



Premier & Cabinet
Division of Local Government

Division of Local Government
Department of Premier and Cabinet

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Review of the Model Code of Conduct for Local Councils in NSW

June 2011

Discussion Paper

1. WHAT IS THE PURPOSE OF THIS PAPER?

The original version of the Model Code of Conduct for Local Councils in NSW (the Model Code) commenced operation on 1 January 2005. A further revised version of the Model Code subsequently came into force on 27 June 2008 and operates to this day.

We see the Model Code as an evolving document. While the framework for managing complaints about council officials has vastly improved over the 6 years the Model Code has been in operation, we agree that there remains scope for further refinement and improvement.

Over the two and a half years in which the revised Model Code has been in operation, we have identified or have had brought to our attention a number of areas where the Model Code has not operated in the manner in which it was intended or where its operation could be improved. We therefore believe that it is timely that we undertake a further comprehensive review of the Model Code.

In Part 4 of this discussion paper we have outlined the issues that have been raised with us about the operation of the current version of the Model Code. We would like to hear from you about any other areas where you consider the Model Code requires improvement and your suggestions on how best to make those improvements.

In Part 5 of this discussion paper we have asked for your views on possible options for improving the Model Code to address the issues that have been raised with us.

We request that you submit your submissions in writing to the following postal address:

Division of Local Government
Department of Premier and Cabinet
Locked Bag 3015
NOWRA NSW 2541

Alternatively, you may wish to email your submission to dlg@dlg.nsw.gov.au.

We ask that submissions be received by **8 July 2011**.

Should you wish to contact us to discuss this discussion paper or the Model Code of Conduct Review, you may telephone John Davies, the Model Code of Conduct Review Project Officer on 02 4428 4139.

2. WHY DO WE HAVE A MODEL CODE OF CONDUCT?

A code of conduct is a key component in any organisation's governance framework. The purpose of a code of conduct is to prescribe minimum standards of ethical and other conduct that members of the organisation are required to observe and to enhance confidence in its integrity.

In the case of NSW councils, a Model Code of conduct is mandated under section 440 of the Local Government Act 1993 (the Act). Under section 440, councils are required to adopt a code of conduct that incorporates the provisions of the Model Code. Councils may supplement the provisions of the Model Code with additional provisions. However a provision in a council's adopted code of conduct will have no effect to the extent that it is inconsistent with the Model Code. A provision of a council's adopted code will not be inconsistent with the Model Code if it seeks to impose a more onerous requirement than one prescribed under the Model Code.

A mandated Model Code of Conduct offers the following benefits:

- It creates minimum standards of conduct all council officials are required to observe in the performance of their functions
- It informs the community of the standards of conduct it is entitled to expect of all council officials
- It informs council officials of the standards of conduct that are expected of them
- It applies uniform standards of conduct to all councils. This means that regardless of where you live, you are entitled to expect the same standards of conduct of your council officials
- It creates a uniform standards with respect to the following:
 - the ethical consideration of development applications

- the identification, disclosure and appropriate management of conflicts of interests
- the disclosure and management of conflicts of interests arising from the receipt of political donations
- obligations in relation to the receipt of gifts and other personal benefits and the use of council resources, facilities and information
- the regulation of interaction between council officials
- It creates a uniform framework for the receipt, management and investigation of complaints about council officials. Again, this means that regardless of where you live, you are entitled to expect that any complaint you make under a council's code of conduct will be dealt with in the same way. Under the current version of the Model Code this includes a requirement that investigations are undertaken by a person independent of the council concerned.
- It creates a uniform regime for disciplinary action where a council official is found to have failed to comply with the standards of conduct expected of them.

3. HOW HAS THE MODEL CODE OF CONDUCT CHANGED OVER TIME?

The Model Code has been operating since 1 January 2005.

Prior to the commencement of the Model Code, there was no mandatory code of conduct that applied to councils in NSW and no uniform regime for managing and investigating complaints about the conduct of council officials. While councils were required to have a code of conduct under the Act, these varied widely between councils. This meant that the standards of conduct expected of council officials and the arrangements for dealing with complaints varied between councils. Under many councils' codes of conduct, the Mayor was responsible for dealing with complaints about councillors and the general manager for complaints about staff.

The Model Code was established to prescribe uniform standards of conduct that apply to all councils and a more rigorous approach to managing and investigating complaints. It was developed in consultation with key stakeholders such as the Local Government and Shires Associations (LGSA), Local Government Managers Australia NSW (LGMA), the NSW Ombudsman, the Independent Commission Against Corruption (ICAC) and individual councils.

The Model Code was reinforced by the introduction of the misbehaviour provisions of the Act. These empower the Chief Executive, under delegation from the Director General, Department of Premier and Cabinet, and the Local Government Pecuniary Interest and Disciplinary Tribunal to take disciplinary action against councillors who engaged in "misbehaviour" for the purposes of the Act. This included the power to suspend councillors from civic office for periods of up to six months.

Together with prescribing the minimum standards of conduct council officials were to observe, the 2005 version of the Model Code created the following framework for dealing with complaints:

- Complaints other than those relating to the general manager were to be made to the general manager. Complaints about the general manager were to be made to the Mayor.
- The general manager was responsible for the management and investigation of complaints about staff.
- Councils were to establish conduct review committees comprising of the Mayor, general manager and at least one person independent of the council to investigate complaints about councillors or the general manager. Where the complaint related to the general manager or the Mayor, the deputy Mayor or another councillor nominated by the council would take their place on the committee.
- Where appropriate, the general manager was to refer complaints about councillors (and the Mayor complaints about the general manager) to the conduct review committee.
- The committee could decline to make enquiries into a matter referred to it but was required to give reasons in writing for its decision.
- Where the committee made enquiries, it was required to comply with the requirements of procedural fairness.
- The committee was required to find whether a complaint reported to it disclosed a prima facie breach of the code and report its findings to the council together with any recommendation as to sanction.
- Where the council determined that a councillor or the general manager had breached the code, it could impose one or more of the sanctions prescribed under the Model Code.

In late 2006, the then Department of Local Government commenced a review of the implementation of the Model Code. As a result of that review, the Department issued a revised Model Code in 2008. The revised Model Code commenced operation on 27 June 2008. The revised Model Code made a

number of significant improvements to the 2005 version of the Model Code. Among other things it:

- created more prescriptive requirements for the identification and management of non-pecuniary conflicts of interests,
- created new requirements for the disclosure and management of political donations and non-pecuniary conflicts of interests arising from the receipt of political donations;
- provided clearer guidance on the standards of conduct that apply to the receipt and management of gifts and personal benefits.

The revised Model Code also created a new framework for the management and investigation of complaints. This included the following:

- As with the previous version of the Model Code, complaints other than those relating to the general manager are to be made to the general manager. Complaints about the general manager are to be made to the Mayor.
- As with the previous version of the Model Code, the general manager continues to be responsible for the management and investigation of complaints about staff.
- However the revised Model Code gives the general manager and Mayor more options for managing complaints received by them than was previously available to them. In addition to declining a complaint at the outset or referring a matter for investigation, the general manager or Mayor may now seek to resolve the complaint by alternative means such as mediation, informal discussion or negotiation.
- Beyond the initial assessment of complaints received by them, the general manager and Mayor no longer have any direct role in the investigation of complaints.

- Councils are now required to appoint panels of persons independent of the council to comprise members of conduct review committees or sole conduct reviewers. To qualify for membership of the panel, conduct reviewers must not be an employee or contractor of the council.
- Where appropriate, a general manager or Mayor may refer a matter reported to them to a sole conduct reviewer or a conduct review committee comprising of three or more persons appointed from the council's panel of conduct reviewers.
- Sole conduct reviewers and conduct review committees are not obliged to investigate a matter referred to them. They have other options for managing the matter including to decline it at the outset or to resolve it by alternative means such as mediation, informal discussion or negotiation.
- Where a sole conduct reviewer or conduct review committee decides to make enquiries into a matter, they are required to comply with the procedural requirements prescribed under the Model Code. These include requirements relating to procedural fairness.
- Where a sole conduct reviewer or conduct review committee make enquiries into a matter referred to them, they are required to report their findings and any recommendations as to sanction to the council. They are not required to do so where they do not make enquiries into a matter.
- Where a sole conduct reviewer or conduct review committee reports their findings and any recommendations to the council, before the council may impose any sanction it must make a determination that the person whose conduct is the subject of the report has breached the code.

4. WHAT ISSUES HAVE BEEN RAISED WITH US?

The issues that have been raised with us in relation to the current version of the Model Code primarily relate to the procedures that apply to the consideration of matters under the code of conduct. Few issues have been raised with us about the standards of conduct currently prescribed under the Model Code.

The following issues have been identified below for the purposes of seeking your views in relation to them. By identifying these issues, we do not necessarily endorse any views expressed with respect to them or agree that the concerns raised are valid.

Standards

The following issues have been raised with us about the standards of conduct prescribed under the Model Code:

- The lack of clarity about whether the political donations provisions of the Model Code apply to donations received by councillors in their capacity as candidates in State and Federal elections.
- The political donations provisions of the Model Code do not apply to political donations received by locally based political parties or groups even though the campaigns of councillors who were endorsed candidates of such parties or groups may have directly benefitted from such donations.
- The political donations provisions of the Model Code do not apply to political donations received by the State division of a councillor's political party.
- The need to specifically prohibit participation in binding caucus votes.
- The need to better address the situation where compliance by a majority of councillors with a requirement under the code of conduct

results in the loss of a quorum where the matter being considered relates to a non-delegable function of the council.

- The need to allow councillors to communicate directly with a member of staff or organisation exercising an internal audit function for the council.

Operations

As stated above, most of the issues raised with us relate primarily to the operation (implementation and complaint handling processes) of the Model Code. These can be broadly summarised as follows:

- Remote and rural councils have faced challenges in identifying sufficient numbers of appropriately qualified people locally to serve as conduct reviewers.
- The Model Code currently makes no provision for the management of unsatisfactory performance by a conduct reviewer.
- While conduct reviewers are required to be independent of the council and are not permitted to do any work for the council other than in their capacity as a conduct reviewer, some conduct reviewers have been permitted to perform other work for councils.
- The Model Code is being misused by some councillors and other persons to make vexatious complaints.
- The Model Code is being misused by some councillors for political point scoring.
- The Model Code is being misused to persecute minority councillors.
- The Model Code does not offer any protection to a complainant from detrimental action in reprisal for making a complaint under the code of conduct.

- The person who exercises the “gate-keeper” role in relation to the preliminary assessment of complaints (ie the general manager or Mayor) is not independent of the council.
- General managers have in turn raised concerns about the strains that performance of the preliminary assessment role places on their relationships with councillors.
- While general managers or Mayors have options under the Model Code for managing complaints other than to refer them to a conduct reviewer, some prefer to refer all matters to a conduct reviewer regardless of their merit, often at great cost to the council.
- There is currently no specific provision under the Model Code for situations where a complaint is made about both the Mayor and the general manager or where the complaint is made by the Mayor about the general manager or vice versa. Such matters have to be referred to an independent conduct reviewer for assessment, irrespective of the merits of the complaint, often at great cost to the council.
- Conduct reviewers will often have a financial incentive to investigate matters referred to them rather than to seek to resolve them by alternative means. This has meant that some non-serious matters or matters that could have been readily resolved without the need for investigation have been investigated.
- The investigation of matters under the Model Code is costly.
- The Model Code gives insufficient guidance on the application of the procedural requirements that are prescribed by it.
- The procedural fairness requirements that apply to the investigation of matters under the Model Code are not prescribed in sufficient detail.
- Ambiguities in the procedures prescribed for the investigation of matters under the Model Code have been exploited to frustrate the investigation.

- There is no sanction that applies to persons who do not cooperate with investigations.
- The Model Code does not offer any protection to persons who perform a function under the Model Code from detrimental action in reprisal for exercising the function.
- Councils can simply ignore the finding and recommendation of a conduct reviewer.
- There is currently no provision for the formal review of a council's determinations under the code of conduct.
- The lack of clarity in relation to the procedural requirements of the Model Code and the absence of a right of review has resulted in councils facing costly litigation in relation to code of conduct matters.
- The effectiveness of the penalties or sanctions that currently apply to breaches.

5. WHAT ARE THE OPTIONS FOR ADDRESSING THESE ISSUES?

The questions posed by the issues raised with respect to the standards of conduct are as follows:

1. Should the scope of the political donations provisions of the code of conduct be expanded to include the following:
 - a. Donations received by councillors in their capacity as candidates at State and Federal elections?
 - b. Donations received by political parties and groups that endorsed the candidacy of a councillor where the councillor receives a direct benefit from the donation in question?
2. Should participation in binding caucus votes be specifically prohibited under the Model Code?
3. Should councillors be exempted from an obligation to comply with a requirement under the Model Code in relation to a non-delegable function where compliance will result in a loss of quorum? If so how should the exemption be granted and should any conditions or restrictions be imposed on it?
4. Should councillors be permitted to communicate directly with a member of staff or organisation exercising an internal audit function for the council?

The questions posed by the issues raised with respect to the procedural requirements of the Model Code are as follows:

5. Should councils enter into shared arrangements for the establishment of panels of conduct reviewers? If so, should this be done on a regional basis? Can this be done through Regional Organisations of Councils?

6. Is there a need to prescribe the process by which conduct reviewers are appointed? Is there a need to more clearly prescribe the criteria conduct reviewers are required to meet? What should these requirements be?
7. Should conduct reviewers continue to be required to be independent of the council that engages them as a conduct reviewer?
8. Is there a need to prescribe arrangements for the management of the performance of conduct reviewers? If so, who should be responsible for the management of the performance of conduct reviewers and how can this be done in a way that does not compromise their independence?
9. Should the person who makes an initial assessment of complaints made under a council's code of conduct be independent of the council the complaint relates to? If so, who should undertake the initial assessment of complaints made under a code of conduct?
10. Should there be more options under the Model Code for managing complaints. If so, what should these be?
11. What can be done to ensure that the only matters that are investigated under the code of conduct are matters that warrant investigation? What can be done to ensure that complaints that can be resolved by means other than investigation are not investigated?
12. Do the provisions of the Model Code relating to investigations need to be more prescriptive? Do the procedural fairness requirements that apply to the consideration of a matter under the code of conduct need to be better defined? If so what should these requirements be?

13. What can be done to ensure that councils give appropriate consideration to conduct reviewers' reports in making a determination under the code of conduct?
14. Should there be a right of review in relation to determinations made by a council under its code of conduct. If so, who should exercise this role?
15. What can be done to prevent the misuse of the code of conduct? Should it be a breach of the code of conduct to misuse the code of conduct? If so, who should deal with complaints about the misuse of the code of conduct?
16. What can be done to prevent detrimental action being taken against a person for making a complaint or exercising a function prescribed under the code of conduct? Should it be a breach of the code to take detrimental action? If so, who should deal with complaints about detrimental action?
17. How can the penalties or sanctions that apply to breaches be made more effective?

6. WHAT DO WE WANT FROM YOU?

We want your assistance in undertaking our review of the Model Code.

In particular, we would like to hear from you about any areas other than those we have identified where you consider the Model Code requires improvement and your suggestions on how best to make those improvements.

We would also like to hear your views on possible options for addressing the issues we have identified.

We request that you make your submissions in writing to the following postal address:

Model Code of Conduct Review
Division of Local Government
Locked Bag 3015
NOWRA NSW 2541

Alternatively your submission may be lodged electronically to email address: dlg@dlg.nsw.gov.au .

We ask that submissions be received by **8 July 2011**. However, we will consider any submissions received after this date.

Should you wish to contact us to discuss this discussion paper or the Model Code of Conduct Review, you may ring John Davies, the Model Code of Conduct Review Project Officer on 02 4428 4139.

7. WHERE TO FROM HERE?

We will consider your submission in identifying preferred options for the amendment of the Model Code.

Once we have identified preferred options for the amendment of the Model Code, it is our intention to undertake further targeted consultation with stakeholders with a view to identifying and addressing any potential implementation issues.

Once we have completed this targeted consultation, we intend to prepare a new draft of the Model Code containing our proposed amendments. We intend to undertake further open consultation in relation to the proposed draft Model Code and we will be seeking your further views in relation to it, before making a recommendation to the Minister for consideration for gazettal under the Local Government (General) Regulation 2005.

As with previous versions of the Model Code we intend to supplement the new Model Code with amended Guidelines to assist in the interpretation of the new provisions of the Model Code. We also intend to reissue an updated education package to assist councils to raise awareness among councillors, staff, delegates and committee members of any new requirements under the new Model Code.