision. It provides that the decision maker(s) is not to be taken to have had a closed mind "just because" (sic) the decision-maker(s) had previously done anything relevant to the decision, that directly or indirectly, indicated what view the decision-maker took, or would or might take, in relation to a matter.

The courts have, of course, gone a long way in recognising that politicians need to be politicians and that not all that they say is necessarily what they do at the point of decision making. In effect, the courts already apply a presumption against bias in relation to local elected representatives to enable democracy to work in the way it has developed, and we have seen a string of cases including *National Assembly for Wales v Condron* and another 27 November 2006 to support that proposition.

The Government's position is that this provision does not involve a change in the law, which begs the question why the section is necessary in the first place. It is difficult to understand how this can be so, given that the ability of the courts to intervene is being curtailed by the new "presumption".

If the legislative presumption of "no closed mind" is applied then one must assume that the presumption is rebuttable. In a situation where a member said something like "over my dead body" in respect of voting a particular way on an issue, the view must be that whilst the provision on predetermination in the Localism Act might be useful in giving councillors confidence about making their views on particular issues known, it didn't change the legal position that if a member could be shown to have approached a decision with a closed mind, that could affect the validity of the decision. Equally, if a member had expressed views on a particular issue but could show that when taking the decision they had approached this with an open mind and taken account of all the relevant information, they could reasonably participate in a valid decision. If a member has expressed particularly extreme views, it will be more difficult in practice to be able to get away from the impression that they would approach the decision with a closed mind. It may therefore be appropriate for



Monitoring Officers to warn members against making such extreme comments and to provide them with guidance. This provision is effective from 15 January 2012.

### ***Conclusion***

There is legitimate concern that different Codes of Conduct across principal councils and presumably parish councils will give rise to confusion in their application and understanding. As the representative bodies of principal authorities and parish councils respectively, there is logic in the Local Government Association and the National Association of Local Councils accepting leadership responsibility for producing uniform recommended code provisions.

The Act does not provide a clear and cohesive framework for local government to work to, partly due to the haste with which some of the provisions were introduced at the last minute. One cannot help thinking that Parliament will have no option but to again review the application of standards to local government in due course. In the meantime, as we await regulations local authority practitioners will endeavour, as always, to give effect to the new requirements.

## Appendix B

### ACSeS Draft CODE OF CONDUCT

#### Introduction

This Code applies to you as a member of this authority when you act in your role as a member and it is your responsibility to comply with the provisions of this Code.

You are a representative of this authority and the public will view you as such therefore your actions impact on how the authority as a whole is viewed and your actions can have both positive and negative impacts on the authority.

This Code is based upon the “Nolan Principles – the seven principles of public life” which are set out at Appendix 1.

This Code does not cover matters in respect of which the Secretary of State may, under the Localism Act (when in force), specifically provide that criminal sanctions will apply.

#### Interpretation

In this Code—

“meeting” means any meeting of—

- (a) the authority;
- (b) the executive of the authority;
- (c) any of the authority’s or its executive’s committees, sub-committees, joint committees, joint sub-committees, or area committees;

whether or not the press and public are excluded from the meeting in question by virtue of a resolution of members

“member” includes a co-opted member and an appointed member.

#### General Obligations

1. When acting in your role as a member of the authority:

1.1 **Do** treat others with respect.

1.2, **Do not** conduct yourself in a manner which is contrary to the Council’s duty to promote and maintain high standards of conduct of members.

1.3 **Do not** disclose information given to you in confidence by anyone, or information acquired by you which you believe, or ought reasonably to be aware, is of a confidential nature, except where—

- (i) you have the consent of a person authorised to give it;

(ii) you are required by law to do so;

(iii) the disclosure is made to a third party for the purpose of obtaining professional *legal* advice provided that the third party agrees not to disclose the information to any other person; or

(iv) the disclosure is—

(aa) reasonable and in the public interest; and

(bb) made in good faith and in compliance with the reasonable requirements of the authority; and

(cc) you have consulted the Monitoring Officer prior to its release; or

1.4 **Do not** prevent another person from gaining access to information to which that person is entitled by law.

2. When using or authorising the use by others of the resources of the authority—

2.1 **Do** act in accordance with the authority's reasonable requirements including the requirements of the authority's ITC policy and the policies listed at appendix 3, copies of which have been provided to you and which you are deemed to have read ;

2.2 **Do** make sure that such resources are not used improperly for political purposes (including party political purposes); and

2.3 **Do** have regard to any applicable Local Authority Code of Publicity made under the Local Government Act 1986.

### **Interests [Subject to localism Bill]**

3. As a public figure, your public role may, at times, overlap with your personal and/or professional life and interests however when performing your public role as a member, **Do** act solely in terms of the public interest and **Do not** act in a manner to gain financial or other material benefits for yourself, your family, your friends, your employer or in relation to your business interests.

4. There will be no requirement for you to declare or register any gifts and hospitality; however **Do not** accept any gifts or hospitality in excess of £50.00 (Fifty Pounds).

### **Disclosure and participation [Dependant on contents of interests Above]**

5. At a meeting where any such issues arise, **Do** declare any personal and/or professional interests relating to your public duties and **Do** to take steps to resolve any conflicts arising in a way that protects the public interest.

6. Certain types of decisions, including those relating to a permission, licence, consent or registration for yourself, your friends, your family members, your employer or your business interests, are so closely tied to your personal and/or professional life that your ability to make a decision in an impartial manner in your role as a member may be called

into question and in turn raise issues about the validity of the decision of the authority. **Do not** become involved in these decisions any more than a member of the public in the same personal and/or professional position as yourself is able to be and **Do not** vote in relation to such matters.

7. There are some decisions that your authority will need to make that could affect every member. A list of these is set out at Appendix 2. **You may** take part in these decisions *unless* you fall into one of the exceptions set out in the list.

8. **Do not** improperly use knowledge gained solely as a result of your role as a member for the advancement of yourself, your friends, your family members, your employer or your business interests.

### **Pre-determination or bias [Subject to Localism Bill provisions]**

9. Where you have been involved in campaigning in your political role on an issue which does not impact on your personal and/or professional life you should not be prohibited from participating in a decision in your political role as member, however **Do not** place yourself under any financial or other obligation to outside individuals or organisations that might seek to influence you in the performance of your official duties.

10 When making a decision, **Do** consider the matter with an open mind and on the facts before the meeting at which the decision is to be taken.

### **Interests arising in relation to overview and scrutiny committees [Subject to Localism Bill provisions]**

11. In relation to any business before an overview and scrutiny committee of the authority (or of a sub-committee of such a committee) where—

11.1 that business relates to a decision made (whether implemented or not) or action taken by your authority's executive or another of your authority's committees, sub-committees, joint committees or joint sub-committees; and

11.2 at the time the decision was made or action was taken, you were a member of the executive, committee, sub-committee, joint committee or joint sub-committee mentioned in paragraph 11.1 and you were present when that decision was made or action was taken;

Or

11.3 that business relates to a decision made (whether implemented or not) or action taken by you (whether by virtue of the Council's constitution or under delegated authority from the Leader);

**You may** attend a meeting of the overview and scrutiny committee of your authority or of a sub-committee of such a committee but only for the purpose of making representations, answering questions or giving evidence relating to the business, provided that the public are also allowed to attend the meeting for the same purpose, whether under a statutory right or otherwise.

## **APPENDIX 1**

### **THE SEVEN PRINCIPLES OF PUBLIC LIFE**

#### **SELFLESSNESS**

Holders of public office should act solely in terms of the public interest. They should not do so in order to gain financial or other material benefits for themselves, their family, or their friends.

#### **INTEGRITY**

Holders of public office should not place themselves under any financial or other obligation to outside individuals or organisations that might seek to influence them in the performance of their official duties.

#### **OBJECTIVITY**

In carrying out public business, including making public appointments, awarding contracts, or recommending individuals for rewards and benefits, holders of public office should make choices on merit.

#### **ACCOUNTABILITY**

Holders of public office are accountable for their decisions and actions to the public and must submit themselves to whatever scrutiny is appropriate to their office.

#### **OPENNESS**

Holders of public office should be as open as possible about all the decisions and actions that they take. They should give reasons for their decisions and restrict information only when the wider public interest clearly demands.

#### **HONESTY**

Holders of public office have a duty to declare any private interests relating to their public duties and to take steps to resolve any conflicts arising in a way that protects the public interest.

#### **LEADERSHIP**

Holders of public office should promote and support these principles by leadership and example.

## APPENDIX 2

Where the decision referred to in Clause 7 above relates to one of the functions of the authority set out below, and the condition which follows that function does not apply to you when making that decision, you may participate in the decision:

- (i) housing, where you are a tenant of your authority *unless* those functions relate particularly to your tenancy or lease;
- (ii) school meals or school transport and travelling expenses, where you are a parent or guardian of a child in full time education, or are a parent governor of a school, *unless* it relates particularly to the school which the child attends;
- (iii) statutory sick pay under Part XI of the Social Security Contributions and Benefits Act 1992, where you are in receipt of, or are entitled to the receipt of, such pay;
- (iv) an allowance, payment or indemnity given to members;
- (v) any ceremonial honour given to members; and
- (vi) setting council tax or a precept under the Local Government Finance Act 1992.