



Councillor Conduct Accountability in NSW Local Government

Consultation paper

November 2021

Contents

1. Introduction	4
2. Guidelines for submissions	5
4. Objectives and expectations	8
5. Complaint processes	10
6. Investigation timeframes	13
7. Outcomes	14
8. Costs	18
9. Insights from other jurisdictions	19
10. Conclusion	22
Attachment 1	23

1. Introduction

About the review

The Minister for Local Government, the Hon. Shelley Hancock MP, has commissioned an independent review of the processes and procedures for dealing with allegations of councillor misconduct.

The review will examine the current administrative framework under which complaints about councillor misconduct are managed, with the aim of identifying possible areas for improvement. The review will include an examination of similar frameworks used in other jurisdictions for any lessons they may offer for improving the New South Wales framework.

This consultation paper has been prepared to facilitate an understanding of the current framework and to invite submissions identifying areas for improvement, together with suggestions for the practical application of those improvements.

All stakeholders are invited to respond to this consultation paper, including voters, ratepayers and citizens served by councillors, councils and joint organisations, individual councillors and council staff, conduct reviewers, professional and employee representative organisations, local government industry stakeholder groups and key NSW Government agencies and other related stakeholders.

The review will be undertaken by an independent consultant experienced in local government, who will author the final report canvassing options for improvement and making recommendations accordingly. Administrative support for the reviewer will be provided through the Office of Local Government (OLG) for coordination purposes. The findings and recommendations of the final report however will be those of the independent reviewer.

Who may make submissions?

Anyone is welcome to offer comment through formal written submissions. These will be collated, and their views considered in identifying options for improvement. The views of all stakeholder groups will be given equal weight and evaluated in terms of the most

advantageous approach to achieving the best outcomes associated with fulfilling the principles for local government enshrined in the *Local Government Act 1993* (the Act).

Anyone making submissions for consideration by the review should use the Guidelines referred to in Section 2 below to formulate their contributions in the most effective way.

Closing date for submissions

Submissions should be made before **28 March 2022**.

It is recognised that the timing of this review coincides with the forthcoming council elections and the caretaker period preceding the elections, as well as the Christmas/New Year period when many councils are in recess. Accordingly, a long lead time is provided for the making of submissions.

Terminology

References to councils in this paper are to be taken as a reference to general purpose councils, county councils and joint organisations.

The term “misconduct” carries a specific technical meaning under the Act and includes among other things:

- a breach by a councillor of the Act or regulations,
- a failure by a councillor to comply with their council’s code of conduct,
- an act of disorder by a councillor at a meeting and
- any act or omission intended by a councillor to prevent the proper or effective functioning of the council or a committee of the council.

The phrase “councillor misconduct” used in this paper carries this broader meaning and includes breaches by councillors of a council’s code of conduct.

2. Guidelines for submissions

In order to assist stakeholders in formulating submissions that will be informative to the review and that can be compiled in a way that facilitates communication and integration into the review analysis, guidelines have been prepared and are incorporated as Attachment 1 to this consultation paper.

The guidelines generally provide advice on the form and structure of submissions to create a focus on the best way of providing information and experiences from stakeholders, to enable their valuable contribution to the review.

3. Overview

This section of the consultation paper provides information and general commentary about the current framework for dealing with complaints about councillor misconduct and identifies various issues that may assist stakeholders to consider and reflect on those aspects of the framework that could be improved. While not exhaustive, the following information is intended to provide a broad overview for the purposes of consultation.

How is councillor conduct regulated?

Australians are rightly proud of their democracy and embrace the representation they receive through their elected councils in local decision-making. Local communities rightly expect that their elected representatives on councils will observe standards of good governance and demonstrate appropriate standards of conduct as elected officials.

The legislation prescribing the framework for managing complaints about councillor misconduct has been formulated in response to a community expectation that elected representatives should observe appropriate standards of conduct and that there are appropriate mechanisms in place for enforcing compliance with those standards.

In addition to being accountable to their communities through the electoral process, councils are also subject to regulation and oversight by the NSW Government.

It does this in part through the prescription of standards of conduct that all council officials (including councillors) are required to observe through the *Model Code of Conduct for Local Councils in NSW* (the Model Code of Conduct) prescribed under the Act and the *Local Government (General) Regulation 2021* (the Regulation). All councils, (including county councils and joint organisations), are required to adopt a code of conduct based on the Model Code of Conduct.

Uniquely in Australia, the NSW Model Code of Conduct applies to all classes of council officials including councillors, staff and delegates of councils.

Breaches of a council's code of conduct are to be dealt with by councils in accordance with the *Procedures for the Administration of the Model Code of Conduct for Local Councils in NSW* (the Model Procedures) These are also prescribed under the Act and the Regulation. All councils (including county councils and joint organisations) must adopt procedures for the administration of their codes of conduct that incorporate the provisions of the Model Procedures.

The Model Code of Conduct and Model Procedures can be found [here](#).

The Model Code of Conduct and Model Procedures are supplemented by provisions in the Act that allow the “departmental chief executive” of OLG to investigate allegations of councillor misconduct and that confer disciplinary powers on the departmental chief executive and the New South Wales Civil and Administrative Tribunal (NCAT) with respect to councillor misconduct. These provisions are referred to below as the “misconduct provisions” of the Act.

Overview of the framework

The current framework for dealing with complaints about councillor misconduct is multi-layered with complaints escalated based on the seriousness of the alleged conduct and the severity of the disciplinary action attached to it. There is a strong focus on the informal resolution of less serious matters.

Complaints alleging breaches of a council’s code of conduct by a councillor are required initially to be dealt with locally by the council concerned in accordance with the Model Procedures.

Code of conduct complaints about councillors must be made in writing to the general manager of a council at first instance. The general manager (or a person authorised to exercise the general manager’s complaints management functions in relation to code of conduct matters) has a discretion to decline code of conduct complaints about councillors at the outset or to informally resolve them. The Model Procedures set out grounds on which complaints may be declined at the outset.

If a complaint is not declined or informally resolved at the outset, it is referred to an independent expert conduct reviewer who will deal with the matter at arms’ length of the council. The conduct reviewer will undertake a preliminary assessment to determine how the matter should be dealt with.

Conduct reviewers may decline or informally resolve complaints at the preliminary assessment stage by means such as explanation, counselling, training, mediation, informal discussion, negotiation, a voluntary apology, or an undertaking not to repeat the offending behaviour.

Only more serious matters may be formally investigated by conduct reviewers. Investigations must follow strict rules that are designed to ensure that matters are dealt with fairly, confidentially and with rigour.

Where, following a formal investigation, a conduct reviewer determines that a councillor has breached the code of conduct, the conduct reviewer may recommend that the council formally censures the councillor for the breach and, where the breach is serious, that the matter is referred to OLG for further disciplinary action under the misconduct provisions of the Act.

Where the council censures a councillor for a breach of the code of conduct, the council must specify in its resolution the grounds on which the councillor is being censured. It does this by disclosing in the resolution the conduct reviewer’s findings and determination. This information is recorded in the minutes of the meeting, thereby ensuring the councillor is publicly accountable to their electors for their conduct.

As noted above, serious breaches of the code of conduct may also be referred to OLG for further disciplinary action. Some matters are automatically deemed to be serious and are referred to OLG for consideration instead of being dealt with by councils. These include allegations of:

- pecuniary interest breaches
- failure to disclose conflicts of interest arising from the receipt of political donations, and
- breaches of the “integrity” provisions of councils’ codes of conduct (ie misuse of the code of conduct, reprisal action, disclosure of information about code of conduct matters and failure to comply with a council resolution).

The departmental chief executive of OLG can take disciplinary action or refer more serious matters to the NCAT. Disciplinary action can include suspension from office or suspension of the payment of fees for up to three months by the departmental chief executive, or for up to six months by the NCAT.

The NCAT can also disqualify a councillor from holding office in any council for up to five years. Councillors who have been suspended by either the departmental chief executive or the NCAT on three or more occasions are automatically disqualified for five years.

In the case of pecuniary interest breaches, the departmental chief executive can also apply to the Supreme Court for an order requiring a councillor to pay to the council any financial benefit they received from a pecuniary interest breach.

Code of conduct statistics

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.

OLG also collects data from councils on code of conduct complaints received about councillors and the general manager each year. To date it has not been possible to separate the data based on whether a complaint was about a councillor or the council's general manager. Consequently, for the purposes of this Consultation Paper the statistics shown reflect the combined data only and any analysis needs to take this into consideration.

In the 2019/20 reporting period (from 1 September 2019 to 31 August 2020), the total number of code of conduct complaints received by councils about councillors or the general manager was 400.

Councils received on average 2.9 code of conduct complaints about councillors or their general manager during the 2019/20 reporting

period. Out of 128 general purpose and 9 county councils, 59 councils received no code of conduct complaints during that period and 25 received only 1 code of conduct complaint.

As noted above, most code of conduct complaints about councillors or the general manager are declined or resolved informally at the outset by the general manager (or the mayor in the case of complaints about the general manager) or by a conduct reviewer at the preliminary assessment stage following referral.

Of the total number of complaints finalised in the 2019/20 reporting period (411), 94 complaints (22.8%) were declined or resolved by the general manager at the outset. 139 (33.8%) complaints were declined or resolved following a preliminary assessment by a conduct reviewer.

178 (43.3%) complaints finalised in the 2019/20 reporting period were the subject of a formal investigation. Of the complaints formally investigated, 47 (26.4%) resulted in a determination that the councillor had breached the code of conduct and resulted in disciplinary action by the council such as censure. Of these, 2 complaints were referred to OLG for further disciplinary action under the misconduct provisions of the Act. In 71 cases, the conduct reviewer determined there had been no breach. 60 cases were still under investigation at the time of reporting.

There has been an increase in the number of code of conduct complaints made about councillors and general managers over time. For example, in the 2013/14 reporting period (from 1 September 2013 to 31 August 2014), 322 code of conduct complaints were received by councils about councillors or the general manager.

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.

4. Objectives and expectations

Purpose of the Model Code of Conduct

Section 8A of the Act sets out principles for local government. These principles relate to three broad areas of:

- exercising functions generally,
- decision-making and
- community participation.

These principles articulate the following terms and values:

- strong and effective representation, leadership, planning and decision-making
- work with others to secure appropriate services for local community needs
- act fairly, ethically and without bias in the interests of the local community
- provide a consultative and supportive working environment for staff
- recognise diverse local community needs and interests
- consider social justice principles
- be transparent and be accountable for decisions and omissions.

The Model Code of Conduct sets out standards of conduct that councillors are required to observe that reflect these principles and values. Under the Model Code of Conduct, council officials are expected to:

- conduct themselves in a manner that will not bring the council into disrepute
- act lawfully, honestly and exercise due care
- treat others with respect and not bully, harass or discriminate against them, or support others who do so
- consider issues consistently, promptly and fairly
- ensure development decisions are properly made and deal fairly with all parties involved
- disclose and appropriately manage conflicts of interests including from reportable political donations
- use and secure information appropriately and not disclose confidential information
- use council resources ethically, effectively and efficiently.

Defining expectations

The purpose of the Model Code of Conduct is to prescribe minimum ethical and behavioural standards that all council officials are required to comply with and to ensure that councils and council officials exercise their functions and make decisions ethically and appropriately and in a way that promotes community confidence in the council and its decisions.

As with any organisation, councils can experience interpersonal conflict. This is accentuated by the fact that they operate in a political environment.

The code of conduct and the misconduct framework are not designed to prevent or resolve interpersonal or political conflict which is often a natural feature of democratic processes and political discourse. Nor is it designed or intended to prevent or restrict normal and respectful debate or constrain free speech.

Adoption of the Model Code of Conduct by councils

All councils are required to adopt a code of conduct based on the Model Code of Conduct prescribed under the Act and the Regulation. In doing so, councils have the flexibility to strengthen the ethical and behavioural standards prescribed under the Model Code of Conduct should they choose to do so. For example, where the Model Code of Conduct allows the acceptance of gifts with a value of up to \$100, many councils have chosen to ban the acceptance of all gifts.

In adopting a code of conduct, councils must not weaken the ethical and behavioural standards prescribed under the Model Code of Conduct. A provision of a council's code of conduct that is weaker than an equivalent provision of the Model Code of Conduct is invalid, and the stronger standard prescribed in the Model Code of Conduct automatically overrides it.

As noted above, the Model Code of Conduct automatically applies to all councillors, council staff and others who exercise council functions under delegation from the council. However, in adopting a code of conduct, councils may also

extend its application to other persons such as volunteers, advisory committee members and contractors. It is also open to councils to adopt separate codes of conduct for councillors, staff and other types of council officials, provided the adopted codes are consistent with the Model Code of Conduct.

Councillor training

Councils are required under the Regulation to deliver induction training for newly elected mayors and councillors and refresher training for returning mayors and councillors within 6 months of each ordinary council election. Councils are also required to provide ongoing professional development to mayors and councillors over the balance of the council term.

OLG has issued *Councillor Induction and Professional Development Guidelines* to inform the delivery of councillor induction training and professional development. The Guidelines are available [here](#). A key focus of the

training recommended in the Guidelines is on ethical conduct, appropriate behaviours and compliance with the council's code of conduct.

To assist councils to induct councillors into their roles and responsibilities, OLG has also delivered "Hit the Ground" running workshops after each local government elections. One of the workshop modules relates to compliance with the code of conduct.

Councils are required to report on councillors' participation in induction training and professional development in their annual reports.

OLG's Guidelines also recommend that councils hold pre-election information sessions to ensure that candidates understand their role and responsibilities if they are elected, including their obligations under the council's code of conduct. OLG has issued a Candidate Guide and an online training tool for candidates to assist councils to deliver candidate training.

Considerations:

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

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

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

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

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

5. Complaint processes

Making complaints

Under the Model Procedures, all code of conduct complaints, including complaints about councillors, staff and delegates of the council are to be made to the general manager at first instance. Complaints about the general manager are to be made to the mayor.

Concerns have been raised about whether the Model Procedures may place general managers in the invidious position of having to receive and deal with code of conduct complaints about their employers, namely the councillors.

It should be noted that under the Model Procedures, general managers are not required to have any involvement in the management of code of conduct complaints about councillors after their receipt if they choose not to. However, some general managers have observed that by simply not electing to decline a complaint and allowing it to be referred to a conduct reviewer, (even though no positive decision is required for

this to occur under the Model Procedures), they may still be exposed to criticism or reprisal by aggrieved councillors and their supporters.

General managers are permitted under the Model Procedures to delegate their functions in receiving, declining, and resolving code of conduct complaints about councillors to another member of staff or persons outside of the council if they wish.

It is also open to councils to establish shared complaints management arrangements that allow code of conduct complaints about councillors to be managed externally. There is currently only one such arrangement in place, the shared internal ombudsman service established by the City of Parramatta, Cumberland and Inner West Councils. Some councils have set up their own internal ombudsman functions and have delegated the general managers' complaints management functions to the internal ombudsman.

Considerations:

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?

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?

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

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

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

Preliminary assessment of complaints by conduct reviewers

Code of conduct complaints about councillors that are not declined or resolved at the outset by the general manager must be referred via the council's complaints coordinator to an independent conduct reviewer selected from a panel of conduct reviewers established by the council.

The complaints coordinator is a member of staff (who must not be the general manager) who is responsible for coordinating the management of code of conduct complaints, providing administrative support to conduct reviewers and acting as a point of liaison between the conduct reviewer and the council.

All councils are required to appoint a panel of conduct reviewers to manage code of conduct complaints about councillors. Many councils operate regional panels that are shared by all councils within the region.

To qualify for appointment to a panel, conduct reviewers are required to satisfy independence requirements and to possess specialist skills. The independence requirements and qualifications conduct reviewers need to satisfy to be appointed to a council's panel are prescribed under the Model Procedures.

The Model Procedures also establish guidelines for how conduct reviewers are to approach the exercise of their functions including managing conflicts of interests or bias and maintaining independence.

After complaints are referred to them, conduct reviewers are required to make a preliminary assessment of how the complaint is to be managed against criteria set out in the Model Procedures. Conduct reviewers have the following options for managing complaints about councillors. They may:

- decline to take any action in relation to the complaint (eg because it lacks merit), or
- resolve the complaint using a range of possible strategies including explanation, counselling, training, mediation, informal discussion, negotiation, a voluntary apology,

or an undertaking not to repeat the offending behaviour, or

- refer the matter back to the general manager for resolution by explanation, counselling, training, mediation, informal discussion, negotiation, a voluntary apology, or an undertaking not to repeat the offending behaviour, or
- refer the matter to an external agency such as OLG or ICAC, or
- formally investigate the matter.

The Model Procedures place an emphasis on the informal resolution of complaints. Only serious complaints (as defined by the Model Procedures) may be formally investigated. The Model Procedures set out criteria for determining whether a complaint is sufficiently serious to warrant formal investigation. Conduct reviewers are also required to justify their decision to formally investigate matters in their final reports after investigations are concluded.

As noted above, of the total number of complaints finalised in the 2019/20 reporting period, 33.8% complaints were declined or resolved following a preliminary assessment by a conduct reviewer. This is in addition to the 22.8% of complaints declined or resolved by the general manager prior to referral to a conduct reviewer.

Formal investigations

As noted above, conduct reviewers may only formally investigate code of conduct complaints about councillors where they are satisfied the complaint is serious. Conduct reviewers must be satisfied as to the following before they can make a decision to formally investigate a complaint:

- that the complaint is a "code of conduct complaint" as defined under the Model Procedures, and
- that the alleged conduct, if substantiated, would be sufficiently serious to warrant the formal censure of a councillor, and
- that the matter is one that could not or should not be resolved by alternative means.

The Model Procedures set out benchmarks for seriousness that conduct reviewers must consider in making an assessment of whether a complaint is sufficiently serious to warrant formal investigation. In determining whether a matter is sufficiently serious to warrant formal censure, conduct reviewers must consider the following:

- the harm or cost that the alleged conduct has caused to any affected individuals and/or the council
- the likely impact of the alleged conduct on the reputation of the council and public confidence in it
- whether the alleged conduct was deliberate or undertaken with reckless intent or negligence
- any previous proven breaches by the councillor whose alleged conduct is the subject of the complaint and/or whether the alleged conduct forms part of an ongoing pattern of behaviour.

As noted above, of the total number of complaints finalised in the 2019/20 reporting period, 43.3% complaints were the subject of a formal investigation.

In undertaking formal investigations, conduct reviewers are required to follow strict rules to ensure that procedural fairness is complied with. The Model Procedures prescribe detailed requirements in this respect.

At the start of the investigation, the person being investigated (the respondent) is notified of the allegations against them and they are invited to respond by written submission. Conduct reviewers are also required to give respondents an opportunity to make submissions in person to the conduct reviewer.

Conduct reviewers are required to undertake all necessary enquiries when investigating matters.

Before completing their investigation, the conduct reviewer is required to provide a draft of their investigation report to the respondent, invite them to make a submission, and to consider their submissions.

The investigator's final report must:

- make findings of fact in relation to the matter investigated, and,
- make a determination that the conduct investigated either, constitutes a breach of the code of conduct, or does not constitute a breach of the code of conduct, and
- provide reasons for that determination.

The Model Procedures provide a detailed list of the minimum standards for the content of conduct reviewers' final investigation reports.

Oversight by OLG

OLG exercises an oversight role to ensure code of conduct complaints are managed by councils in accordance with the Model Procedures.

OLG may, at any time, whether or not in response to a request, review the consideration of a matter under a council's code of conduct where it is concerned that a person has failed to comply with a requirement prescribed under the Model Procedures or has misinterpreted or misapplied the standards of conduct prescribed under the code of conduct in their consideration of a matter.

OLG will also review any complaints made either directly to it or through the general manager in relation to conduct reviewers.

Considerations:

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?

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

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?

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

6. Investigation timeframes

An issue for both councils and OLG is the time taken to deal with allegations of councillor misconduct and to take disciplinary action.

The management of complaints by councils

The Model Procedures require councils' complaints coordinators to refer code of conduct complaints about councillors that are not declined or resolved at the outset by the general manager to a conduct reviewer within 21 days of their receipt by the general manager.

Conduct reviewers are required to complete their preliminary assessments of complaints about councillors within 28 days. However, there are no time limits imposed on conduct reviewers' formal investigations of complaints.

No data is held on the average time taken by conduct reviewers to complete formal investigations.

Investigations by OLG

Councillor misconduct matters referred by councils to OLG are dealt with in accordance with its *Framework for Managing Councillor Misconduct Allegations*. The framework is available [here](#).

The time taken by OLG to complete misconduct investigations, often includes the review and adoption of findings of investigations completed by conduct reviewers. A key concern is that disciplinary action loses its efficacy as a deterrent if it is taken long after the conduct in question occurred.

There are three factors that contribute to the time taken between the occurrence of councillor misconduct and disciplinary action taken in relation to it by OLG or the NCAT.

First, where a matter is first dealt with at the local level by a council and subsequently referred to OLG, there is the time that elapses between the complaint being made and the completion of the conduct reviewer's investigation and a decision being made by the council to refer the matter to OLG based on the conduct reviewer's recommendation.

Second, there are the timeframes taken by OLG to complete investigations of councillor misconduct.

Third, where a matter is referred to the NCAT or where disciplinary action by the departmental chief executive of OLG is appealed to the NCAT, the ultimate decision in a matter becomes even more remote in time.

Data collected on misconduct matters finalised by OLG between April 2020 and September 2021 indicates that on average, it takes OLG 59 weeks to complete misconduct investigations where disciplinary action is taken by the departmental chief executive. Where a misconduct matter is referred to the NCAT, the average time taken by the Tribunal to hand down its decision is 49 weeks (based on data collected over the last 5 years).

Considerations:

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

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

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

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?

7. Outcomes

Penalties available to councils for councillor misconduct

Where, following an investigation, a conduct reviewer determines there has been a breach of the council's code of conduct, their report is submitted to the council for disciplinary action and possible referral to OLG for further disciplinary action.

Councils are not obliged to adopt the conduct reviewer's recommendation. Where they do not do so, the council is required to provide its reasons for not adopting the recommendation in its publicly available resolution and to notify OLG of the decision. If OLG considers that disciplinary action is warranted, OLG can take disciplinary action for the breach instead of the council.

As a result of Supreme Court's decision in the matter of *Cornish v Secretary, Department of Planning, Industry and Environment*, the only penalty now available to councils for misconduct by councillors is to censure them by resolution under section 440G of the Act. During the 2019/20 reporting period, 18 code of conduct matters resulted in a recommendation that the councillor be censured.

The content of censure resolutions has been strengthened to ensure they operate more effectively as a deterrent by publicly naming councillors who have breached the council's code of conduct. When censuring a councillor, councils are now required to disclose in the resolution, the conduct reviewer's findings and determination and any other information the council considers may be relevant or appropriate.

Where councils consider that a more serious penalty is warranted, in addition to censure, they may resolve to refer a matter to OLG for further disciplinary action under the misconduct

provisions of the Act where this has been recommended by the conduct reviewer who investigated the breach. Conduct reviewers are required to consult with OLG before recommending that a matter is referred to OLG to ensure that it is suitable for referral. During the 2019/20 reporting period, two code of conduct matters resulted in the councillor being censured and the matter being referred to OLG for further disciplinary action.

Under the current Model Procedures, councillors may seek to avoid public censure for breaches of the code of conduct by voluntarily agreeing to undergo training or counselling, to apologise for their conduct or to give undertakings not to repeat their conduct before the investigator finalises their report to the council. Conduct reviewers can finalise their investigations without a report to the council where they consider these to be an appropriate outcome to the matter they are investigating.

Many councils believe that censure is an insufficient deterrent against councillor misconduct.

An objection in the past to expanding or strengthening the disciplinary powers available to councils in relation to councillors who have breached the council's code of conduct has been that these powers could be misused against minority councillors or could be used in a partisan manner. A key difference now is that the Model Procedures ensure that the only circumstances in which a council could exercise any expanded or stronger disciplinary powers, are where an independent conduct reviewer has first determined the councillor has breached the council's code of conduct and recommended disciplinary action following a formal investigation in which procedural fairness has been afforded.

Rights of review against penalties imposed by councils

As noted above, councils are subject to oversight by OLG in the management of code of conduct complaints.

The Model Procedures allow anyone to seek a review by OLG of the way code of conduct matters have been dealt with. In reviewing code of conduct matters, as a matter of practice OLG does not seek to substitute its views for the views of a conduct reviewer on the merits of a matter, and will only intervene in the consideration of a matter where the Model Procedures have not been correctly followed or the conduct reviewer has not correctly applied the standards prescribed under the council's code of conduct to the facts found by them.

The Model Procedures also confer on councillors who have been censured by councils the right to seek a review of the council's decision by OLG. Under the Model Procedures, a respondent councillor who has been censured by a council for a breach of the council's code of conduct may, within 28 days of the sanction being imposed, seek a review by OLG of the conduct reviewer's determination and recommendation. A review may be sought on the following grounds:

- that the conduct reviewer has failed to comply with a requirement under the Model Procedures, or
- that the conduct reviewer has misinterpreted or misapplied the standards of conduct prescribed under the council's code of conduct, or
- that in imposing its sanction, the council has failed to comply with a requirement under the Model Procedures.

Where a respondent councillor requests a review, OLG may direct the council to defer any action to implement a sanction while the review is undertaken. Where the conduct reviewer or council has been found to have erred, OLG may direct the council to reconsider its decision.

If councils were to be permitted to impose more severe penalties on councillors that carried more serious consequences, consideration may need to be given to what rights of appeal should be available for these more onerous penalties.

Penalties available to the departmental chief executive of OLG for councillor misconduct

As noted above, where a breach is serious, in addition to censure, the council may refer the matter to OLG for additional disciplinary action. Conduct reviewers are required to consult with OLG before recommending to a council that a matter is referred to OLG, to ensure that it is suitable for referral. OLG can also initiate disciplinary action on its own motion without a referral by a council.

The departmental chief executive may take the following disciplinary action in relation to councillor misconduct:

- counsel the councillor
- reprimand the councillor
- direct the councillor to cease engaging in the misconduct
- direct the councillor to apologise for the misconduct in a specified manner
- direct the councillor to undertake training
- direct the councillor to participate in mediation
- suspend the councillor from civic office for a period not exceeding 3 months
- suspend the councillor's right to be paid any fee or other remuneration for up to 3 months (without suspending the councillor from civic office for that period).

In determining which disciplinary action, if any, to take against a councillor who has engaged in misconduct, the departmental chief executive may take into account any previous incidents of misconduct by the councillor, any disciplinary action previously taken against the councillor and any other relevant matters.

In the last five years, the departmental chief executive has taken the following types of disciplinary action against councillors under the misconduct provisions of the Act:

Disciplinary action	Number of times imposed
Counselling	1
Reprimand	6
Order to cease engaging in misconduct	7
Order to apologise	3
Suspension of fees	8
Suspension from civic office	4

Rights of appeal against disciplinary action by the departmental chief executive

Where the departmental chief executive of OLG takes disciplinary action against a councillor under the misconduct provisions of the Act, the councillor may, within 28 days, appeal the decision to the NCAT. The NCAT may stay any decision made by the departmental chief executive until such time as the NCAT determines the appeal.

On hearing the appeal, the NCAT may confirm the decision, amend the decision, or set aside the decision and substitute a new decision.

In the past five years, disciplinary action taken by the departmental chief executive has been the subject of appeal to the NCAT on 3 occasions. On one of these occasions, the NCAT has amended the departmental chief executive's decision and on one occasion it has set the decision aside.

Penalties available to the NCAT for councillor misconduct

Under the misconduct provisions of the Act, if a breach is particularly serious, OLG may refer councillor misconduct to the NCAT for disciplinary action following investigation. The NCAT can take the following disciplinary action in relation to councillor misconduct:

- counsel the councillor
- reprimand the councillor
- suspend the councillor from civic office for a period not exceeding 6 months
- suspend the councillor's right to be paid any fee or other remuneration for up to 6 months (without suspending the councillor from civic office for that period)
- disqualify the councillor from holding civic office for a period not exceeding 5 years.

One challenge in seeking the imposition of the stronger penalties currently available for councillor misconduct under the Act is that currently they can only be imposed by NCAT. This usually requires a lengthy hearing with no guarantee of success. Recent experience indicates that NCAT also tends not to impose stronger penalties.

In the last five years, the departmental chief executive has referred 9 matters to the NCAT for disciplinary action against councillors under the misconduct provisions of the Act. All these referrals resulted in disciplinary action being taken by the NCAT against the councillor concerned (two matters are currently before the NCAT).

Where the NCAT has taken disciplinary action against councillors during this five-year period, it has taken the following types of disciplinary action against councillors:

Disciplinary action	Number of times imposed
Reprimand	4
Suspension of fees	1
Suspension from civic office	1
Disqualification from civic office	1

Decisions by the NCAT are subject to appeal to the Supreme Court or the Land and Environment Court depending on the grounds on which the appeal is being sought.

In the past five years, one decision by the NCAT to take disciplinary action against a councillor has been overturned on appeal (*Cornish v Secretary, Department of Planning, Industry and Environment*).

Other types of penalties for councillor misconduct

Under the misconduct provisions of the Act, if a councillor has been suspended on three or more occasions by OLG or the NCAT for breaches of a council's code of conduct, they are automatically disqualified from holding office in any council for 5 years and their office automatically becomes vacant. Only one councillor has been disqualified from holding civic office on these grounds.

In the case of councillors who have financially benefitted from a breach of their pecuniary interest obligations, OLG also can apply to the Supreme Court for an order forcing the councillor to surrender the financial benefit to the council. This power has never been exercised.

Considerations:

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

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?

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?

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?

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?

8. Costs

Councils' costs

Councils are required to publicly report on the cost of dealing with code of conduct complaints about their councillors and general manager annually. This is intended to identify a “price signal” for misconduct and to make councillors accountable to their communities for their conduct and the costs of dealing with that conduct.

In the 2019/20 reporting period, the average cost incurred by councils in dealing with a single code of conduct complaint about a councillor was \$7,126.68.

OLG's costs

Currently, OLG's complaint handling, intervention, general investigations and councillor misconduct functions are undertaken by a team that comprises of a manager and six senior investigators. The team is also supported by a lawyer embedded in the team. These resources are also called upon to undertake interventions, investigations and public inquiries arising from council maladministration.

There is no separate data that would indicate the annual costs incurred by OLG in dealing with councillor misconduct matters.

The Act allows OLG to recover the reasonable expenses incurred in the investigation of councillor misconduct from councils. This option has not been exercised to date.

Considerations:

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

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

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

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?

9. Insights from other jurisdictions

This section reports trends in the way other states and the Northern Territory handle issues of councillor conduct. The coverage is far from comprehensive but includes examples of how other systems work that may point to possible changes in New South Wales.

Clarifying the nature of ‘misconduct’

There is a trend away from defining all breaches of the Local Government Act or codes of conduct as ‘misconduct’. ‘Lower-level’ breaches are now commonly defined as ‘behavioural’ or ‘inappropriate conduct’, to be handled largely by councils themselves (with expert assistance if necessary).

- South Australia does not use the term ‘misconduct’ at all. The Act is written in terms of ‘behaviour’ and ‘integrity’ – the latter term covering serious cases of fraud, misuse of position/information, conflicts of interests, bullying/harassment etc that are handled by the Ombudsman and SACAT.
- Queensland uses the terms ‘unsuitable’ and ‘inappropriate’ conduct.
- Western Australia refers to ‘behavioural’ breaches and breaches of ‘rules of conduct’.

Using the Local Government Act

Several states have expanded or strengthened conduct provisions in the Act itself, with less reliance on codes, regulations and policies, to give greater weight to issues of behaviour, integrity and good governance.

- Nearly all jurisdictions spell out more serious offences (as well as associated procedures and penalties) in the Act.
- South Australia has abandoned its code of conduct and sets out all the relevant principles and processes in the Act.

Robust supporting principles

Assessing the nature and gravity of ‘misconduct’, and enforcing required standards, depends on clear and consistent statements of objectives, principles and responsibilities that flow through the Act, codes of conduct and meeting practices, as well as related policies for handling complaints.

- ‘Ethical and legal behaviour’ is one of Queensland’s five overarching Local Government Principles that underpin the Act.
- South Australia recently made extensive changes to its Act, including ‘to act with integrity’ as the primary role of a councillor.

Application of codes of conduct

No other state or the Northern Territory includes general managers and staff in the same code or standards of conduct as councillors.

- South Australia and Victoria are the only states without a mandatory or detailed model code of conduct.
- Victoria prescribes ‘Standards of Conduct’ that each council must incorporate into its own code of conduct for councillors.
- Western Australia’s code extends to committee members and nominated candidates.

Links to training programs

Required standards and reasonable expectations for good conduct are being translated into ‘universal’ training/professional development programs.

- Western Australia and South Australia have amended their Acts to strengthen mandatory training, including in relation to conduct and integrity; failure to complete training may lead to a fine (WA) or suspension (SA).

‘In-house’ management of meeting behaviour and councillor-to-councillor disputes

Several jurisdictions have introduced formal procedures to avoid escalating unacceptable behaviour at meetings and personal disputes between councillors to external bodies. This may include significant additional responsibilities for mayors.

- In Queensland the chair of a meeting, acting on his/her own authority, may reprimand a councillor, order a councillor to leave a meeting and stay away from the meeting place, and have a councillor removed from the meeting place; failure to comply may become a higher-level offence.
- Victoria has a system of ‘internal arbitration’ to deal with councillor-to-councillor disputes, using state-approved arbiters.

Independent panels to handle ‘mid-range’ breaches

Most jurisdictions use standing or ad hoc panels for conduct matters that cannot be handled by councils themselves but fall short of warranting very heavy penalties.

- South Australia and Western Australia have ‘standards’ panels; Queensland has a ‘conduct tribunal’; in the Northern Territory, Tasmania and Victoria ‘conduct’ or ‘complaints’ panels are convened as required, drawn from a list of pre-approved members.
- In South Australia serious ‘integrity’ matters are investigated by the Ombudsman; while in Victoria they are handled by the independent Local Government Inspectorate; and in Queensland by the Independent Assessor.
- State departments/offices of local government agencies in Queensland, South Australia and Victoria have at most a minimal role; elsewhere they provide administrative support to panels and handle serious offences that require referral to state tribunals.

Streamlining investigations and hearings

At the ‘mid-range’ level it is common for Local Government Acts to seek maximum informality in proceedings and swift resolution of allegations. The scope for parties to seek reviews and lodge appeals may be restricted.

- Most states and the Northern Territory enable panels to determine their own procedures, subject to generic principles – right to be heard, natural justice and procedural fairness.
- Tasmania limits appeals against panel decisions to denial of natural justice.

‘Lower-level’ disciplinary measures

All states have a similar range of ‘basic’ sanctions (censure, apology, training/ counselling, short periods of suspension etc) for offences below those handled by state tribunals or courts, but some have more severe options.

- Additional measures may include reimbursement of the council’s costs, temporary loss of allowances, exclusion from meetings, suspension/exclusion from positions held other than being a councillor (eg mayor/deputy, committee chair, council’s representative).
- Queensland’s tribunal may require payment of a ‘fine’ to the council.
- Tasmania and Victoria provide for longer periods of suspension (up to 3/12 months).
- Victoria’s review panels may order ‘remedial action’ (eg. training/counselling) regardless of whether or not misconduct has been proven.

Significant roles for local government associations

In some jurisdictions processes for handling conduct complaints reveal a high level of cooperation or even a formal partnership between the state agency and the local government association.

- The Northern Territory association is a 'prescribed corporation' under the Act and may convene complaints panels on behalf of councils
- In South Australia, the new Behavioural Standards Panel is funded by the association under an agreement with the Minister; costs may be recovered from member councils
- In Western Australia, the association delivers approved training programs under the Act and provides guidelines and templates to help councils meet statutory requirements.

Role of the council chief executive

Several jurisdictions limit the potential difficulties council chief executives face if they are required – or perceived – to play a significant role in handling complaints against the mayors and councillors who employ them.

- Queensland has removed CEOs from the initial phases of handling conduct complaints; all complaints (except corrupt conduct) are 'triaged' by the Office of the Independent Assessor.
- Western Australia requires councils to have a designated complaints officer – not necessarily the CEO.
- Victoria excludes CEOs from the position of Councillor Conduct (complaints) Officer.

Requirements for lodging complaints

The number of unwarranted complaints may be contained by shortening the timeframe within which they may be lodged and requiring more detailed information by means of standard form.

- Several states have standard forms for lodging complaints and require detailed information (including a statutory declaration in some cases).
- In Tasmania, complaints must be lodged within 3 months, detail efforts made to resolve the issue, and involve a lodgement fee (about \$80, refunded if complaint upheld).
- In Queensland, repeated frivolous complaints and vexatious, reckless, mischievous or malicious complaints may attract a fine.

Considerations:

Are there any elements of interstate frameworks for dealing with complaints about councillor misconduct that could be adapted to improve the NSW framework?

10. Conclusion

The review seeks input from stakeholders to identify any legislative, systemic, procedural or resourcing issues impacting adversely on the effectiveness of the current framework for dealing with councillor misconduct that need to be addressed by this review.

The consideration bullet points provided throughout the Consultation Paper are intended only as prompts to generate discussion on key issues. In making submissions, please feel free to address any other relevant issues that have not been specifically highlighted in the Consultation Paper.

Submissions, comments and suggestions are welcomed to inform further discussion, debate and deliberation on the key areas such as:

- Fairness and equity
 - access of complainants
 - substantiation of allegations
 - natural justice for councillors
 - independence of investigations and disciplinary processes
 - objective determination
 - appeal and review
- Effective procedures
 - opportunities for early resolution
 - constructive rather than adversarial approaches
 - results focused processes
 - uncomplicated procedural steps
 - timely progression
 - cost effective procedures
- Integrity of outcomes
 - increased respect for and compliance with appropriate standards of conduct
 - confidence in the framework to encourage positive conduct and to deter misconduct
 - community confidence in outcomes

Attachment 1

How to make a submission

Submissions may be made in writing by **28 March 2022** to the following addresses.

Post: Locked Bag 3015 NOWRA NSW 2541

Email: olg@olg.nsw.gov.au

Submissions should be labelled 'Councillor Conduct Accountability Review'.

To ensure submissions offer maximum value in assisting this review to identify the issues it needs to consider and address and to identify possible opportunities for improvement, they should be made based on the following guidelines:

- Submissions should be framed to offer constructive responses to the considerations identified in the dialogue boxes at conclusion of each section of the Consultation Paper. These are designed to prompt consideration of the key issues that need to be considered and addressed by the review.
- Submissions should focus on making positive suggestions for improvement rather than seeking to remedy past errors or failures. However, examples that illustrate any deficiencies in the current framework may assist the review in identifying opportunities for improvement.
- The review is not a vehicle to re-prosecute individual cases or as an appeal mechanism for past decisions. Submissions seeking to do this will not be considered.
- In identifying opportunities for improvement, please provide clear and relevant examples that identify deficiencies in the current framework in delivering the desired outcomes. Suggested options for improvement should be practical and readily capable of implementation.
- There is no word limit on submissions. However, the inclusion of copious attachments and appendices to illustrate the points made in a submission is discouraged and will only detract from the attention that can be given to the submission.

While every effort will be made to preserve any confidential information provided in submissions, submissions or extracts from submissions may be incorporated into the review report and may otherwise be made publicly available at the discretion of OLG in consultation with the independent reviewer. If submissions are made public, contact details will be redacted. The name of the person making a submission may be released unless that person has requested to remain anonymous.

Any submissions received are also subject to the *Government Information (Public Access) Act 2009*.

For more information, please contact OLG's Council Governance Team on (02) 4428 4100 or via email at olg@olg.nsw.gov.au.

