LOCAL GOVERNMENT NSW

Our ref: R90/0014-06 Out-34159
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24 March 2022

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Councillor Conduct Accountability Review

Local Government NSW (LGNSW) is the peak body for local government in NSW, representing NSW general purpose councils and related entities. LGNSW works with councils to support, promote, and improve communities throughout NSW.

LGNSW welcomes the opportunity to make a submission to the independent review of the effectiveness of the framework for dealing with councillor misconduct in NSW.

This is a draft submission awaiting review by LGNSW's Board. Any amendments will be forwarded in due course.

Opening statement

The stated purpose of the "Model Code of Conduct for Councils in NSW" (the Code) and the "Procedures for the Administration of the Model Code of Conduct" (the Procedures) is to ensure that council officials (at page 5 of the Code):

- understand and comply with the standards of conduct that are expected of them
- are able to fulfil their statutory duty to act honestly and exercise a reasonable degree of care and diligence
- act in a way that enhances public confidence in local government.

Unfortunately, there is a small minority of council officials that deliberately or unintentionally do not act appropriately and so the Code and Procedures need to act as a deterrent and be robust enough to achieve changes in behaviour when breaches of the Code do occur.

The effectiveness of the Code and Procedures to act as a deterrent is undermined by:

1. The timeframe for resolution of matters that are referred to the Office of Local Government (OLG) or the NSW Civil and Administrative Tribunal (NCAT) (Examples of these are set out in the attachment "Case studies"); and
2. The lack of effective sanctions.

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Consideration should be given to the creation of an independent statutory body to replace the OLG and NCAT as the body that deals with the matters referred to OLG and NCAT under the Procedures. This is dealt with in more detail in the body of the submissions.

Should there be separate codes of conduct prescribed for councillors, staff and other classes of council official?

The Office of Local Government (OLG) website does state that there is nothing to prevent councils from adopting separate codes of conduct for councillors, staff and delegates and committee members instead of a single code of conduct applying to all council officials.

The website goes on to say that "…*the OLG has prepared bespoke versions of the Model Code of Conduct for councillors, staff and delegates and committee members for adoption instead of a single code of conduct for councils wishing to do this*".

This information should be set out prominently in "Part 1: Introduction" chapter of the Code so that councils are aware that they can do this and not be hidden away on the website.

However, whilst councils can separate the Code, a Code that is specifically drafted to address councillor conduct can be directly tailored to address the nature of the functions and role of a councillor as an elected official.

It should also be noted that the *Local Government (State) Award 2020* does have clauses that provide for workplace bullying and misconduct by employees. This should be taken into consideration if a separate Code is drafted for employees.

Are the standards of conduct currently prescribed in the Model Code of Conduct appropriate? Do they need to be strengthened or softened?

The standards of conduct are appropriate. However, where possible breaches of the Code should be categorised according to the standard that has been breached and the level of the severity of the breach. This would provide greater consistency and transparency for councillors and for those whose function it is to impose sanctions for a breach.

Is the level of prescription in the Model Code of Conduct appropriate? Should it be more, or less prescriptive?

It is appropriate. However, the language in the Code is overly complex and would benefit by having examples or case studies of the different situations that confront council officials. This could be provided in practice directions (per cl. 10.1 of the Procedures, the power exists for the OLG to issue practice directions).

As an example, the definition of a "council committee member" is very confusing. That definition is:

> A council committee member is a person other than a councillor or member of staff of a council who is a member of a council committee other than a wholly advisory committee, and a person other than a councillor who is a member of the council's audit, risk and improvement committee.

The definition of a wholly advisory committee is "…a council committee that the council has not delegated any functions to".

The definition of a council committee member arises because a council committee member must disclose pecuniary interests. This means that a member of a wholly advisory committee who is a councillor or a member of staff must disclose conflicts of interest whereas community members do not.

Many people do not understand what is meant by the delegation of functions, so as an advisory committee is not exercising any functions of council it should be clarified by examples what this means. It will assist a councillor or a member of staff who is a member of an advisory committee to understand when they need to disclose conflicts of interest. It would assist understanding meaning of the definition and when it applies.

In the decision of *Deputy Secretary, Local Government, Planning and Policy v Byrne* [2021] NSWCATOD 53 the Tribunal [at 66] clarified that clause 5.1 is a non-exhaustive list of non-pecuniary conflicts of interest. This should be made clearer in the Code.

Does there need to be any changes to the types of conduct currently regulated under the Model Code of Conduct?

Currently bullying and "Work, health and safety" are dealt with under separate headings. Bullying is behaviour that creates a risk to health and safety (cl. 3.9(b)) and as such it is a workplace safety issue. It should be set out under the WHS heading and retitled as "workplace bullying" to emphasise that it is a workplace safety issue.

Whilst the code does say that councillors are subject to the *Work Health and Safety Act 2011* (WHS Act) councillors may not realise the WHS Act requires that a person at a workplace is required to:

a. take reasonable care for his or her own health and safety, and
b. take reasonable care that his or her acts or omissions do not adversely affect the health and safety of other persons, which includes fellow councillors and staff; and
c. comply, so far as the person is reasonably able, with any reasonable instruction that is given by the general manager to allow the general manager to comply with the WHS Act.

It should be made clear that bullying is conduct that does impact on the health and safety of the victims, and on the health and safety of witnesses to the conduct.

<u>Management of councillor bullying complaints</u>

General managers have a duty under the WHS Act to provide a safe working environment for staff. Councils have robust procedures in place to deal with allegations of bullying among staff, but allegations of bullying by a councillor are a lot more challenging.

It would be of assistance if the Code is clearer about the manner in which bullying and harassment issues (or other work health safety issues) involving councillors are managed. Currently there is an overlap between the two regulatory frameworks of the WHS Act and of local government resulting in complaints falling between the OLG and SafeWork NSW and neither party taking responsibility.

Are the current training requirements for mayors and councillors adequate? Do these requirements need to be strengthened?

The current training requirements as provided for in the "Councillor Induction and Professional Development Guidelines" and the Local Government (General) Regulation 2021 are adequate.

Councillors are currently taking part in induction courses and in on-line training through the "Hit the Ground Running" webinars offered by the OLG. It remains to be seen how effective those webinars are.

Should code of conduct complaints about councillors continue to be dealt with locally by councils in the first instance? If not, how should they be dealt with?

Yes. Councils should retain the management of code of conduct complaints in the first instance, other than WHS matters involving councillors, which should be referred immediately to the OLG or SafeWork NSW to manage depending upon who is determined to be responsible.

Should code of conduct complaints about councillors continue to be received by the general manager of a council? If not, who should receive code of conduct complaints about councillors?

The Procedures do allow the general manager to delegate their functions under Part 5 of the Procedures. This includes their ability to decline to deal with a complaint; refer the complaint to the OLG; deciding to take no action (5.22) and referring the complaint to the complaints coordinator.

The risk to a general manager managing the misconduct of councillors or mayors is that it can create unnecessary conflict between the general manager and the council. It places the general manager in an invidious position where they can be subject to undue influence. This is of particular concern in rural councils. Whilst the general manager can delegate their functions, it could be avoided by limiting the function of the general manager to simply receiving the complaint for referral to the complaints coordinator to manage.

There also needs to be better protection against retaliatory action to protect the staff of council who manage the code of conduct complaints, as well as to protect complainants.

"Retaliatory action" is provided for at clause 9.4 of the Code:

> 9.4 You must not take detrimental action or cause detrimental action to be taken against a person substantially in reprisal for any function they have exercised under the Procedures.

Persons exercising functions in relation to the management of code of conduct complaints need greater protection to act without fear of reprisal actions. The penalty for reprisal actions should mirror the penalties in the Public Interest Disclosures Act 1994, namely fines, imprisonment and compensation orders.

Complaints alleging a breach of clause 9.4 are dealt with by the OLG. However as submitted elsewhere in this document, the OLG is not sufficiently resourced to deal with the current

volume of code of conduct complaints. This is reflected in the time it takes for complaints to be dealt with by the OLG (see page 13 of the consultation paper).

Given the recommendation to increase the penalties for taking detrimental actions, the investigation of these are matters is better suited to an investigation by an independent Local Government Commission.

Should mayors have a more active role in the management of code of conduct complaints about councillors?

No. Whilst the role of the mayor is to be the leader and principal member of the governing body, if the mayor becomes more involved in managing code of conduct complaints it may result in an adverse change in the power balance in the relationship. It would do nothing to discourage political in-fighting and interpersonal conflict.

Should there continue to be a discretion to decline or resolve complaints about councillors before they are referred to a conduct reviewer?

It is important to retain this discretion in the Procedures as it does allow the matter to be resolved appropriately and speedily. The early resolution of a complaint also means savings in terms of staffing and financial resources.

The options that are currently available to the general manager or mayor to resolve the complaint by alternative means such as counselling, training, mediation, informal discussion, negotiation, or a voluntary apology can contribute positively to the development of the respondent (cl.5.24 For the GM and cl. 5.31 for the mayor). Whereas in contrast, the governing body has limited sanctions available to it, being to either formally censure the councillor and/or refer the matter to the OLG for further action.

However, in accordance with the submission above, discretionary decision making should be removed from the general manager. These functions should be held by a senior member of staff who would have the protection of the general manager.

The use of an internal ombudsman or a shared ombudsman service should also be encouraged. This is because an internal ombudsman who is a council's complaints coordinator and has been appointed to the council's panel of conduct reviewers, may undertake a preliminary assessment of a matter referred to them (cl. 3.15 of the Procedures).

Are the procedures for dismissing frivolous and vexatious complaints adequate and effective? How might they be improved?

Yes they are adequate but anecdotally they are not being used as often as they can. There are instances where general managers are concerned that if they dismiss a complaint at an early stage they will be accused of protecting the respondent or of bowing to pressure. It is easier to refer it outside to a conduct reviewer than to make the decision.

This is supported at page 7 of the Consultation:

> Data collected by OLG indicates that the proportion of complaints being declined or resolved by the general manager prior to referral to a conduct reviewer has decreased over time. The proportion of complaints declined or resolved by conduct reviewers at

the preliminary assessment stage has remained constant. The proportion of complaints progressing to formal investigation has increased.

Guidance on the application of the procedures can be provided by practice directions (cl.10.1) of the Procedures), but this has not occurred to date.

In order to deter councillors making frivolous or vexatious complaints, councillors who make three or more complaints should face a short mandatory suspension from office.

Does the current system for referring code of conduct complaints about councillors to independent conduct reviewers work effectively? If not, how can it be improved?

Yes, the framework is effective, however there does need to be specific training and development for Complaint Coordinators.

Should there continue to be an emphasis on the informal resolution of code of conduct complaints about councillors? How can those processes be improved?

Yes. As stated above, the options available to resolve the matter by alternative means such as counselling, training, mediation, informal discussion, negotiation, or a voluntary apology can contribute positively to the development of the respondent (cl.5.24 For the GM and cl. 5.31 for the mayor).

However, just as for the dismissal of frivolous or vexatious complaints, there needs to be more training and guidance by way of practice directions, so that persons making these decisions can act with confidence and certainty in the early resolution of matters without proceeding to an investigation.

Are the current procedures governing the formal investigation of code of conduct complaints about councillors effective in ensuring investigations and their outcomes are robust and fair? If not, how can they be improved?

The Procedures are robust and fair. However, they can be improved as they are too complex which can result in the Procedures not being followed correctly.

Are OLG's oversight powers adequate and effectively implemented? What improvements might be considered?

The OLG's oversight powers should be exercised by an independent Local Government Commission. This Commission would be established by statute similar to the Inspector of Custodial Service who can employ staff or engage consultants with functions to inspect or investigate. The Commissioner would be able to impose sanctions. The role would also include:

- the ability to sanction the councillor if the commissioner determines that complaints made by the councillor are vexatious or an abuse of the Code
- the investigation and imposition of sanctions for councillor misconduct (as defined in the LG Act)
- the investigation and imposition of sanctions for matters referred to the OLG under cl.5.20 of the Procedures (breach of pecuniary interest; failing to properly disclose conflicts from political donations; failing to maintain integrity of the code; and special complaint management)

- If sanctions remain with the council, allegations that the elected body has improperly declined to impose a sanction.
- Matters referred to the OLG under clause 7.58 of the Procedures (referral to OLG for further action under misconduct provisions of the LG Act)
- Enforcement of apologies and undertakings

How can the time taken to deal with allegations of councillor misconduct be reduced?

The Consultation paper reports that some investigations take over a year to resolve. This can mean that the conduct may be continuing and the relationships between councillors become even more dysfunctional leading to more code of conduct complaints. This could be avoided by the establishment of a properly resourced independent Local Government Commission.

If the OLG retains its current functions it needs to be properly resourced and funded to deal with the allegations in a timely fashion.

How can the efficiency of the processes for dealing with code of conduct breaches by councillors under the Model Procedures be improved?

The current processes are efficient on paper and do ensure procedural fairness. It is the implementation of the Procedures that needs to be improved.

How can the efficiency of referrals of councillor misconduct to OLG for investigation and disciplinary action be improved?

The referral process is simple, but this is not the issue. The issue is the time taken by the OLG and by NCAT to resolve matters.

A dedicated and properly resourced independent Local Government Commission will improve the efficiency of investigations and disciplinary action.

Are there opportunities for councillor misconduct to be dealt with summarily? If so, how can this be done in a way that ensures due process and that is procedurally fair?

This would be a matter for the Local Government Commission to determine in line with its enforcement guidelines. The guidelines could set out indicative sanctions for specific behaviours according to the standard breached and the severity of the breach.

A right of appeal against more serious disciplinary action could go to a panel established by the Commission.

Should the full range of disciplinary powers previously available to councils under the Model Procedures before the Cornish decision be restored by legislation?

Yes. Censuring the councillor is of little deterrent effect and does not provide a means to reform the councillor's behaviour in the way that counselling, or training can. The sanction needs to be such that it acts as a deterrent or that it can be tailored to the conduct the subject of the complaint in a way that changes the behaviour.

If councils were once again able to require councillors to apologise for breaches of the code of conduct or to give undertakings not to repeat their conduct, how should apologies and undertakings be enforced?

It should be treated as misconduct and referred to the OLG (or if established, to the independent Local Government Commission).

Should the disciplinary powers available to councils for breaches by councillors of the code of conduct be strengthened? If so, what additional disciplinary powers should be given to councils?

No. Disciplinary powers that restrict the ability of the councillor to represent the community should remain with the Departmental Chief Executive under section 440I of the *Local Government Act 1993* (or if established, to the independent Local Government Commission). This power should only be exercised by a body independent of the council. Procedures can be weaponised in an attempt to exclude, sanction or silence opponents within the governing body.

If councils were given stronger disciplinary powers, should the right of appeal in relation to the exercise of those powers be to OLG or to another agency or tribunal?

If councils retain the final decision on sanctions following an investigation, the right of appeal should be to NCAT under the *Administrative Decisions Review Act 1997* (or if established, to the independent Local Government Commission).

Are the disciplinary powers currently available to the departmental chief executive of OLG and the NCAT for councillor misconduct sufficient? If not, what additional disciplinary powers should be made available to them?

The powers are sufficient except in cases involving persons who are no longer councillors. The recent decision of *Deputy Secretary of the Department of Local Government, Planning and Policy v Doueihi* (No 2) [2022] NSWCATOD 3, is a case in point. Former Cr Doueihi was found to have breached the Code and the *Local Government Act 1993* in several ways including:

- failed to complete his written return disclosing interests
- failed to provide information in his written return
- lodged returns disclosing interests which he knew, or ought reasonably to have known, were false or misleading in a material particular

But because Mr Doueihi was no longer a councillor the only sanction available was to reprimand the former councillor.

Who should carry the cost of dealing with complaints about councillor misconduct?

The OLG should carry the cost as it is the regulator for councils in NSW (or if established, the independent Local Government Commission).

Should councils be accountable to their communities for the cost of dealing with complaints about councillor misconduct?

Yes, for the reasons given in the Consultation paper [page 7]:

Each year, councils are required to report on the numbers of code of conduct complaints made about councillors and the general manager, how they were dealt with and how much it cost the council to deal with them. This is to ensure that councillors are individually and collectively accountable to their communities for their conduct and performance.

Should OLG be able to recover the cost of misconduct investigations from councils?

No.

Should councils and/or OLG be able to recover the cost of dealing with complaints about councillor misconduct from councillors who have been found to have engaged in misconduct? If so, what mechanism should be used to recover these costs?

No.

Thank you again for the opportunity to make a submission to the independent review of the effectiveness of the framework for dealing with councillor misconduct in NSW. LGNSW would also welcome an ongoing conversation on matters raised during the review.

For further information in relation to this submission, please contact Liz Hayes, Legal officer on 02 9242 4125 or elizabeth.hayes@lgnsw.org.au.

Your sincerely

Scott Phillips
Chief Executive

ATTACHMENT

CASE STUDIES

Case studies of Code of Conduct Matters dealt with by the NSW Civil and Administrative Tribunal.

Councillor Coppock Code Conduct Investigation January 2018 – July 2021

Timeline of Code of Conduct investigation, referral to the OLG and subsequent NCAT hearing:

January 2018 matter referred to a Code of Conduct Reviewer.

April 2018 Report of an Investigation into Alleged Misconduct Involving Clr Coppock provided by Conduct Reviewer with the following findings:

- Allegation was substantiated
- Clr Coppock's conduct was in breach of cll 5.8, 6.2(b) and (c) and 6.7(g) of the Council's Code of Conduct, and in breach of the Council's Access to Information and Interaction with Staff Policy.
- Report recommended that the findings of inappropriate conduct be made public, and that Clr Coppock be formally censured for the breach under s 440G of the LG Act.

May 2018 Supplementary Report provided, confirming the conclusions reached in the Report of 18 April 2018.

May 2018, the Council resolved:

That Council:

1. Note the findings of the Conduct Reviewer.
2. That Council **does not adopt** the recommendations of the Conduct Reviewer.
3. That Council's reason for not adopting the recommendations was that Council does not accept the finding of the Conduct Reviewer due to the differing perceptions of the participants in the conversation.
4. Make public Council's resolutions as above, following the closed part of this meeting, pursuant to clause 253 of the Local Government (General) Regulation 2005.

October 2018 the DCE authorised preparation of a departmental report into Clr Coppock's conduct.

July 2019 Departmental Report issued under Section 440H of the Local Government Act 1993, concluding that:

- Clr Coppock had contravened cll 3.1(a), (c) and (d), 5.8 and 6.2(b) and (c) of the Council's Code of Conduct, and the failure to comply with the Councillors' Access to Information and Interaction with Staff Policy and those clauses of the Code of Conduct and s 440(5) of the Act constituted misconduct as defined in s 440F of the LG Act.
- The finding of misconduct warranted disciplinary action by the Deputy Secretary.

February 2020 The Deputy Secretary, Local Government Planning and Policy made orders made under s 440I of the LG Act determining that Clr Coppock:

1. Be reprimanded pursuant to s440I(2)(b) of the LG Act;

2. Pursuant to s440I(2)(e) of the LG Act, undertake training with respect to his rights and obligations as a councillor when interacting with Council staff, within 3 months of the date of the decision; and
3. Pursuant to s 440I(2)(h) of the LG Act, suspend Clr Coppock's right to right to be paid any fee or other remuneration to which he would otherwise be entitled as the holder of civic office for a period of 2 months (without suspending him from civic office for that period) commencing on 1 April 2020 and ending on 31 May 2020.

Cr Coppock appealed the orders

Coppock v Department of Planning and Environment (No 2) [2021] NSWCATOD 18

Hearing date: 18 November 2020

Date of orders: 10 February 2021

Decision date: 10 February 2021

Date for directions: 16 February 2021

The Tribunal is satisfied that Clr Coppock failed to comply with cll 3.1(a), 5.8, 6.2(b), (c) and 6.7(g) of the Council's Code of Conduct. In doing so, he failed to comply with the obligation stated in s 440(5)(a) of the LG Act that he comply with the applicable provisions of the Council's adopted code of conduct. That was a contravention of the Act.

Clr Coppock's contravention of the LG Act, and his failure to comply with the applicable requirements of the Code of Conduct, was "misconduct" as defined in s 440F(1)(a) and (b) of the LG Act.

The Tribunal is satisfied that Clr Coppock engaged in misconduct as defined in s 440F of the LG Act. The matter is listed for directions at 4.00pm on Tuesday 16 February 2021 by telephone.

Coppock v Secretary, Department of Planning and Environment (No 3) [2021] NSWCATOD 96

Date of orders: 16 July 2021

Decision date: 16 July 2021

The Tribunal orders pursuant to s 440L(4) of the *Local Government Act 1993*:

1. The decision of the Deputy Secretary, Local Government, Planning and Policy, Department of Planning, Industry and Environment dated 28 February 2020 is amended, by deletion of the requirement pursuant to s 440I(2)(e) of the *Local Government Act 1993* that Councillor Stuart Coppock is to undertake training with respect to his rights and obligations as a councillor when interacting with Council staff;
2. The decision is otherwise confirmed.

NOTE: The Tribunal noted that in the affidavit provided by Cr Coppock he had advised that he would not be standing for re-election therefore training would serve no apparent purpose.

Office of Local Government v Councillor Martin Ticehurst of Lithgow City Council [2016] NSWCATOD 122

Hearing dates:16 June 2016

Date of orders: 27 September 2016

Decision Date: 27 September 2016

The amended application

By amended application received 24 February 2016, the applicant alleged seven contraventions. Essentially, they were as follows:

1. On 27 October 2014, Councillor Ticehurst swore at the Mayor, calling her twice, a "bitch", and also threatening her by saying "I hope you choke on your sandwich" (Ground 1);
2. On 10, 11, 12 and 13 May 2015, wrote emails in relation to the investigation into that conduct on 27 October 2014 (Grounds 2-5);
3. At the Council meeting on 1 June 2015, despite there being a Council resolution that he apologise to the Mayor, declined to do so (Ground 5A); and
4. On 1 June 2015 following the Council meeting, acted in an aggressive, rude, intimidating and embarrassing manner towards a member of the public, namely Ms Renee Difranco (Ground 6).

Office of Local Government v Councillor Ticehurst of Lithgow City Council (No 2) [2016] NSWCATOD 162

Hearing dates:13 December 2016

Date of orders:13 December 2016

Decision date: 13 December 2016

I take into account that:

1. The misconduct in this case concerns matters central to the effective operation of the important civic institution of local government;
2. There needs to be punishment of the Councillor's failure to comply with his statutory obligations, bearing in mind that any punishment greater than reprimand or censure will, by operation of law, prevent Councillor Ticehurst for a period of time, from exercising any functions as a Councillor, and this does have an impact on his constituents which weighs in his favour. Just now, Councillor Ticehurst has reminded me that he has been re-elected and that he is the Deputy Mayor, and there will be a cost involved in any by-election. I have taken those matters into account; and
3. Finally and significantly, there is no acknowledgement of wrongdoing (or apology), indeed, Councillor Ticehurst's continuing persistence with apparently baseless claims of malicious prosecution and perjury means that any reduction of punishment on the basis of contrition, and thus insight, is unavailable.

In the circumstances, I suspend Councillor Ticehurst for a period of 5 months from civic office. That has a consequence by operation of law, but my order is for suspension for a period of 5 months.