

**Submission to the Office of Local
Government on the Consultation
Draft Model Code of Conduct
for Local Councils in NSW
and Consultation Draft
Procedures for the
Administration of the Model
Code of Conduct for Local
Councils in NSW**

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Introduction

Local Government NSW (LGNSW) is the peak body for local government in NSW, representing all NSW general-purpose councils and associate members including special-purpose county councils.

LGNSW thanks the Office of Local Government (OLG) for the opportunity to provide a submission on the draft Model Code of Conduct for Local Councils in NSW (“Code”) and the draft Procedures for the Administration of the Model Code of Conduct for Local Councils in NSW (“Procedures”).

Purpose

This submission is in response to the OLG’s invitation for submissions on the Code and Procedures, made via Circular No. 17-30 dated 23 October 2017.

Background

LGNSW supports a strong and effective regulatory framework for ensuring the ethical conduct of councillors and staff. An effective Code and Procedures support the operation of the sector overall, and importantly, enhance sector credibility and community confidence. All components need to work well, from the Code and Procedures, through to training, implementation and enforcement.

LGNSW has consulted with the sector about the Code and Procedures in preparing this submission, and included the feedback provided.

The submission identifies the key issues associated with the Code and Procedures. Aspects of the Code and Procedures not referred to in this submission should be read as acceptable to LGNSW.

1.1 General comments

- **Plain English:** The Code is not written in plain English and as such may be inaccessible for a number of people who are subject to its provisions. Further explanatory notes or guidelines may assist.

Excessively complicated provisions should be deleted or rewritten. Examples include, but are not limited to, details on pecuniary interests and how these should be declared or otherwise managed, gift declarations and access to information.

- **Focus on Councillors:** In general, the Code is focussed on Councillors only and loses sight of the fact that Council officials also include other council representatives such as staff, advisory committee members (members of the public), contractors volunteers and delegates. Much of the content applies only to Councillors. The Code will be a difficult and somewhat irrelevant tool for training staff and others operating under the Code.

The OLG should consider splitting the Code of Conduct into separate documents for separate groups of Council officials (as per the Victorian model), or at minimum

reorganise the document into sections such as “General”, “Councillors”, “Staff”, “Delegates” etc. to assist in training and Code comprehension for the people affected.

- **Scope/Subject:** Further to the above regarding the excessive focus on Councillors, the scope of the document has been somewhat lost in this document and should be realigned with the function and activities of councils. It should be made clear that all specified representatives of a council should be subject to the Code. This includes elected representatives, staff, contractors, advisory committee members and volunteers. The latter two groups have been missed and removed, respectively, from the Code. Independent Hearing and Assessment Panels (IHAPs) should also be made expressly subject to the Code in preparation for changes in early 2018 and in alignment with Department of Planning intent. A separate Code of Conduct for IHAPs is considered unnecessary.
- **Complication of purpose:** The Code is attempting to consolidate many model policies leading to overregulation. This significantly detracts from the purpose of the document, which is cause for considerable concern.
- The Code includes some meeting practice and councillor handbook content as well as s449 disclosure guidelines, secondary work guidelines, gifts and benefits policy and a conflict of interest assessment tool for managers and Code administrators. Model or guideline documents already exist for these topics and the Code must ensure consistency with such documents in the absence of an intention to override them.
- While their inclusion in the Code would appear to be for the purpose of providing Code of Conduct consequences for relevant breaches, this could be much more simply dispensed with via a statement that “breaches of relevant legislation or of Council policy may constitute a breach of this Code of Conduct” .
- Abovementioned sections could then be moved out of this draft to simplify it. In particular, Schedule 1 Part 2 should not be a part of this document, but should be a separate publication by the OLG as it creates confusion.
- **Increased administration of Code burden:** In addition to the above complication of purpose, inclusion of procedural matters for WHS (such as reporting near misses) or s449 disclosures suggests that a failure to follow those procedures should be investigated as a Code of Conduct breach, making administration of the Code a significant burden for complaints coordinators. This is unnecessary where there are pre-existing consequences in relevant legislation or corresponding policies, which may not fall under the purview of the complaints coordinator.

1.2 Definitions

- **Committees:** The definition of “committees” versus “council committees” should be clarified. The effect of the definition as currently provided is that only Councillors, through the OLG definition of ‘council committees’ are subject to the Code.
- In addition, the effect of removing advisory committees from the definition of “council committee” is that management of issues such as confidentiality, harassment, bullying, conflicts of interest etc., will need to sit outside the Code for these committees, increasing

the administrative burden on Councils to manage these in terms of reference or similar documents. Please see above with respect to Scope/ Subject.

1.3 Harassment and discrimination

- **Clause 3.7:** The word “and” should be removed from the end of sub-clause (b). The definition proposed may be setting too high a threshold.

1.4 Land use planning, development assessment and other regulatory functions

- **Clause 3.15:** This is an unrealistic requirement and does not fully comprehend the role (including the statutory role) of an elected representative. It lacks practicality. Given all of the other requirements in the Code (and other governance requirements), it is over-regulation better dealt in an accompanying Practice Guide.

1.5 Obligations in relating to meetings

- **Clause 3.24:** The effective use of this clause requires additional guidance from the OLG. There is a risk that without additional guidelines and thresholds, this section would be potentially used against Councillors inappropriately and further impede the efficient functioning of councils.

1.6 Pecuniary and non-pecuniary interests

- **Excessive complication:** In general, people subject to the Code should be encouraged to err on the side of transparency and ensure that potential conflicts are reported for further assessment as required. The Code needs only a relatively simple statement on how to identify and declare conflicts of interests, with the minutiae of pecuniary vs. non-pecuniary, significant vs. non-significant and notes on managing these to be contained in supporting documents for use by officials administering the Code, such as a guideline or local policy. The inclusion of this section in its current form raises serious concerns about assessing the type of interest and the ability to train staff and Councillors effectively on the Code.
- **Exceptions for interest reporting:** The development of complicated exclusions from declaration provisions is unnecessary and impenetrable for most readers. In particular, 4.6(e), (f), (g), (h), (i) & (m) should be deleted as they carry significant risk of important conflicts not being declared and create a corruption risk as well as risk of inadvertent exposure to breach of Code of Conduct by people otherwise attempting to do the right thing under the Code. The over prescription in the Code may also have the net effect of people not declaring what would otherwise be expected as a result of distinct instructions being omitted from the Code.
- **Section 449:** Duplication of s449 of the LG Act is unnecessary and should be deleted from the Code. Additional procedures for s449 in the Code creates the situation where Councillors are personally exposed to increased risk of harassment and intimidation by members of the public. We submit that, beyond the draft Code, s449 declarations should not

be held as a public register, but as an internal conflicts of interest tool which can be made available to the OLG and other regulatory or investigative bodies as required.

- **Clauses 4.16 and 4.17** should be clarified in the context of the proposed removal of advisory committees from the Code.

1.7 Gifts and Benefits

- **General:** The Gifts and Benefits section is excessively complicated and should be simplified. Gifts and benefits obligations as set out in the Code should be aligned with those of State or Federal representatives. Note the respective Codes of Conduct for NSW State Ministers and Members of Parliament. It should then be the responsibility of the individual Council to impose additional obligations as it sees fit.

The requirement to declare receipt or offer of token hospitality such as tea/coffee and must be removed

- **Token gifts:** All of clause 6.6 on token gifts should be deleted as it is redundant with the inclusion of Clause 6.7 and creates confusion.
- **Cash-like gifts:** Lottery tickets should be added to the list of cash-like gifts.
- It is unclear whether prizes are captured by the Code.

1.8 Internet Access and Use of Social Media

- **Clause 8.21(b):** This proposed clause is too broad, with almost anything being able to be alleged as having the potential for a negative impact. Undue breadth and generality provide a point of exploitation for some who want to lodge a complaint involving quite innocuous conduct for which the Code is not intended. Given the other sub-clauses, it is not needed and could be removed.

1.9. Maintaining the Integrity of this Code

- **Clause 9.1:** There has been, and will likely continue to be, robust public debate about the efficacy of the Code and Procedures, including much critical comment about its integrity. This has often occurred in relation to a specific complaint which highlights problems and weaknesses. The reach of this clause is too much and what it is trying to achieve is adequately dealt with elsewhere, including in clause 9.3(i) and 9.7. The argument of undue breadth and generality also applies here.

1.10 Disclosure of information

- **Clause 9.13** as drafted is difficult to understand and may be interpreted to understand that there is no appropriate forum for allegations to be made under the Code. This should more appropriately state that “once an allegation is made under the Code, that the details of the allegation, and any related investigation, are confidential.”

2.0 Comments on the draft Procedures

- **Clause 3.16(b)** The Procedures no longer have provision for a Conduct Review Committee but rather anticipate a single investigator. There is an erroneous reference to a Conduct Review Committee in Clause 3.16 (b) which needs to be deleted.
- **Clause 3.9** of the draft Procedures should be amended to read that “The Council may terminate the panel of conduct reviewers at any time, however this termination is not effective for reviewers conducting ongoing review matters, until such matters have been finalised.” If this qualification is not included, there is a risk that Councils may be pressured to terminate a panel while there is an unfavourable review ongoing, thus exposing the Council and the Code of Conduct review process to risk.
- **Clause 4.2(b)** should be reconsidered. As drafted, this clause creates a potential grey area for Code of Conduct complaints relating to conflict of interest matters.
- **Clause 4.2(d)** should be deleted. As drafted, this creates a procedural issue for complaints coordinators where good faith and intention cannot be established at the outset without a review. This also creates a significant loophole where the wrong thing, which may be significant, is done for the right reasons. Good faith intentions may be a mitigating factor with respect to any sanctions imposed, but is not a determination which can be made at the outset for the purpose of applying the procedures.
- **Clause 5.2** should be qualified to state that it does not limit the ability for the GM or Mayor to refer a matter externally for preliminary assessment.
- **Clauses 5.3 to 5.8** (complaints about staff) **and Clauses 5.9 to 5.16** (complaints about committee members and delegates) place all responsibility on the general manager, while failing to acknowledge that these responsibilities may be referred to an external reviewer, or delegated to the complaints coordinator. These clauses should be amended to reflect this reality.
- **Clause 7.39** should be amended to be, for example, “notify the Office in advance with respect to its recommendations” without requiring extensive consultation. As drafted, it is possible that conduct reviews could be unreasonably extended where the Office and a conduct reviewer are unable to agree on appropriate recommendations.
- **Clauses 7.4 and 7.8:** These provisions (and some related to them) require the investigator to provide certain information and advice to the subject person and complainant. However there is no requirement on the investigator to advise the subject person and complainant of **Clause 7.16 (and 12.1)** which requires the matter to be dealt with confidentially. The integrity of the investigation process and the proper management of the interests of those involved depend on confidentiality and the investigator should have a duty to advise the subject person and complainant about their responsibilities to keep the matter from the public arena. Lack of confidentiality being observed by subject persons and complainants has been a major problem area with the Code to date.

- **Clauses 7.27 & 7.28:** Similarly when providing a copy of the draft report, the investigator should be required to advise the subject and affected persons of their responsibilities in relation to confidentiality.
- **Clauses 7.41 & 7.42:** A final report is written and its outcome depends on whether a breach is found and the nature of the recommendations made by the investigator. Clauses 7.41 and 7.42 state a copy of the report is to be provided to the subject person (7.41) and a written statement to the complainant (7.42). There is no reference to timing. Yet it would be more appropriate for 7.41 and 7.42 to be executed within say 7 days of the report being provided to the Complaints Coordinator, GM, Mayor and/or Council as required by clauses 7.43 – 7.46. In other words the appropriate representative/s of the council should be furnished a final copy first before copies/information is provided to the subject person and complainant. This is a pretty standard protocol and also allows the council to be prepared should the matter find its way into the public arena. As with points 4 and 5 above, confidentiality advice should be required to be given by the investigator at the time of furnishing the report/information to the subject person and complainant.