

Circular Details	Circular No 18-44 / 18 December 2018 / A621282
Previous Circular	<i>18-24 Status of the new Model Code of Conduct for Local Councils in NSW and Procedures</i>
Who should read this	Mayors / Councillors / General Managers / Joint Organisation Executive Officers / Complaints Coordinators / Conduct Reviewers
Contact	Council Governance Team – (02) 4428 4100 / olg@olg.nsw.gov.au
Action required	Council to Implement

Commencement of the new Model Code of Conduct for Local Councils in NSW and Procedures

What's new or changing

- The new 2018 *Model Code of Conduct for Local Councils in NSW* (the Model Code of Conduct) and *Procedures for the Administration of the Model Code of Conduct for Local Councils in NSW* (Procedures) have now been prescribed under the *Local Government (General) Regulation 2005*. The new prescribed Model Code of Conduct and Procedures are available on OLG's website.
- Provisions governing the use of social media (clause 8.21) in the previously released version of the Model Code of Conduct issued on 5 September 2018 have been removed. However, it remains open to councils to adopt this provision as a supplementary provision of their code of conduct, should they choose to do so.

What this will mean for your council

- Councils have six months from the date of prescription, (**14 December 2018 – 14 June 2019**) to adopt a code of conduct and procedures based on the prescribed Model Code of Conduct and Procedures. The transitional arrangements for the new Model Code of Conduct and Procedures are set out below.
- Councils' complaints coordinators should bring this circular and the attached FAQ to the attention of their council's conduct reviewers. Complaints coordinators should also inform conduct reviewers when the council has adopted a new code of conduct and procedures and provide copies.
- Councils should review their existing panels of conduct reviewers and determine to appoint a new panel using the expression of interest process prescribed under the Procedures if they have not done so in the past four years. Councils may appoint shared panels with other councils including through a joint organisation or another regional body associated with the councils.

Key points

- Councils' existing adopted codes of conduct and procedures will remain in force until such time as councils adopt a new code of conduct and procedures

based on the Model Code of Conduct and Procedures prescribed under the Regulation.

- If a council fails to adopt a new code of conduct and procedures based on the new Model Code of Conduct and Procedures within six months of their prescription, the provisions of the new Model Code of Conduct and Procedures will automatically override any provisions of a council's adopted code of conduct and procedures that are inconsistent with those contained in the Model Code of Conduct and Procedures through the operation of sections 440(4) and 440AA(4) of the *Local Government Act 1993* (unless the inconsistent provisions of a council's adopted code of conduct are more onerous than those contained in the Model Code of Conduct).
- In adopting a new code of conduct and procedures, councils may include provisions that are supplementary to those contained in the Model Code of Conduct and Procedures. Councils may also impose more onerous requirements under their adopted codes of conduct than those prescribed under the Model Code of Conduct. However, councils must not dilute the standards prescribed under the Model Code of Conduct in their adopted codes of conduct.
- Some councils indicated in their feedback on the consultation draft of the Model Code of Conduct a preference for adopting separate codes of conduct for councillors, staff and delegates and committee members instead of a single code of conduct that applies to all council officials. To assist councils to do this, 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, should councils wish to do so.
- Code of conduct complaints must be assessed against the standards prescribed under the version of the council's code of conduct that was in force at the time the conduct the subject of the complaint is alleged to have occurred.
- Code of conduct complaints must be dealt with in accordance with the version of the council's procedures that were in force at the time the complaint was made.

Where to go for further information

- Further information is provided in the FAQ attached to this circular.
- The new Model Code of Conduct and Procedures and other associated documents are available on OLG's website at www.olg.nsw.gov.au.
- OLG will be providing further guidance and assistance to councils to support implementation of the new Model Code of Conduct and Procedures during the six month transitional timeframe.
- For more information, contact the Council Governance Team by telephone on 02 4428 4100 or by email at olg@olg.nsw.gov.au.



Tim Hurst
Chief Executive

FREQUENTLY ASKED QUESTIONS

What is the purpose of the Model Code of Conduct?

The *Model Code of Conduct for Local Councils in NSW* prescribes the minimum ethical and behavioural standards all council officials in NSW are required to comply with. In doing so it seeks to:

- prescribe uniform minimum ethical and behavioural standards for all councils in NSW
- provide clear guidance to council officials on the minimum ethical and behavioural standards expected of them as council officials
- provide clear guidance to local communities on the minimum ethical and behavioural standards they can expect of the council officials who serve them
- promote transparency and accountability
- promote community confidence in the integrity of the decisions councils make and the functions they exercise on behalf of their local communities, and
- promote community confidence in the institution of local government.

How is the Model Code of Conduct prescribed?

The Model Code of Conduct is prescribed under section 440 of the *Local Government Act 1993* (LGA) and the *Local Government (General) Regulation 2005* (the Regulation).

Under section 440 of the LGA, each council is required to adopt a code of conduct based on the Model Code of Conduct prescribed under the Regulation. Councils may enhance or strengthen the standards prescribed under the Model Code of Conduct in their adopted codes of conduct to make them more onerous. Councils may also supplement the provisions contained in the Model Code of Conduct with additional provisions in their adopted codes of conduct.

However, councils cannot dilute or weaken the standards prescribed in the Model Code of Conduct in their adopted codes of conduct. Provisions contained in a council's adopted code of conduct that are less onerous than those prescribed under the Model Code of Conduct will be invalid and the equivalent provisions of the Model Code of Conduct will override them through the operation of section 440 of the LGA.

How are the Procedures prescribed?

The *Procedures for the Administration of the Model Code of Conduct for Local Councils in NSW* are prescribed under section 440AA of the LGA and the Regulation. Under section 440AA, each council is required to adopt procedures for the administration of their adopted code of conduct based on the Model Procedures prescribed under the LGA and Regulation. Councils' adopted procedures may contain provisions that supplement the Model Procedures, but a council's adopted procedure has no effect to the extent that it is inconsistent with the Model Procedures prescribed under the Regulation.

Are joint organisations and county councils required to adopt the Model Code of Conduct and Procedures?

Yes.

Who does the Model Code of Conduct apply to?

Section 440 of the LGA specifies the classes of council officials that a Model Code of Conduct prescribed under the Regulation may apply to. Under section 440, a Model Code of Conduct may be prescribed that applies to councillors, members of staff of councils and delegates of councils. For this reason, the Model Code of Conduct prescribed under the Regulation only applies to councillors, council staff and delegates of councils (including members of committees that are delegates of councils). These are all defined as “council officials” for the purposes of the Model Code of Conduct and the Procedures.

Section 440 also allows regulations to be made to apply the provisions of the Model Code of Conduct relating to the disclosure of pecuniary interests to members of a committee of a council (including the Audit, Risk and Improvement Committee) and advisers to councils. A regulation has been made to give effect to this and the new Model Code of Conduct contains provisions prescribing the obligations of committee members and advisers to councils in relation to the disclosure of pecuniary interests.

What is the regulatory scope of the Model Code of Conduct?

The Model Code of Conduct applies to any conduct by a “council official” that is connected with their role as a council official or the exercise of their functions as a council official.

It is the personal responsibility of all council officials to ensure that their conduct complies with the ethical and behavioural standards prescribed under the Model Code of Conduct. This applies to both the exercise by council officials of their functions as a council official and any conduct (including in a private capacity) that is connected with their role as a council official.

Can councils adopt separate codes of conduct for councillors, staff and delegates and committee members?

Yes. Some councils indicated in their feedback on the consultation draft of the Model Code of Conduct, a preference for 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.

There is nothing to prevent councils from doing so, provided that the adopted codes of conduct, taken together as a package, reflect all the provisions contained in the prescribed Model Code of Conduct and are consistent with it. To assist councils to do this, 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.

Can a council extend the application of its adopted code of conduct to persons other than councillors, council staff and delegates of council?

Yes. There is nothing under the LGA to prevent a council, when adopting a code of conduct based on the Model Code of Conduct, to extend its application to persons other than councillors, council staff and delegates of council.

In adopting a code of conduct based on the Model Code of Conduct, councils may amend the provisions of the Model Code of Conduct and the associated Procedures to extend their application to contractors, community members of wholly advisory committees and/or volunteers. In doing so, to be effective, councils will also need to

make it a condition of a contractor's engagement or volunteer's or advisory committee member's appointment that they comply with the council's adopted code of conduct.

How many iterations of the Model Code of Conduct and Procedures have there been?

The Model Code of Conduct has been reviewed every four years to address new and emerging issues and to reflect shifting community standards and expectations. The 2018 version of the Model Code of Conduct is the fourth iteration. The first iteration of the Model Code of Conduct was prescribed in January 2005 in support of amendments to the LGA that required the adoption of a code of conduct based on a prescribed Model Code of Conduct. Before this, councils were free to adopt their own codes of conduct with the result that ethical standards varied from council to council.

The 2018 version of the Procedures is the second iteration. The first iteration of the Procedures was prescribed in March 2013 in support of amendments to the LGA that required the adoption of procedures for the administration of council's adopted codes of conduct based on a prescribed Model Procedure.

Why was the new Model Code of Conduct developed?

The new 2018 version of the Model Code of Conduct gives effect to a key reform made by amendments passed by the NSW Parliament to consolidate the prescription of all ethical standards for local government into a single statutory instrument. Previously, ethical standards were prescribed from three sources, the pecuniary interest provisions of the LGA and the Regulation and the Model Code of Conduct.

Consolidating all ethical standards into a single instrument will:

- result in a better understanding of, and compliance, with ethical standards - council officials will no longer need to be familiar with their obligations prescribed from three separate statutory sources, the LGA, the Regulation and the Model Code of Conduct
- allow pecuniary interest breaches by councillors to be treated as "misconduct", meaning that minor breaches can be dealt with by the Chief Executive of OLG as an alternative to referral to the NSW Civil and Administrative Tribunal (NCAT) and suspensions for pecuniary interest breaches will be counted towards disqualification for the purposes of the "three strikes" automatic disqualification
- allow greater flexibility and efficiency in updating the standards to address emerging issues – amendments will now be able to be made by way of a Regulation amendment.

How were the new Model Code of Conduct and Procedures developed?

Moving the pecuniary interest provisions to the Model Code of Conduct necessitated a rewrite of the Model Code of Conduct. As part of this process, it was decided to also undertake a comprehensive review of the existing provisions of the Model Code of Conduct (as part of the regular four-year review cycle) and the Procedures.

In undertaking the review, OLG consulted extensively with councils and other stakeholders. In developing the new Model Code of Conduct and Procedures, there have been two rounds of public consultation:

- in late 2016, submissions were invited suggesting changes and improvements to the existing Model Code of Conduct and Procedures

- based on the feedback received from the first round of consultation, consultation drafts of the proposed new Model Code of Conduct and Procedures were developed and issued for comment.

The final versions of the 2018 Model Code of Conduct and Procedures have been informed by the comment received in response to the consultation drafts.

What changes have been made in the 2018 version of the Model Code of Conduct?

The most obvious change is that the pecuniary interest provisions previously contained in the LGA and Regulation have now been included in the Model Code of Conduct.

One of the recurrent themes of the feedback received in the first round of consultation on the new Model Code of Conduct was that the “principles-based” approach to prescribing ethical and behavioural standards in the previous version of the Model Code of Conduct resulted in some of the prescribed standards being too vague, meaning that the ethical and behavioural standards expected of council officials were unclear and that almost anything could potentially constitute a breach of a council’s code of conduct. In response to this, the Model Code of Conduct has been substantially redrafted to be more prescriptive and to more clearly identify the behaviours that it seeks to deter.

Other key changes include:

- 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
- 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
- councillors will be required to disclose in their returns of interests whether they are a property developer or a close associate of a property developer.

What changes have been made to the previously approved version of the Model Code of Conduct posted on OLG’s website on 5 September 2018?

Provisions governing the use of social media (clause 8.21) in the previously released version of the Model Code issued on 5 September 2018 have been removed. However, it remains open to councils to adopt this provision as a supplementary provision of their code of conduct, should they choose to do so. Should councils require further assistance in relation to this, they may contact OLG’s Council Governance Team.

What changes have been made in the 2018 version of the Procedures?

In response to feedback, changes have been made to the Procedures to address the following issues:

- the role of the general manager in the receipt and initial management of code of conduct complaints about councillors
- the ability of complainants, who are unhappy with decisions of the council, to misuse councils’ codes of conduct by repackaging routine complaints as “code of conduct complaints”

- the lack of recourse against members of the public who inappropriately disclose information about complaints they have made under a council's code of conduct.

These changes are outlined below:

How can councils outsource and centralise the management of complaints about councillors through regional arrangements under the new Procedures?

The new Procedures have sought to address concerns about the role of the general manager in the receipt and initial management of code of conduct complaints about councillors by giving general managers (and mayors in the case of complaints about the general manager) the flexibility to delegate their functions under the Procedures to another member of staff or a person external to the council.

The new Procedures have also been designed to allow councils to centralise the management of code of conduct complaints through a joint organisation, a regional organisation of councils or another shared arrangement should they choose to do so. This could be done, for example, through the establishment of a broader internal ombudsman function in a joint organisation or regional organisation of councils or through another shared arrangement to service member councils.

In particular:

- councils are able to establish and maintain regional panels of conduct reviewers through a joint or regional organisation of councils or another shared arrangement
- a staff member of a joint or regional organisation of councils or another member council can (in consultation with and through the executive officer of the joint organisation or general manager of the employer council) be appointed by general managers of member councils as the complaints coordinator for all member councils
- general managers and mayors of member councils can (in consultation with and through the executive officer of the joint organisation or general manager of the employer council) delegate their complaints management functions under the Procedures to a joint organisation or regional organisation of councils or to a staff member of another member council
- councils' internal ombudsman may, with the approval of OLG, be appointed to a panel of conduct reviewers allowing them to exercise the functions of a conduct reviewer, subject to their being able to meet the qualification criteria for conduct reviewers and being able to demonstrate to OLG's satisfaction a requisite degree of independence from member councils.

This offers a number potential benefits:

- centralisation of these functions through a joint organisation, a regional organisation of councils or another shared arrangement has the potential to deliver efficiencies and economies of scale and allows the development of a body of expertise within the region in the management of code of conduct complaints
- it allows general managers and mayors to divest themselves of the sometimes onerous responsibilities associated with code of conduct complaints management, allowing them to focus on their core responsibilities
- it allows all code of conduct complaints about mayors, councillors and general managers to be managed independently of the councils they relate to.

How do the new Procedures address misuse of councils' codes of conduct?

The purpose of a council's code of conduct is to prescribe the ethical and behavioural standards council officials are expected to comply with. The purpose of the Procedures is to support the enforcement of those standards. Consistent with this, councils' codes of conduct should not be used to deal with routine complaints.

The definition of a "code of conduct complaint" under the new Procedures has been tightened up to address the potential for misuse of councils' codes of conduct to re-litigate council decisions a person may disagree with or to re-prosecute complaints that have previously been addressed under councils' routine complaints management processes.

To be a code of conduct complaint, a complaint must show or tend to show conduct on the part of a council official in connection with their role as a council official or the exercise of their functions as a council official that would constitute a breach of the standards of conduct prescribed under the council's code of conduct. Complaints that do not meet this definition of a "code of conduct complaint" must not be dealt with under the Procedures and are to be dealt with under councils' routine complaints management processes.

The new Procedures make it clear that the following are not code of conduct complaints:

- complaints about the standard or level of service provided by a council or a council official
- complaints that relate solely to the merits of a decision made by a council or a council official or the exercise of a discretion by a council or a council official
- complaints about the policies or procedures of a council
- complaints about the conduct of a council official arising from the exercise of their functions in good faith, whether or not involving error, that would not otherwise constitute a breach of the standards of conduct prescribed under the council's code of conduct.

What recourse do the new Procedures provide against persons who inappropriately disclose information about code of complaints they have made?

Allegations of breaches of a council's code of conduct must not be made publicly and information about code of conduct complaints and the consideration of code of conduct complaints is not to be publicly disclosed. This is to ensure the allegations are dealt with appropriately and fairly in accordance with the prescribed Procedures for the management of code of conduct complaints.

While council officials disclosing this information may face disciplinary action, under the previous Procedures there was no recourse against members of the public who did so. Under the new Procedures, where members of the public publicly disclose information about a code of conduct complaint they have made, general managers can determine, with OLG's consent, that the complainant is to receive no further information about their complaint and any future code of conduct complaints they make (subject to the requirements of the *Government Information (Public Access) Act 2009*).

When must councils adopt a new code of conduct and procedures based on the new prescribed Model Code of Conduct and Procedures?

Councils have six months from the date of prescription, (**14 December 2018 – 14 June 2019**) to adopt a code of conduct and procedures based on the prescribed Model Code of Conduct and Procedures.

What are the transitional arrangements for the new Model Code of Conduct and Procedures?

The following transitional arrangements apply to the new Model Code of Conduct and Procedures:

- Councils' existing adopted codes of conduct and procedures will remain in force until such time as councils adopt a new code of conduct and procedures based on the Model Code of Conduct and Procedures prescribed under the Regulation.
- If a council fails to adopt a new code of conduct and procedures based on the new Model Code of Conduct and Procedures within six months of their prescription, the provisions of the new Model Code of Conduct and Procedures will automatically override any provisions of a council's adopted code of conduct and procedures that are inconsistent with those contained in the Model Code of Conduct and Procedures through the operation of sections 440(4) and 440AA(4) of the LGA (unless the inconsistent provisions of a council's adopted code of conduct are more onerous than those contained in the Model Code of Conduct).
- In adopting a new code of conduct and procedures, councils may include provisions that are supplementary to those contained in the Model Code of Conduct and Procedures. Councils may also impose more onerous requirements under their adopted codes of conduct than those prescribed under the Model Code of Conduct. However, councils must not dilute the standards prescribed under the Model Code of Conduct in their adopted codes of conduct.
- Code of conduct complaints must be assessed against the standards prescribed under the version of the council's code of conduct that was in force at the time the conduct the subject of the complaint is alleged to have occurred.
- Code of conduct complaints must be dealt with in accordance with the version of the council's procedures that was in force at the time the complaint was made.

Where can I get Word© versions of the new Model Code of Conduct and Procedures?

If you require a Word© version of the new Model Code of Conduct or Procedures, please contact OLG's Council Governance Team.