

UPDATE ON LEGAL RESPONSIBILITIES FOR ELECTED MEMBERS

Jessica Wood – Legal Officer LGNSW

John Davies – Manager Council Governance Office of Local
Government

Overview



1. Statutory roles of the governing body and elected members

2. Community engagement

3. Access to information

4. New Model Meeting Code of Practice

6. Professional development

7. Work health and safety

8. Surcharging

9. New Model Code of Conduct

Role of the governing body

Section 223 *Local Government Act (NSW)* –

- (a) To direct and control the affairs of the council in accordance with the *Local Government Act*,
 - (b) To provide effective civic leadership,
 - (c) To ensure the financial sustainability of the council,
 - (d) To act in accordance with the guiding principles for local government in Chapter 3, the plans and policies of council,
 - (e) to determine the process to appoint the general manager and monitor the general manager's performance,
 - (f) To consult regularly with the community and stakeholders and keep them informed of council's decisions,
 - (g) To consult with the general manager in directing and controlling the affairs of the council.
-

Expanded role of councillors

Section 232 *Local Government Act (NSW)* –

- (a) Be an active and contributing member of the governing body,
- (b) Make considered and well informed decisions as a member of the governing body,
- (c) Participate in the development of the integrated planning and reporting framework,
- (d) Represent the collective interests of the community,
- (e) Facilitate communication between the community and the governing body,
- (f) Uphold and represent accurately the policies and decisions of the governing body,
- (g) Make all reasonable efforts to acquire and maintain the skills necessary to perform the role of a councillor,
- (h) Be accountable to the local community for the performance of the council.

Community Engagement

Local Government Act 1993 (NSW) –

- Community Strategic Plan
 - Delivery Program
 - Operational Plan
-

Community Engagement

Environmental Planning and Assessment Act 1979 (NSW) (EP&A Act) –

- Community participation plans (s 2.23 EP&A Act)
 - Local strategic planning statement (s 3.9 EP&A Act)
 - Local Environmental Plan (s 3.36 EP&A Act)
 - Mandatory community participation requirements (Schedule 1 EP&A Act)
-

Access to information

- Councillors may have access to information necessary to perform their official functions.
 - If a councillor only has a private interest in a matter and the material is not open access information, it may need to be obtained under the *Government Information (Public Access) Act 2009 (NSW)*.
 - Councils are bound by the *Privacy and Personal Information Act 2014 (NSW)*, the Information Protection Principles and the Privacy Code of Practice for Local Government.
-

Meeting Code of Practice

- Councillors are bound by the council's Meeting Code of Practice.
 - OLG has consulted on a new Model Meeting Code of Practice.
 - Obligations in relation to meetings are also in the new Model Code of Conduct.
 - Councillors must make reasonable efforts to attend council meetings.
 - An extraordinary meeting may be held at the written request of at least 2 councillors.
-

Meeting Code of Practice

- Provisions of note in the proposed Model Code of Meeting Practice include:
 - Pre-meeting briefing sessions
 - Public forums
 - Vacancy of office if absent from 3 consecutive ordinary meetings
 - Web casting of meetings
 - Order of business
 - Rules of debate
 - Voting entitlements
 - Time limits on council meetings.
-

Avoiding Defamation

- Defamation may occur where material is published which identifies a person and which lowers the reputation of the identified person in the mind of reasonable members of the community.
 - Defences include:
 - Truth
 - Publication of public documents
 - Fair report of proceedings of public concern
 - Honest opinion
 - Innocent dissemination
 - Triviality.
-



Professional Development (s232)

New provision

- Role of a councillor (s232(1)(g)) includes a requirement to make all reasonable efforts to acquire and maintain the skills necessary to perform the role of a councillor.
 - New regulation-making power for induction courses and other professional development for mayors and councillors (Schedule 6, Cl. 13A).
 - Note – no regulation has been made yet.
-

Work Health and Safety Obligations of Councillors

- Councillors have an obligation to take reasonable care that their conduct does not adversely affect the health and safety of others at council chambers, offices and other buildings which constitute a council workplace.
 - The obligation extends to visitors to council workplaces, as well as council staff.
 - Obligations under the *Work Health and Safety Act 2011 (NSW)* have been included in the new Model Code of Conduct.
-

Surcharging

- A councillor can be charged for:
 1. a loss suffered by the council as a result of the councillor's negligence or misconduct, or
 2. for any money which should have been brought into account by the councillor, but which has not been.
-



Review of the Model Code of Conduct and Procedures

- The new 2018 version of the Model Code of Conduct will see, for the first time, all ethical standards for local government prescribed in a single statutory instrument
- Consultation drafts of Model Code of Conduct and Procedures were released for comment late last year
- Final versions of the Model Code of Conduct and Procedures are available on OLG's website





Key changes to Model Code of Conduct

- New standards relating to discrimination and harassment, bullying, work health and safety, behaviour at meetings, access to information and maintenance of council records
- New rules governing the acceptance of gifts including mandatory reporting
- Pecuniary interests provisions are included
- A new ongoing disclosure requirement for councillors and designated persons requiring disclosure of new interests in returns of interests within three months of becoming aware of them



Key changes to Procedures

- Expanded and clearer definition of what is a “code of conduct complaint”
- Greater flexibility to allow GMs and mayors to delegate complaints management functions
- Clearer guidance on what complaints can be declined at the outset
- Clearer prescription of what complaints are sufficiently serious to warrant investigation
- Requirement for conduct reviewers to consult with OLG before recommending referral for disciplinary action under misconduct provisions
- New sanctions against complainants who publicly disclose information about complaints



Implementation of new Model Code

- Councils have 6 months to adopt and implement
- OLG will be preparing separate codes of conduct based on the Model Code for councillors, staff and delegates and committee members for adoption by councils should they wish
- OLG will also be issuing plain English guides and specific topic guides to promote understanding of obligations
- OLG will also be preparing procedural guides for complaints coordinators, and for GMs/mayors on initial complaints management, and for conduct reviewers on preliminary assessments and investigations



New internal audit framework for councils

- The Phase 1 amendments in effect mandate internal audit for all councils - The LGA requires all councils to appoint Audit, Risk and Improvement Committees (councils may share committees)
- The internal audit provisions are yet to commence - Under the transitional provisions, the internal audit provisions do not take effect until 6 months after the next ordinary election following commencement (likely to be March 2021)
- The internal audit provisions will be supported by regulation/guidelines which will contain most of the prescriptive detail



Why internal audit?

- The Government sees internal audit in councils as an integral part of its reform agenda for Local Government to achieve improved governance and performance
- The reforms contemplate internal audit operating not only as an internal assurance mechanism but also as a powerful business improvement tool to support councils to better achieve their strategic objectives and to meet the needs of their communities more effectively and efficiently
- Internal audit is used extensively in the private sector, and in NSW and Australian Government public sector agencies



Policy objectives

The regulatory framework is being designed to ensure that internal audit:

- operates effectively as an internal assurance mechanism and business improvement tool
- conforms with standards and best practice
- meets the “Brewarrina test” i.e. it is deliverable by all councils regardless of size, budget and capacity
- is cost effective and adds value





Progress so far

- Development of the new internal audit framework is well-advanced - a discussion paper will be released for consultation in 2018 on the key elements of the proposed regulatory framework for internal audit
- The proposed framework will be based on:
 - NSW public sector model developed by NSW Treasury
 - International standards (IIA)
 - OLG's 2010 Internal Audit Guidelines
 - ICAC inquiry recommendations
 - Independent Local Government Review Panel recommendations

Questions?!





LOCAL
GOVERNMENT
NSW

LGNSW.ORG.AU